UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

February 14, 2017, at 3:00 p.m.

---

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on December 5, 2016. By the court's calculation, 52 days' notice was provided. 42 days' notice is required.

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

The Motion to Confirm the Amended Plan is denied.

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

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on January 5, 2017. Dckt. 94. The Trustee argues that Abbigail Clymer ("Debtor") cannot comply with the Plan under 11 U.S.C. § 1325(a)(4) for two reasons. First, the Trustee asserts that the adequate protection payment amount is too low. Debtor

proposes adequate protection payments of $150.00 per month while a reverse mortgage application is process, but the Trustee calculates that the monthly amount should be $399.93 based on Bosco Credit LLC's ("Creditor") Claim 1-2 for $68,561.79 with an interest rate of 8.75%.

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

JANUARY 31, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on February 14, 2017, due to reported medical issues for Debtor's counsel. Dckt. 102.

DISCUSSION

No further pleadings have been filed since the January 31, 2017 hearing.

The Trustee's objections are well-taken. Debtor has not proposed an adequate protection payment amount that satisfies 11 U.S.C. § 1325(a)(4). Additionally, Debtor has not filed any pleadings relating to a proposed motion to approve a reverse mortgage. The Amended Plan does not comply with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is not confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Amended Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Confirm the Amended Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

2. **16-24111-E-13** **ABBIGAIL CLYMER** **CONTINUED MOTION FOR RELIEF**
NLG-1 **D. Randall Ensminger** **FROM AUTOMATIC STAY**
8-24-16 [25]

BOSCO CREDIT, LLC VS.

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

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

Below is the court's tentative ruling.

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

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

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

The Motion for Relief from the Automatic Stay is granted.

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

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

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

A. Case No. 09-39133

1. Filed: September 4, 2009

2. Type: Chapter 7

3. Date of Discharge: December 9, 2009.

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

B. Case No. 16-24111 (Current Case)

1. Filed: June 24, 2016

2. Type: Chapter 13

3. Instant Case

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

TRUSTEE'S RESPONSE

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

The Trustee supplies the following information:

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

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

DEBTOR'S OPPOSITION

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

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

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

SEPTEMBER 20, 2016 HEARING

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

OCTOBER 25, 2016 HEARING

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

DECEMBER 6, 2016 HEARING

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

TRUSTEE'S STATUS REPORT

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

JANUARY 31, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on February 14, 2017, due to reported medical issues for Debtor's counsel. Dckt. 104.

DISCUSSION

No further pleadings have been filed since the January 31, 2017 hearing.

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

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

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

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

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

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

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

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

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

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

Debtor's real property is stated to have a value of $320,000.00. Schedules A/B and D, Dckt. 1. Wells Fargo Bank, N.A. is listed as having a claim in the amount of $169,000.00 and Movant is listed as having a Claim in the amount of $70,000.00. By Debtor's calculation there is approximately a $90,000.00 equity cushion for both creditors.

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

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

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

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

No other or additional relief is granted by the court.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief From the Automatic Stay filed by Bosco Credit LLC ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are immediately vacated to allow Bosco Credit LLC, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the real property commonly known as 6059 Kingwood Circle, Rocklin, California.

IT IS FURTHER ORDERED that the fourteen-day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is waived for cause shown by Movant.

No other or additional relief is granted.

3.	**11-47286-E-13** **DPC-2**	**TROY/TERI MCCOMAS** **Peter Macaluso**	**CONTINUED MOTION TO MODIFY PLAN** **11-1-16 [94]**

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on November 1, 2016. By the court's calculation, 49 days' notice was provided. 35 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Modified Plan is denied.

11 U.S.C. § 1329 permits a trustee to modify a plan after confirmation. David Cusick, the Chapter 13 Trustee, seeks to modify Troy McComas and Teri McComas's ("Debtor") confirmed plan to increase plan payments by an $11,000.00 lump sum paid previously by Debtor, to obtain current Schedules I & J from Debtor, to provide for an accounting of life insurance proceeds received by Debtor, to attempt to recover any avoidable transfers Debtor made with life insurance proceeds, and to recover any remaining life insurance proceeds from Debtor if their expenditure has not been identified.

The Trustee brought this Motion because Debtor Teri McComas died on September 16, 2014, and Debtor's motion seeking omnibus relief was denied. The Plan is now in the sixtieth month, and the Trustee seeks to modify it.

The confirmed plan provides $900.00 per month for sixty months and no less than 35% to unsecured claims. The modified plan proposes $900.00 per month for sixty months plus a lump sum payment of $11,000.00 in the fifty-eighth month with no less than 40% to unsecured claims.

The court has conducted several hearings on the Motion and has afforded Debtor and Debtor's counsel to address the diversion of more than $200,000.00 of life insurance proceeds by Debtor during this case. Unfortunately, to date Debtor's response and evidence of the disposition of the monies has been insufficient.

INFORMATION PROVIDED BY DEBTOR

Debtor filed a Reply on December 6, 2016, in which Debtor requests that the Motion be granted, thus confirming the modified plan. Dckt. 101. Debtor also filed a supporting declaration. Dckt. 102. Debtor states that after his wife died, he received $216,000.00 in insurance benefits, which he then spent. He claims to have spent it all on cars, clothes, food, gambling, vacations, family, friends, dating sites, gifts to family and friends, furniture, house remodeling, new air conditioning and furnace, repairing and painting used cars, fixing and buying new tires for three cars, purchasing three new big screen television sets, and other miscellaneous items.

Debtor asserts that his former attorney did not advise him that money he received belongs to the court.

The court continued the hearing on this Motion to 3:00 p.m. on February 14, 2017. Civil Minutes, Dckt. 104.

Debtor's Supplemental Declaration

Debtor filed a Supplemental Declaration on January 31, 2017. Dckt. 105. Debtor states that he sold a 2014 Chevrolet Silverado to a dealer on July 7, 2015, for the amount of $20,000.00. Debtor states that he took a big loss of $22,000.00, and he does not remember why he sold the truck at such a loss. There were "add-ons" to the truck that Debtor was unable to recover.

Debtor states that he is unable to recover Christmas presents given to his family members in the amount of $3,500.00. The items include flat screen TVs and miscellaneous gifts.

Debtor states that he erroneously wrote that he had given a car worth $11,000.00 to his son. He states that the mention of that gift was a repeat.

Debtor states that he gave money to his stepson for two reasons: to pay off the stepson's car loan of $2,900.00 and to "help pay on his bad credit." Debtor asserts that "he" (presumably the stepson) had filed a bankruptcy petition in early 2011 and was once again in financial trouble.

Regarding a $5,000.00 loan made to a friend, Debtor states that the friend "disappeared" after receiving the money in January 2015, and Debtor has not seen or heard from the friend since that time. Debtor claims not to know where the friend lives now.

Debtor asserts that he did not give $3,500.00 to his daughter. Debtor explains that he had a 1994 Toyota that had been re-painted and repaired that was given to the daughter. After a few months, the vehicle allegedly began having more problems. Debtor asserts that he was unaware that his daughter traded the car in for a newer model, at which time she received $600.00 for the 1994 Toyota.

Debtor states that he spent $5,400.00 painting and repairing a 2000 Honda as "a spare just in case." Then, Debtor seems to allege that the Honda was more than a mere backup because he "had sold the pickup."

As to a 2012 Mini Cooper, Debtor states that he decided to sell the vehicle in June to give money to the Trustee. Debtor alleges that he mailed $11,000.00 on June 18, 2016. Debtor states that even though the vehicle was worth $25,000.00 after taxes, fees, and an extended warranty, he took a loss when a dealer paid $12,000.00 for the vehicle.

Debtor states that he gave a 1988 Honda Accord to another stepson, but the vehicle apparently needed repairs, insurance, and registration, which totaled $4,300.00.

Debtor relays that he has spoken with his family members about his bankruptcy case, but he does not expect any money from them because of their own debts.

Debtor alleges that he has no equity in his home, certainly not in the amount of $14,696.00. Debtor states that he owes more on the house's mortgage than the house is worth.

DISCUSSION

Despite Debtor admitting to wrongdoing, the Trustee has proposed a modified plan that seeks to "resolve" the plan defaults in the sixtieth month. The proposed plan provides for only a 35% dividend to creditors holding $137,000 of general unsecured claims, notwithstanding the estate having received $216,000.00 in insurance proceeds that have been improperly diverted by Debtor.

As the court has addressed previously, Debtor's conduct is very serious and one that the court cannot just let slide—$217,000.00 is serious money and not an amount which can be ignored.

This diversion of more than $200,000.00 came to light when Debtor needed to be substituted in as the personal representative for Teri McComas, his late wife and co-debtor, after the death in September 2014. Motion to Substitute and Continue Administration of Chapter 13 Case, Dckt. 76. Debtor, represented by his current counsel, makes passing reference to having received $200,000.00 in insurance proceeds, but says nothing of the disposition of the monies in the Motion. *Id.*

In his declaration in support of the motion to be appointed as the personal representative of his late wife, he provides a discussion of having spent the $200,000 on various items, gifts, loans, and

entertainment. Dckt. 78. No accounting of the disposition of the monies (such as cancelled checks, copies of contracts, and bank records showing the disbursement of the monies is provided).

The court denied without prejudice the motion to be appointed as the personal representative. Civil Minutes, May 3, 2016 hearing; Dckt. 87. The court's findings included the following:

> "As outlined by the Trustee's opposition, the Surviving Debtor has failed to provide the transparency that is required of a Chapter 13 Debtor. The Debtor, in the declaration, admits, point blank, that the Surviving and Deceased Debtor did not report tax refunds to the Trustee, failed to report how the $200,000.00 insurance was spent, and failed to provide updated employment and expenses.
>
> Additionally, also as the Trustee highlighted, the Debtor fails to properly state the legal basis for the instant Motion. While it is correct that the analysis is, in part, arising under Fed. R. Civ. P. 25 and Fed. R. Bankr. P. 7025, the relative provision for the instant Motion is pursuant to Fed. R. Bankr. P. 1016 and Local Bankr. R. 1016-1. This alone is grounds to deny the instant Motion.
>
> A further concern of the court is that the Debtor's declaration is neither signed under the penalty of perjury nor dated. The caption on the Declaration indicates that the date of the hearing on the instant Motion is "November 24, 2015." This suggests to the court that this declaration was filed months prior to the instant hearing and no longer accurately reflects the Debtor's finances and whether continued administration is possible.
>
> The Trustee also requests that the court dismiss the case based on the failure of the Debtor to comply with the Plan and properly report proceeds and expenses. The court declines to dismiss the case at this time."

Id., p. 6.

In denying the motion to be appointed the personal representative, the court was cognizant of the circumstances and has tried to allow Debtor and Debtor's counsel to "right the bankruptcy ship." The court's conclusions in ruling on the prior motion include the following:

> "While the court recognizes the need to tread carefully under the circumstances, Debtor's counsel can also surely recognize the need for the court to insure that this explanation cannot be seen as a signal for less scrupulous parties and fiduciaries (debtors and their attorneys) to ignore their duties and obligation, as well as the rights of the bankruptcy estates.
>
> . . .
>
> The court denies the Motion without prejudice. Clearly, the Trustee needs to investigate further, as well as Debtor to take stock of the situation, work with his counsel, and figure out whether there is a 'way out of this mess' which properly vindicates the rights of the estate and at least passably appears to correct the failures

> to comply with the Bankruptcy Code. The Trustee can proceed with discovery utilizing Federal Rule of Bankruptcy Procedure 2004.
>
> The court denies the Motion rather than providing a continuance in order to afford both parties the opportunity to create a "clean" record with proper evidence. Additionally, this will afford Debtor and his counsel the opportunity to figure out what, if anything, can be done without the pressure of there being a hearing shortly on the horizon."

Id., p. 3, 6–7.

Debtor has not filed a new motion or attempted to obtain authorization to be appointed as the personal representative of the co-debtor so that this case may proceed. As discussed below, Debtor and Debtor's "way out of this mess" is to contend that the $200,000 is lost, there is nothing to be done, and the Debtor is entitled to his discharge—apparently abandoning any intention to have a personal representative appointed for the interests of the late co-debtor.

Debtor's Initial Reply to Motion to Modify

Debtor's current counsel offers a reply, which says nothing more than "read the Debtor's declaration" go understand why Debtor supports the Modification that provides for $11,000.00 of the more than $200,000.00 of insurance proceeds, as well as the additional diverted tax refund, to sufficiently address the unauthorized transfers of property by Debtor. Reply, Dckt. 101. Debtor's counsel provides no legal authorities or arguments why confirmation of a modified plan (as opposed to dismissal with prejudice of this case, conversion of the case to one under Chapter 7 and the Trustee pursuing recovery of all of the unauthorized transfers by Debtor from each of the Transferees, and the denial of a discharge for Debtor) should be granted.

The two-page declaration provides little in specifics and is little more than a plea for leniency because of his loss. Dckt. 102. The court can only begin to imagine the loss of a spouse. However, Debtor uses this as a license to live a riotous life, disregard his legal obligations, and then get a pass so he can obtain a discharge and walk away from his debts.

The Declaration provides no documentation of where the money has gone, who actually has received it, and the identity of the "friend" to whom money was loaned but has disappeared.

Debtor's Supplemental Declaration

Debtor's Supplemental Declaration rings hollow with the same plea for leniency while making excuses for the myriad of questionable expenses in Debtor's case. Despite being given an opportunity to explain the situation for the court, including how it can be corrected, Debtor relies upon a belief that none of the transferred $120,400.00 can be recovered for the Estate because all of the beneficiaries have their own indebtedness and cash-flow problems.

In this Declaration, Debtor now makes further statements about why and how these improperly transferred assets and monies cannot be recovered. Dckt. 105. Some of the significant statements include the following:

A. "Silverado PU 2014 was sold to dealer for $20,000.00, big loss of $22,000.00, sold in July 7, 2015. I was not in my right mind, it had only been 10 months since she passed. I don't even remember why I sold it at such a loss."

Id., ¶ 1. Previously Debtor did not testify that the vehicle had been disposed of. This disclosure now comes after the court has commented that the Silverado could be sold and the money used to fund the plan and dissipate the taint of Debtor's improper disposal of estate assets.

B. "Good friend loan of $5,000.00 - He disappeared after I gave him the money in January 2015 and I have not seen nor heard from him since. I do not know where he lives or maybe he left the state."

Id., ¶ 6. The "good friend" remains unidentified and is purported to be in parts unknown. In this day and age of the internet, on-line data searches, and skip tracing, the "I don't know where he could be" excuse does not ring credible.

C. "9. 2012 Mini Copper [sic] - I decided to sell the Mini-Cooper in June so I could give the money to the court, to the Trustee, Mr. Cusick. I mailed the $11,000.00 to the court on June 18, 2016. The Mini Cooper was $20,000.00 and after taxes, fees, and extended warranty it came to $25,000.00 not $27,000.00. I took a loss again. The dealer only gave me $12,000.00 for the Mini."

Id., ¶ 9. Taken at face value, in June 2016, with full knowledge that post-petition disposition of assets was improper, Debtor states that he dumped the Mini Cooper for a "loss." This statement is unbelievable. Debtor was fully aware of all the trouble he had gotten himself into by just spending assets as he deemed fit. Debtor was represented by his current counsel who had to have counseled him that he could not just dispose of assets, but had to get court authorization. Finally, Debtor purports to have sold the Mini Cooper in the worst financial way possible, desperately selling it back to a dealer, rather than selling it through a broker or personally to a retail buyer.

D. "11. I have talked to all of my family and have informed them of my situation but because of their financial situations of being in debt I don't expect any help from them as I have said before."

Id., ¶ 11. Debtor's family and friends, the transferees of the improper disposition of assets, and the Debtor concludes that they will not help out the Debtor, so their receiving and keeping the improper disbursements are fine.

Debtor and his current counsel continue attempting to blame a prior unnamed attorney. Debtor places the "blame" on the attorney, stating, "It would have helped had I been advised by my previous attorney that money I received belongs to the court but he did not communicate with me during my

bankruptcy." Declaration, p. 2:20–23; Dckt. 102. It appears that Debtor, in the declaration prepared by his current attorney, states under penalty of perjury that Debtor told his prior attorney that Debtor was receiving the insurance money and the attorney failed to advise Debtor what to do. It appears that Debtor is stating that he, and the bankruptcy plan estate, has a professional liability claim against the former counsel to recover the amounts improperly diverted by Debtor.

Debtor and his current counsel do not get a pass to "blame" the prior attorney as an excuse for Debtor having improperly diverted the monies to various persons, including family members and friends.

Debtor and his counsel, while contending that various unidentified people (other than identified as "son," "daughter," "good friend") are incapable or unwilling to pay back any of the improper diversions of monies, have failed to provide copies of checks, contracts, purchase agreements, and bank records showing how the monies were disbursed and the actual transactions that occurred. More than $200,000 of cash received in insurance proceeds is trackable through the bank accounts, electronic transfers, withdrawals, and disbursements. No such documentation has been provided by Debtor and his counsel.

Compounding Debtor's and his attorney's problems are that it is only after the court comments that the vehicles can be sold does Debtor "mention" that the Chevy truck was sold years before, without accounting for those proceeds. Then, after Debtor and counsel are well aware of Debtor not being allowed to make such transfers, they proceed to have the Mini Cooper dumped back to a dealer who pays a low price so he can pocket the fair market value profit, and then offer to pay only $11,000.00 of the $12,000.00 in proceeds received from that unauthorized disposition of assets.

Denial of Motion

The court cannot approve such improper conduct by confirming the proposed plan. Debtor's and Debtor's counsel's failure to act, and passively acquiesce to a plan that provides nothing more than under the existing plan, would appear to merely be an effort "wash" the unauthorized transfers under color of federal law. That conduct cannot be rewarded by the court, even if the Trustee believes that (absent Debtor fulfilling his fiduciary duties and Debtor's counsel properly acting on the rights of the bankruptcy estate and Debtor) there is little more the Chapter 13 Trustee can do.

It appears that Debtor and Debtor's counsel have elected to gamble that the court will not closely look at what is happening in this case and the Debtor and his transferees can keep the misappropriated insurance proceeds. The court will not approve such abuse of the bankruptcy laws.

While the Trustee is attempting to find some way to complete this case, Debtor and his counsel are impeding the process, as most recently shown by Debtor just selling the Mini Cooper to a dealer and belatedly telling the court that the Chevy Silverado does not really exist as an asset anymore, it purportedly having been sold years earlier.

The Trustee has provided a declaration of Ed Weedman, an employee of the Chapter 13 Trustee who reviewed the financial information provided by Debtor at his recent 2004 examination. Dckt. 97. Mr. Weedman's testimony includes the following:

A. "5. The Debtor testified at the meeting that for the funeral he rented a hall, bought flowers, and took various people out to dinner. He estimated the funeral costs were $10,000.00."

Id., ¶ 5. While not an unreasonably large amount, these expenses can be easily documented through bank records and copies of checks and credit card statements. Something more than merely the Debtor saying, this money is gone is necessary.

B. "6. The Debtor testified as to gifts to children from the insurance proceed, including by purchase of a cashier's check for $10,000."

Id., ¶ 6. The children are unidentified. The Debtor can, and must, provide documentation of such payments.

C. "7. The Debtor indicated that the monies he had earlier characterized as a $5,000.00 cash loan to a friend were given to Tim Byers, who did landscaping and may have moved to Oregon. He indicated that Tim Byers was someone who had given or loaned him monies years ago when he was going through a divorce."

Id., ¶ 7. The court is unsure of what this statement means. Is it that Debtor, having previously testified under penalty of perjury that he had loaned money to a "good friend" is now recanting his testimony, instead stating that he was "repaying a loan?" This does not appear to be credible, good faith conduct and changing of Debtor's story.

It appears that the court has now been provided a name of the recipient of the $5,000 loan or gift (there appearing to be no legal obligation to pay such a debt from some unstated date in the past). A quick internet search using the Yahoo and Google search engines for "Tim Byers Sacramento" yields leads through "MyLife.com," "Bizapedia," "Spokeo," and "Facebook." It appears that Debtor and Debtor's counsel are taking a "We Know Nothing" approach to addressing this portion of Debtor's improper conduct.

D. "8. The Debtor testified as to spending monies on various dating web sites such as QPID and Veronica, paying $20-30 to talk to women for ten or fifteen minutes at a time, and then spending money to send gifts to these women such as cologne, roses, or clothing, where such a gift could cost $150. The Debtor understood the websites operated oversees, and required the Debtor to buy credits which the Debtor could then spend. The Debtor did not provide the specific dates and time that monies were spent, although the bank statements appeared to provide such information."

Id., ¶ 8. Again, these $20 to $30 payments and $150 gifts can be traced through bank and credit card numbers. At $20 to $30 a call, it would take 10,000 calls to exhaust $200,000.00.

E. "9. The Debtor brought with him documents he indicated were 'e-statements' for his Safe Credit Union account, from November 2014 through November 2015, although no copies were ever provided to the Chapter 13 Trustee. The Debtor maintained that by July 2015 the insurance proceeds were spent."

Id., ¶ 9. Debtor and his counsel, if acting in good faith, would present the banking records to show how $200,000.00 disappears in a 12 month period. Debtor and his counsel would also provide records showing how the proceeds from selling the Chevy Silverado were received and disbursed. No such records are provided.

While it is a terrible tragedy which Debtor has suffered; Debtor, Debtor's counsel, and the beneficiaries of the improper transfers create the appearance of wanting to use that tragedy as a cover for diverting more than $200,000. It is clear that Debtor and Debtor's counsel could work out a very humane, fair, compassionate resolution to these unfortunate circumstances for a debtor who in good faith was trying to "make things right." However, Debtor's counsel and Debtor are doing nothing to try in good faith to address this very unfortunate situation. FN.1.

FN.1. While the consensus of the other judges who have commented on this situation has been to convert the case to one under Chapter 7, have the Chapter 7 Trustee proceed to track down the transferees to obtain judgments and then turn the judgments over to collection agencies, and then allow the Chapter 7 Trustee or the U.S. Trustee to determine whether an objection to discharge be filed, the judge with whom this matter is pending continues to afford Debtor and Debtor's counsel to be candid, disclose all of the assets and transfers, provide records, work with "friends and family" to recover more than just $11,000.00 as part of their "make right efforts," and fix this through Chapter 13 rather than having the case converted or dismissed (potentially with prejudice). But that will require Debtor and Debtor's counsel to provide real records and documentation, truthfully identify assets, if Debtor's story changes for Debtor and Debtor's counsel to provide a credible explanation why, and for the transferees to own up to their obligations to return some of the money.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Modified Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Confirm the Modified Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

4. **17-20052-E-13** **MARIA DE LA CRUZ** **STATUS CONFERENCE RE: VOLUNTARY PETITION**
Daniel Weiss **1-4-17 [1]**

Debtor's Atty: Daniel Weiss

Notes:
Set by order filed 2/2/17 [Dckt 30]. Debtor to file on or before 2/16/17 all documents identified as not having been filed in the Notice of Incomplete Filing [Dckt 11]. At Status Conference, Debtor and her Attorney in Fact are to report how this case will be prosecuted, why counsel did not respond to the Notice of Incomplete Filing, and why counsel did not appear at the hearing on the Motion to Extend the Stay to advise the court of the challenges counsel and client were facing and addressing in this case.

5. **15-28400-E-13** **HEATHER URBAN** **MOTION TO MODIFY PLAN**
LBG-1 **Lucas Garcia** **1-10-17 [29]**

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 10, 2017. By the court's calculation, 35 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is denied.

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

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on January 30, 2017. Dckt. 38. Heather Urban ("Debtor") is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to the Trustee, the Plan will complete in sixty-five months because the remaining amounts to be paid under the plan total approximately $68,300.00, and the proposed monthly plan payment is $1.379.68, which equals fifty months from February 2017. The Debtor has completed fifteen months of the plan as of January 2017. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor has insufficient income to support proposed plan payments, and Supplemental Schedules I and J in support of the plan have not been submitted. Debtor's declaration states that business is very slow in the winter months, and the proposed fixed monthly payment of $5,015.00 does not account for that change in business. Without an accurate picture of the Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

The Trustee alleges that the Plan does not include a Class 1 arrearage dividend for months four through sixty. 11 U.S.C. § 1325(b)(1) provides:

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

The Plan refers to additional provisions for the Class 1 arrearage dividend, but does not state a monthly dividend amount, which totals $18,601.19 in arrearage, though the Debtor's projected disposable income under 11 U.S.C. § 1325(b)(2) totals $5,015.00. Thus, the court may not approve the Plan.

DEBTOR'S REPLY

Debtor filed a Reply on February 2, 2017. Dckt. 41. Debtor states that a mortgage payment increase was not taken into account that reduced Debtor's expected plan funds. Debtor suggests increasing the plan payment by $100.00 in the order confirming.

Debtor objects to classification of her child care service as seasonal. She asserts that December is "one particularly slow period" that can be accommodated by setting aside a small amount. Debtor asserts that prior delinquency for December was caused by unforeseen personal reasons that should not occur again.

Debtor also clarifies that the omission of a Class 1 dividend was an oversight that can be resolved in the order confirming. The dividend should be pro rata.

DISCUSSION

Debtor has proposed to increase plan payments by $100.00 for a total of $1,479.68 paid into the Plan each month. By the court's calculation, $68,300.00 divided by $1,479.68 equals slightly more than forty-six months. Those forty-six months plus the fifteen months completed already equal a total of slightly more than sixty-one months, meaning that the plan would complete in sixty-two months. Therefore, Debtor's proposal to increase plan payments is not sufficient, and Debtor is in material default still because the Plan will complete in more than sixty months.

The court's concerns relating to Debtor's finances and the information provided (or not provided) are heightened by the court's review of what has been previously provided. Amended Schedule I, filed in December 2015, states (under penalty of perjury) that Debtor's monthly income is $6,585.16. Dckt. 16. All of Debtor's income comes from the daycare business. On the attachment to Schedule I for Business Income and Expenses, Debtor states that the gross monthly business income is $13,460.90. *Id.* at 6. Some expenses that stand out are: (1) utilities of $1,919.95 and (2) Repairs and Maintenance of $2,250.00 a month ($27,000 a year of repair and maintenance expenses). It is footnoted on this form that the $2,250.00 a month includes pool, yard, and home maintenance. No explanation is provided as to why personal expenses are included as a "business expense." These maintenance and repair expenses are on top of $3,007 a month for "inventory and materials" for the business.

No provision is made on the Business Income and Expenses statement for payment of any income or self-employment taxes.

Looking at Schedule J at the expenses Debtor states (under penalty of perjury) she has, the confusion grows. On Schedule J, Debtor states (under penalty of perjury) here monthly expenses are $1,784.24 (which is the amount needed to fund the plan at the time), which include the following:

A.	Food and Housekeeping Supplies	$350.00	
B.	Home Maintenance	$ 0.00	
C.	Transportation	$150.00	(includes maintenance for three vehicles)
D.	Income Taxes	$Nothing Listed	
E.	Self-Employment Taxes	$Nothing Listed	

Schedule J, Dckt. 1 at 26–27.

On the Statement of Financial Affairs Debtor lists the gross income from her business to be:

For 2015 YTD (Jan-October)	$37,634
For 2014	$18,083
For 2013	$16,611

Statement of Financial Affairs Question 1, *Id.* at 28.

For 2015, assuming that it is only income through September 2015 and this is the "Net" money that Debtor took from her business, that is only $4,000.00 a month, well under $6,585.16 which was listed on Schedule I under penalty of perjury. Schedule I, *Id.* at 23–24.

It appears that both the income and the expenses listed on Original Schedules I and J, and the income on Amended Schedule I are illusory, figments of the imagination of Debtor (and possibly her attorney who may be blindly accepting whatever his client tells him). They make no economic sense.

The Debtor's *story* becomes even more fantastic when other documents filed in this case are considered. Debtor, the one person in her family, has and is retaining three vehicles (listing the registration expense for all three no Schedule J). These are stated on Schedule B and Schedule D, Dckt. 1 at 12, 15, as:

A. 2010 Toyota Highlander
   1. FMV.....$25,602
   2. Securing Debt of.....($25,841)

B. 2009 Toyota Prius
   1. FMV.....$ 6,682
   2. Securing Debt of .....($3,688)

C. 2001 Toyota Sequoia
   1. FMV.....$5,236
   2. Securing Debt of.....($0)

In the prior Chapter 13 Plan confirmed in this case Debtor, the sole person in her family, chose to keep all three vehicles, choosing to make monthly payments on these two secured claims totaling $559.00 a month under the Plan. Plan, Dckt. 5. Though owning, keeping, maintaining, and paying for three vehicles, Debtor could only muster a 1% dividend for creditors holding general unsecured claims.

Debtor has her residence, a 3,300 square foot home, which she values at $508,000 on Schedule A. Dckt. 1 at 9. She believes that she has no equity in the home, which secures debt of ($477,950), after Debtor deducts 8% of the value for "costs of sale." *Id.*

The creditor with the claim secured by the residence, Wells Fargo Bank, N.A., delivered Debtor even worse news in its proof of claim, stating that the actual debt secured by the property is ($489,431). Proof of Claim No. 11. Debtor owed a pre-petition arrearage of $18,994.76 (based on the amount stated in Proof of Claim No. 11).

Debtor provided for the pre-petition arrearage in the prior Plan confirmed in this case, with payments to be made beginning in month 4 of the plan and continuing through month 60. This requires payments of $339.18 a month for the final 56 months of the Plan. This is in addition to the $3,219.28 in regular post-petition mortgage (including taxes and insurance) payment.

As stated above, Debtor fails to provide in her budget for the paying of her state and federal income taxes and her federal self-employment taxes. The Internal Revenue Service filed Amended Proof

of Claim No. 10 which states Debtor owing $12,791.08 in federal taxes. (No proof of claim has been filed by the State of California.) Amended Proof of Claim No. 10 states that these taxes are owed for 2012, 2013, 2014, and 2015. It appears that Debtor's "plan" "plans" not to pay post-petition income taxes.

In the proposed Amended Plan, Debtor states that the current monthly mortgage payment continues to be $3,219.28. Amended Plan, Dckt. 33 at 2. However, on April 26, 2016, Wells Fargo Bank, N.A. filed a Notice of Mortgage Payment Change which states that the post-petition monthly payment has increased to $3,324.32. Ntc. Mtg. Pmt. Change, April 26, 2016 docket entry and filed with Amended Proof of Claim No. 11. Though aware of this payment change, when the proposed Amended Chapter 13 Plan was filed on January 10, 2017, Debtor continued to understate the amount of the current mortgage payment in the proposed plan. All Debtor's attorney can argue (Debtor failing, or not being willing to provide testimony under penalty of perjury, is:

> "2. In response, the Debtor states that it appears a mortgage payment increase was not taken into account which reduced the funds expected."

Reply, ¶ 2, Dckt. 41. The court finds this *explanation*, in light of Debtor's *fantastic* expenses, not to be persuasive or credible. If, when Debtor reviewed the proposed plan and carefully reviewed her declaration, she did not notice that there was an improper low amount, it indicates that the numbers are irrelevant, so long as they justify a plan that lets her keep the house and three cars, and pay nothing to creditors with general unsecured claims.

Debtor's assurances that now that the misstatement of the current monthly mortgage payment has come to light, she will just increase the plan payment an extra $100 is not *credible*. There is not an extra hundred dollars in her budget to reduce her expenses. Her attorney merely arguing in the Reply that:

> "In the order confirming we would be willing to adjust to an additional $100.00 again asserting that the debtor has experienced a small cost of living adjustment from her steady government payments for child care services."

Again, these arguments (for which there is no evidence) are not credible and border on fanciful. How can Debtor just reduce her reasonable expenses. If Debtor has an extra $100, she had to account for it previously. Rather, this further demonstrates that Debtor's financial information is not founded in fact and evidence, but may well likely be a made up set of expenses to produce the predestined plan payment to avoid paying creditors.

Additionally, Debtor has failed to show why and how it is reasonable to have $27,000 a year in repair and maintenance expenses for her house (which is also where she runs her day care business). She has not shown why and how there are $27,000 of business repair and maintenance expenses, or whether some (or most) of these are her personal home repair and maintenance. She has not shown, in light of her limited ability to fund the plan, why paying $27,000 a year to maintain her home (on top of principal, interest, arrearage, insurance, and tax payments) is reasonable and in good faith.

The Trustee's objections are sustained.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Modified Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Confirm the Modified Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

6. 16-27300-E-13 WW-2 | **LEO AUGUST** / **Mark Wolff** | **MOTION TO CONFIRM PLAN** / **12-27-16 [23]**

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on December 27, 2016. By the court's calculation, 49 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Amended Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Amended Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Debtor has provided evidence in support of confirmation.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on January 13, 2017. Dckt. 27. The Trustee does not oppose Debtor's motion. The Trustee notes that Schedules I & J were amended recently to show that Debtor's monthly income is now $3,090.24, however. Therefore, the Trustee estimates that Debtor's plan payments could increase by $290.24 per month. The Trustee also alleges that Debtor appears below median based on Form 122C-1 and has $1,711.90 of social security income per month.

DEBTOR'S "SUPPLEMENTAL" DECLARATION

Debtor filed a Declaration on January 26, 2017, which the court interprets as a Supplemental Declaration in Response to Trustee's Opposition. Dckt. 30. Debtor states that he is filing an Amended Schedule J, but not an Amended Schedule I because it reflects his gross income received from Social Security, Department of Veterans Affairs, and a pension. Debtor intends to file the Amended Schedule J to show two deductions: $185.00 from his pension for taxes and $122.00 from Department of Veterans Affairs for life insurance.

Debtor does believe that he can increase the proposed plan payments, and he asserts that he can pay $2,800.00 monthly. Debtor provides testimony (evidence) to support his arguments in support of confirmation.

DISCUSSION

The court notes that Debtor filed an Amended Schedule J listing the above deductions for taxes and life insurance withholdings. Dckt. 31. The Debtor has addressed the Trustee's Opposition.

The Amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Amended Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and the Amended Chapter 13 Plan filed on December 15, 2016, is confirmed. Counsel for the Debtor shall prepare and forward to the Chapter 13 Trustee a proposed order confirming the Plan, which upon approval by the Trustee shall be lodged with the court.

7. **16-27603-E-13** **CHRISTINE MCKAY** **OBJECTION TO CONFIRMATION OF**
DPC-2 **Peter Macaluso** **PLAN BY DAVID P. CUSICK**
1-11-17 [39]

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on January 11, 2017. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing ----------.

The Objection to Confirmation of Plan is overruled.

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

A. Debtor's plan relies on the Motion to Value Secured Claim of Bank of America being granted for sufficient monies to pay the claim in full.

The Trustee's objections are well-taken.

A review of the Debtor's Plan shows that it relies on the court valuing the secured claim of Bank of America, N.A. The relevant Motion to Value Secured Claim has been set for hearing on February 7, 2017. At the hearing, the court granted the motion and valued the secured claim at the value of the collateral in the amount of $24,000.00.

The Chapter 13 Plan provides for paying the secured claim with 4.50% interest over sixty months. Using the Microsoft Excel Loan Amortization Program, the court computes the monthly payment to be $447.43. (The Plan lists the payment of a $21,000 secured claim to be $395 monthly.)

The Chapter 13 Plan payment is $4,175.00, which is to be disbursed through the Plan as follows:

Plan Payment	$4,175
Ch. 13 Trustee Fees (Est. at 7%)	($293)
Debtor's Attorneys' Fees of $2,500 (amortized for this analysis over sixty months)	($42)
Mortgage Payment (Wells Fargo Bank, N.A.)	($2,187)
Mortgage Arrearage Payment	($775)
Ocwen Loan Servicing Secured Claim (Residence)	($265)
Bank of America, N.A. Secured Claim (Vehicle)	($447)
Priority Tax Claims ($4,915, amortized over sixty months)	($82)
$Over/($Under) Funding of Plan	$84

The Debtor's proposed plan provides sufficient monies to pay the required secured and priority claims, Trustee's fees, and Debtor's counsel's fees. The proposed plan complies with 11 U.S.C. §§ 1322 and 1325, and is confirmed.

The Objection to Confirmation 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 Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is overruled, and Debtor's Chapter 13 Plan filed on December 1, 2016, is confirmed. Counsel for the Debtor shall prepare and forward to the Chapter 13 Trustee a proposed order confirming the Plan, which upon approval by the Trustee shall be lodged with the court.

8. **14-20006-E-13** **RYAN/MEGAN ROSTRON** **MOTION TO MODIFY PLAN**
MJD-1 **Matthew DeCaminada** **12-22-16 [74]**

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 28, 2016. By the court's calculation, 48 days' notice was provided. 35 days' notice is required.

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

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

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

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on January 30, 2017. Dckt. 82. The Trustee states that Debtor failed to file Supplemental Schedules I & J in support of the motion. The Trustee also notes that Debtor has moved since filing the most recent Schedules I & J. Additionally, the Debtor's Declaration does not address if a vehicle totaled in an automobile collision is being replaced.

The court notes that the last Schedules I & J were filed on September 9, 2014. Dckt. 56. Debtor has not filed new schedules reflecting current finances. This information is now more than two years old. Even when the proposed amendment is not to increase or decrease payment, or to cure a default, the better practice is to provide the updated financial information to the court and parties in interest.

On February 10, 2017, new Schedules I and J were filed. Dckt. 85. These are marked as being both "amended" (which date back to the filing of the bankruptcy case) and "supplemental" (which provide

information only from the supplemental date forward, not back to the start of the case). In looking at Schedule I, both debtors have obtained their current employment only in the past year to year and one-half. So the information cannot be date back to the 2014 filing of this case, which was two and one half years ago.

Counsel for Debtor should review with his law firm their practices in preparing supplemental schedules I and J to avoid such inaccurate statements in the future.

In reviewing the file the court notes that a Supplemental Schedule I was filed on September 9, 2017 (again, inaccurately purporting to be an amended and a supplemental schedule I—two mutually inconsistent terms). Comparison of the income information from the Original Schedule I to the Second Amended Schedule I filed on February 10, 2017, discloses the following:

	Original Schedule I, Filed January 1, 2014 (Dckt. 1)	First Amended Schedule I, Filed September 9, 2014 (Dckt. 56)	Second Amended Schedule I, Filed
.....Debtor 1- Second Supplemental Schedule I Unemployed			$2,186
.....Debtor 1 - Supplemental Schedule I .....Unemployed		$0	
Tax, Medicare, Social Security Withholding			($487)
Debtor 1 - Original Schedule I Unemployed - Income	$0		
Total Take Home Income Debtor 1	$0	$0	$1,699
Debtor 2 - Second Supplemental Schedule I			$3,836
.....Debtor 2 - First Amended Schedule I .....Employed 1 Month		$3,422	

Debtor 2 - Original Schedule I Employed 5 Years, 4 Months	$3,258		
Taxes, Medicare, Social Security	($742)	($339)	($710)
Insurance	($36)	($60)	($73)
Life Insurance	($9)	$0	$0
LTD	($16)	$0	$0
403B	($195)	$0	$0
Total Take Home Income	$2,260	$3,023	$3,053
Total Tax Home Income	**$2,260**	**$3,023**	**$4,752**

The court also considers the reasonable and necessary expenses stated on Schedule J upon which the court and parties in interest rely on when determining whether the plan is being proposed in good faith and the plan is feasible. The following chart compares the information on the three Schedules J filed in this case:

	Original Schedule J, Filed January 1, 2014 - 1 Minor Child [same age as on First Supplemental Schedule J] (Dckt. 1)	**First Supplemental Schedule J, Filed September 9, 2014 - 1 Minor Child - (Dckt. 56)**	**Second Supplemental Schedule J, Filed February 10, 2017 - 2 Minor Children - (Dckt. 85)**
Rent/Mortgage (Footnote: "Debtors' parents assist with rent payment" on Original Schedule J)	$0	($1,000)	($1,000)
Property Taxes	$0	$0	$0

Home/Rental Insurance	$0	$0	$0
Home Maintenance	$0	$0	$0
Electricity/Gas	($130)	($100)	$0
Water/Sewage/Garbage	($33)	$0	$0
Phone/Cable/Cell	($191)	($131)	($254)
Food/Housekeeping Supplies	($175)	($225)	($650)
Childcare/Education	$0	$0	($345)
Clothing/Laundry	($20)	($25)	($95)
Personal Care Products	($30)	($75)	($150)
Medical/Dental	$0	($50)	($150)
Transportation	($300)	($200)	($475)
Entertainment	($15)	($50)	($200)
Vehicle Insurance	($240)	($173)	($300)
Car Payment Vehicle 1	$0	($475)	($475)
Pet Expenses	$0	$0	($50)
Total Expenses	($1,134)	($2,504)	($4,144)

As shown above, Debtor has had huge swings in expenses, almost doubling between the first Supplemental Schedule J and the Second Supplemental Schedule J. While possibly the Second Supplemental Expenses may look more rational, it appears that the Original and First Supplemental Expenses are made-up numbers. If family members were provided monetary or in-kind support, such should have been disclosed on the schedules which have been signed under penalty of perjury.

Further, as pointed out by the Trustee, Debtor offers no explanation as to what is being done to replace the vehicle lost in the accident. Debtor offers no explanation as to how that affects the insurance or transportation expense. With the loss of one of the three vehicles, Debtor increased the transportation expense (more than a 100% increase) and increases the registrations (an 80% increase). This is not logical.

The Trustee has raised sufficient concerns for the court to question whether Debtor will be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Without an accurate picture of the Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

Additionally, Debtor's changing expenses, without any explanation, undercuts not only the credibility of the Schedules, but puts into question Debtor's prosecution of this case—whether it is and has been in good faith. Debtor and counsel can preemptively address that point in a new motion to confirm a modified plan. Debtor and counsel can not only disclose what they contend are Debtor's current expenses, but explain why such dramatic increase is reasonable.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Modified Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Confirm the Modified Plan is denied without prejudice, and the proposed Chapter 13 Plan is not confirmed.
>
> **IT IS FURTHER ORDERED** that Debtor shall file a new plan, if any, they seek to have confirmed and cannot merely file a motion to confirm the Plan which was denied confirmation by this Order. The court makes this order "without prejudice" to cover a situation where the terms of the current plan are, in good faith, proposed in a future modified plan.

9. 16-27906-E-13 DPC-2 | **ALBERT MARTIN** / **Dale Orthner** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **1-19-17 [20]**

DEBTOR DISMISSED: 01/22/2017
WITHDRAWN BY M.P.

Final Ruling: No appearance at the February 14, 2017 hearing is required.

The Chapter 13 Trustee having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Objection to Confirmation was dismissed without prejudice, and the matter is removed from the calendar.**

10. **13-24610-E-13** **DAX/TINA CHAVEZ** **CONTINUED MOTION FOR COMPENSATION FOR PETER G. MACALUSO, DEBTORS' ATTORNEY**
PGM-4 **Peter Macaluso** **12-21-16 [130]**

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on December 21, 2016. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

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

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

JANUARY 24, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on February 14, 2017, to allow Applicant to file a supplemental pleading with the necessary task billing analysis. Dckt. 143.

SUPPLEMENTAL PLEADING

Applicant filed a new Motion for Approval of Professional Fees on January 31, 2017, and set it for hearing on February 28, 2017. Dckt. 146. That motion was withdrawn on February 6, 2017. Dckt. 150.

Applicant then filed the court-requested supplement as Exhibit A. Dckt. 151. Debtor provides the court with the necessary task billing analysis for his requested fees.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the services provided as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [professional fees and expenses] without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits relating to a Motion to Reconsider, Motion to Modify Plan, and subsequent related correspondence and meetings with Client. The court finds the services were beneficial to the Client and bankruptcy estate and were reasonable.

"No-Look" Fees

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

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

> (c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.
>
> (1) The maximum fee that may be charged is $4,000.00 in nonbusiness cases, and $6,000.00 in business cases.
>
> (2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.
>
> (3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor's attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6).

The Order Confirming the Chapter 13 Plan expressly provides that Client's former counsel (now deceased) was allowed $4,000.00 in attorneys' fees, the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Dckt. 110. Applicant prepared the order confirming the Plan.

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

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

understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437.

FEES REQUESTED

Applicant provides a task billing analysis and supporting evidence for the services provided, which are described in the following main categories.

Motion to Dismiss (DPC-4): Applicant spent 1.80 hours in this category. Applicant assisted Client with reviewing and opposing the Trustee's Motion to Dismiss, and Applicant appeared at the hearing.

Motion to Reconsider: Applicant spent 2.35 hours in this category. Applicant assisted Client with preparing and filing a Motion to Reconsider regarding clarification of expenses, Applicant filed a supplemental declaration, and Applicant appeared at the hearing.

Motion to Dismiss (DPC-5): Applicant spent 2.85 hours in this category. Applicant assisted Client with reviewing and opposing the Trustee's Motion to Dismiss, and Applicant appeared at two hearings on the Motion.

Motions to Modify (PGM-2 & PGM-3): Applicant spent 8.95 hours in this category. Applicant assisted Client with preparing and filing a modified plan, responding to the Trustee's objection, filing supplemental documents, attending a first hearing, preparing and filing another modified plan, communicated with parties regarding homeowner's insurance, filed a response to objections, filed a supplemental declaration, attended a hearing, and prepared and sent an order confirming the plan.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Peter Macaluso, attorney	15.95	$300.00	$4,785.00
Total Fees for Period of Application			$4,785.00

Applicant seeks to be paid a single sum of $3,000.00 for his fees incurred for the Client.

FEES ALLOWED

The unique facts surrounding the case, including opposing motions to dismiss and filing modified plans, raise substantial and unanticipated work for the benefit of the Estate, Debtor, and parties in interest. The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. The request for additional fees in the amount of $3,000.00 is approved pursuant to

11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Plan in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

Applicant is allowed, and the Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees $3,000.00

pursuant to this Application as final fees pursuant to 11 U.S.C. § 330 in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Peter Macaluso ("Applicant"), Attorney having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Peter Macaluso is allowed the following fees and expenses as a professional of the Estate:
>
> Peter Macaluso, Professional Employed by Chapter 13 Debtor
>
> Fees in the amount of $3,000.00
>
> as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 13 Debtor.
>
> **IT IS FURTHER ORDERED** that the Trustee is authorized to pay the fees allowed by this Order from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

11. 16-27511-E-13 DPC-1 | **ALMA CHAVEZ-NUNEZ** **John Downing** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **1-19-17 [14]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on January 19, 2017. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing ----------.

The Objection to Confirmation of Plan is sustained.

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

A. Debtor is $1,000.00 delinquent;

B. Debtor failed to appear at the First Meeting of Creditors;

C. Debtor failed to provide all business documents; and

D. Debtor's plan will not complete within sixty months.

UNITED STATES' OBJECTION AND SUPPORT OF TRUSTEE'S MOTION

The United States, on behalf of the Internal Revenue Service ("IRS"), filed an Objection to Confirmation of Plan on January 31, 2017. Dckt. 22. The IRS joins the Trustee's Objection and adds that

Debtor has failed to file pre-petition tax returns as required by 11 U.S.C. § 1308. Additionally, the IRS's asserted claim causes Debtor to exceed the debt limit of 11 U.S.C. § 109(e).

DISCUSSION

The Trustee's and IRS's objections are well-taken.

The Trustee asserts that Debtor is $1,000.00 delinquent in plan payments, which represents one month of the $1,000.00 plan payment. According to the Trustee, the Plan in § 1.01 calls for payments to be received by the Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Debtor has not paid anything into the Plan. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

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

Debtor has failed to timely provide the Trustee with business documents including:

A. Questionnaire,
B. Two years of tax returns,
C. Six months of profit and loss statements,
D. Six months of bank account statements, and
E. Proof of license and insurance or written statement that no such documentation exists.

11 U.S.C. § 521(e)(2)(A); Fed. R. Bankr. P. 4002(b)(3). Those documents are required seven days before the date set for the first meeting. 11 U.S.C. § 521(e)(2)(A)(I). Without the Debtor submitting all required documents, the court and the Trustee are unable to determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325.

The Trustee alleges that the Plan is not feasible. 11 U.S.C. § 1325(a)(6). The Plan not complete within sixty months because the first six proposed payments of $1,000.00 and the subsequent $2,250.00 monthly payments for the balance of the plan term are insufficient to pay the Class 1 mortgage as well as the priority debts in Class 5. Thus, the Plan may not be confirmed.

The IRS states that Debtor failed to file pre-petition federal income tax returns. Filing of the return is required. 11 U.S.C. § 1308. Failure to file a tax return is grounds to dismiss the case. 11 U.S.C. § 1307(e).

The IRS alleges that Debtor does not qualify for Chapter 13 treatment because the debt limit in 11 U.S.C. § 109(e) has been exceeded. That section limits Chapter 13 eligibility to individuals with regular income who owe "on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $394,725 and noncontingent, liquidated, secured debts of less than $1,184,200." Debtor's Schedules

plus the IRS's claim (the unsecured portion of $5,745,427.64 by itself exceeding the limit) indicate that Debtor exceeds the Code's unsecured debt limit.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

12. **16-24712-E-13 BLG-3** | **MITCHELL/CANDICE SITTINGER** | **MOTION TO MODIFY PLAN 1-10-17 [66]**
Chad Johnson

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on January 10, 2017. By the court's calculation, 35 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is granted, with the amendments as agreed to by Debtors, and each of them, at the hearing as specified in this ruling.

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

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on January 30, 2017. Dckt. 82. The Trustee opposes confirmation due to Debtor's unfair discrimination against certain unsecured claims. The proposed plan states in the Additional Provisions that all timely filed general unsecured claims will be paid 100% of the allowable except Department of Education/Navient shall be paid $0.00. That provision may unfairly discriminate against the filed claim of the creditor. The unsecured creditors were to have 100% of their claims of $51,037.00 paid off from the sale of Debtor's home.

The Trustee alleges that Debtor has not complied with Local Rule 2002-1 because the Internal Revenue Service and the United States Department of Education were not properly served according to the Roster of Governmental Agencies.

11 U.S.C. § 1322(a)(3) specifies that "if the plan classifies claims, [it] shall provide the same treatment for each claim within a particular class." Section 1322(b)(1) allows Debtor to propose a class of unsecured claims in a plan provided that the plan does "not discriminate unfairly against any class so designated." Debtor has proposed to discriminate against the Department of Education/Navient within Class 7 and not pay the claim until after the Plan completes and Debtor receives a discharge. Debtor has not provided the court with any legal basis for that proposal, and such treatment appears unfairly prejudicial against a holder of a qualified education loan.

Local Bankruptcy Rule 2002-1(b) and Federal Rule of Bankruptcy Procedure 2002(j) set forth the manner of service on governmental agencies, such as the Internal Revenue Service and the Department of Education. A review of the service provided for this Motion shows that Debtor has not served the Internal Revenue Service and the Department of Education at all of the addresses listed on the Roster of Governmental Agencies. *See* Dckt. 73.

Discrimination Between Creditors—Issue of Fairness

Debtor offers no legal authority for the proposed plan provision to pay all creditors from the sale of the residence except one. The Debtor appears to argue that because the debt will be nondischargeable, then other creditors can be paid and the discriminated against creditor can just go unpaid, "satisfied" that at some later date, in some later conceived manner, it will be paid.

While not clear in the Motion, the Declarations provided in support of the Motion provide some explanation. This situation is a good example of why actual evidence (such as testimony from a client) is important to form a basis for the legal arguments of counsel.

Debtor Mitchell Sittinger testifies that the Department of Education debt is an obligation of only co-debtor Candice Sittinger (as a personal obligation). Declaration, p. 3:8–12. Further, that he and co-debtor have separated. *Id.*, p. 3:13–17. Therefore, under the Plan they (Candice Sittinger) intend to continue to make the payments on this obligation.

In reviewing Schedule I filed on August 2, 2016, Debtor Candice Sittinger lists income of $8,731.56 from her long-term employment (19 years with her current employer) as a registered nurse. Debtor Mitchell Sittinger lists similar income, $8,477.25, but for a new job (8 months). Dckt. 9. Thus, it appears that each of the two debtors are fortunate to have significant monthly incomes, with the "promise" of repayment to be of substance.

When the court approved the sale of the real property which has generated the lump sum payment, it was projected that Debtor would net proceeds of $71,000 for the estate. Civil Minutes, Dckt. 65.

A review of the claims filed in this case discloses the following unsecured claims filed by creditors of the Debtor:

A. American Express Bank.....$2,275.00 POC 2
B. LVNV Funding, LLC.....$5,600.13 POC 4
C. Internal Revenue Service.....$12,537.23 (Priority) POC 6

D. Franchise Tax Board.....$ 2,634.18 (Priority) POC 7

The above total (rounded) approximately equals $30,000.00 in general unsecured claims.

Debtor Candice Sittinger has filed her declaration in support of confirmation which is consistent with that of her co-debtor. Declaration, Dckt. 70.

11 U.S.C. § 1322(b)(1) allows for a debtor to create a class or classes of creditors holding general unsecured claims—so long as such classifications do not *unfairly* discriminate against any class of such claims. This court has concluded in connection with other bankruptcy cases that providing for payment of nondischargeable student loans in full outside of the Chapter 13 Plan (which payments extend past the 60 months of the plan) does not unfairly discriminate against the creditors who are not being paid in full. In those cases, the creditors paid on their unsecured claims through the plan, receiving only a fraction of their claims, were not unfairly discriminated against even though the student loan payment creditor was being paid in full. The creditors being paid through the plan by excluding the student loans were receiving a bigger dividend than if the student loan debt was included. For those debtors, they were able to avail themselves of their rights to structure the repayment of the student loans as provided under non-bankruptcy law.

The court views this situation as the converse, but also not *unfair* discrimination. First, it is significant that the effected creditor, the Department of Education, has not opposed confirmation. Its agent, Navient Solutions, Inc. has been served. (The court will address the potential defective service below). Presumably, if this proposed payment structure were offensive, Navient Solutions, Inc. would have responded promptly.

The reason for filing bankruptcy was to try to save the home. Events have transpired to make that a non-achievable goal. The court finds the declarations of the two debtors credible. Student loan debt is a highly regulated area and one in which there are various programs for repayment, deferment, and debt forgiveness—none of which exist for "normal" creditor debt. Under these circumstances, bankruptcy law would be a blunt instrument doing more harm to the debtors if it mandated forgoing the rights of the debtors under various student loan regulations and programs, forcing a payment on nondischargeable student debt when the obligor has significant monthly income.

Therefore, the court concludes, under the unique circumstances of this case, that placing the nondischargeable student debt in a separate class to be paid outside of the Chapter 13 Plan does not constitute an *unfair* discrimination for the treatment of that claim.

The discrimination is not *unfair* on the following conditions that Debtors, and each of them agree on the record, as expressly stated in the order confirming the Chapter 13 Plan prepared by their counsel and approved by the Chapter 13 Trustee:

A. The Obligation owed on the debt set forth in Proof of Claim No. 5 by the Department of Education is not discharged in or through this bankruptcy case, and said obligation is unaffected by this bankruptcy case and any discharge entered herein.

B. The disbursement of monies by the Chapter 13 Trustee to either of the two debtors, and the division of any proceeds from the sale of Debtor's home, is merely a release of monies and not a division of monies between the two debtors, a determination of community or separate property, and does not affect any rights of any creditor to seek recovery of said monies for payment of an obligation of both or either of the two debtors.

These two provisions are necessary to fulfill what Debtor, and each of them, state they are seeking to do—preserve as nondischargeable the debt that is the subject of Proof of Claim No. 5. Both debtors, and each of them, have to agree and so provide in the Chapter 13 Plan that the discharge in this case does not discharge that debt. Additionally, to the extent that the plan or order of the court provides for or authorizes the disbursement of monies from the sale of the home or other source to either of the debtors, that such disbursement is not a determination of rights and interests, and does not limit the creditor's right to seek payment of the obligation in Proof of Claim No. 5 from such funds.

Notice of Motion on Department of Education

With respect to the Internal Revenue Service and Franchise Tax Board, the plan provides for paying those claims in full. While there may be a service issue in the failure to serve the U.S. Attorney, being paid in full, there is little for the two creditors to complain about.

For the Department of Education, Proof of Claim No. 5, service was made as follows:

Navient
PO Box 9500
Wilkes Barre PA 18773-9500

Navient Solutions, Inc. Department of Educat
Loan Services
P.O. Box 9635
Wilkes-Barre, PA 18773-9635

US Attorney For US Dept of Education
501 I St Ste 10-100
Sacramento CA 95814-7306

U S DEPARTMENT OF EDUCATION (Certificate of Services denotes this as "preferred")
P O BOX 5609
GREENVILLE TX 75403-5609

On the court's roster of government agencies, the required service address is:

US Department of Education
Bankruptcy Section
50 Beale St Ste 900

San Francisco, CA 94105-1863

http://www.caeb.circ9.dcn/AttorneyInformation.aspx. The court is uncertain as to why and where Debtor's counsel obtained a preferred address as a Post Office Box in Greenville, Texas, for the United States Department of Education.

Notwithstanding this "preferred" address conundrum, the agent for the Department of Education and the U.S. Attorney have been served. The terms of the Chapter 13 Plan, including the required provisions to make it clear that the Chapter 13 Plan in this case does not alter, limit, or change the rights of any creditor for the debtor that is the subject of Proof of Claim No. 5, the court waives any such defect in service.

The Modified Plan, as further modified to expressly provide that the discharge in this case does not apply to the debt that is the subject of Proof of Claim No. 5, and the disbursement of monies to either of the debtors does not alter or limit the rights of a creditor enforcing the debt that is the subject of Proof of Claim No. 5, does comply with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Modified Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Confirm the Modified Plan filed on January 10, 2017, as further modified to expressly provide that the discharge in this case does not apply to the debt that is the subject of Proof of Claim No. 5, and the disbursement of monies to either of the debtors does not alter or limit the rights of a creditor enforcing the debt that is the subject of Proof of Claim No. 5, does comply with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed. Counsel for the Debtor shall prepare and forward to the Chapter 13 Trustee a proposed order confirming the Plan, which upon approval by the Trustee shall be lodged with the court.

13. 16-24712-E-13 BLG-4 | **MITCHELL/CANDICE SITTINGER** | **MOTION FOR COMPENSATION BY THE LAW OFFICE OF BANKRUPTCY LAW GROUP FOR CHAD M. JOHNSON, DEBTORS' ATTORNEY(S) 1-17-17 [75]**

Final Ruling: No appearance at the February 14, 2017 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on January 17, 2017. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

Chad Johnson, the Attorney ("Applicant") for Mitchell Sittinger and Candace Sittinger, the Chapter 13 Debtors ("Client"), makes a Request for the Additional Allowance of Fees and Expenses in this case.

Fees are requested for the period November 18, 2016, through January 10, 2017. Applicant requests fees in the amount of $2,845.00 and costs in the amount of $58.03.

TRUSTEE'S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a Non-Opposition on January 27, 2017. Dckt. 80.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the services provided as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [professional fees and expenses] without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According to

the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including a Motion to Sell Real Property, Motion to Modify, Motion for Compensation, and subsequent related correspondence and meetings with Client. The court finds the services were beneficial to the Client and bankruptcy estate and were reasonable.

"No-Look" Fees

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

> (a) Compensation. Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c). The failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall signify that the attorney has opted out of Subpart (c). When there is an objection or when an attorney opts out, compensation shall be determined in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017, and any other applicable authority."
> . . .
> (c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.
>
> (1) The maximum fee that may be charged is $4,000.00 in nonbusiness cases, and $6,000.00 in business cases.
>
> (2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.

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

The Order Confirming the Chapter 13 Plan expressly provides that Applicant is allowed $4,000.00 in attorneys' fees, the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Dckt. 75. Applicant prepared the order confirming the Plan.

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

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

FEES AND COSTS & EXPENSES REQUESTED

Fees

Applicant provides a task billing analysis and supporting evidence for the services provided, which are described in the following main categories.

Motion to Sell Real Property: Applicant spent 5.2 hours in this category. Applicant communicated with Trustee's office, realtor, escrow company, IRS, creditors, and client. Applicant also prepared the Motion to Sell.

Motion to Modify: Applicant spent 3.4 hours in this category. Applicant communicated with Debtor and prepared modified plan and motion.

Motion for Compensation: Applicant spent 1.1 hours in this category. Applicant prepared the instant Motion.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Chad Johnson, attorney	7.6	$350.00	$2,660.00
Jennifer Walden, paralegal	2.1	$185.00	$388.50
Total Fees for Period of Application			$3,048.50

Applicant requests to be paid reduced fees in the amount of $2,845.00.

Costs and Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $58.03 pursuant to this application.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Postage		$23.73
Copies		$21.80
Certified Fee		$12.50
Total Costs Requested in Application		$58.03

FEES AND COSTS & EXPENSES ALLOWED

Fees

The unique facts surrounding the case, including drafting a Motion to Sell Real Property, Motion to Modify, Motion for Compensation, and subsequent related correspondence and meetings with Client, raise substantial and unanticipated work for the benefit of the Estate, Debtor, and parties in interest. Applicant seeks to be paid a single sum of $2,903.03 for additional fees and costs incurred for the Client. The request for additional fees in the amount of $2,845.00 is approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Plan in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

Costs & Expenses

Costs in the amount of $58.03 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case.

Applicant is allowed, and the Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	$2,845.00
Costs and Expenses	$58.03

pursuant to this Application as final fees pursuant to 11 U.S.C. § 330 in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Chad Johnson ("Applicant"), Attorney having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Chad Johnson is allowed the following fees and expenses as a professional of the Estate:
>
> Chad Johnson, Professional Employed by Chapter 13 Debtor
>
> Fees in the amount of $2,845.00
> Expenses in the amount of $58.03,
>
> as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 13 Debtor.

IT IS FURTHER ORDERED that the Trustee is authorized to pay the fees allowed by this Order from the available Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case.

14. 13-31616-E-13 ADAM/SHERRI NEWLAND MOTION TO MODIFY PLAN
PGM-2 Peter Macaluso 1-10-17 [59]

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 10, 2017. By the court's calculation, 35 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is denied.

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

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on January 30, 2017. Dckt. 70. The Trustee asserts that Adam Newland and Sherri Newland ("Debtor") are $4,530.00 delinquent in plan payments, which represents one month of the $4,530.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

The Trustee also notes that the Debtor's modified plan proposes to add one post-petition payment to Class 1 for $3,293.96 when Debtor's mortgage payments are actually $3,292.98.

DEBTOR'S REPLY

Debtor filed a Reply on February 3, 2017. Dckt. 73. Debtor promises to be current on plan payments by the hearing and indicates that the Class 1 payment listed was a scrivener's error and should be $3,292.98 as the Trustee notes.

DISCUSSION

Unfortunately for the Debtor, a promise to become current on plan payments is not evidence of such, even when the Trustee's only other ground is easily fixed in an order confirming. The Modified Plan does not comply with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is not confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Modified Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Confirm the Modified Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

15. 15-25720-E-13 MJD-1 — STEPHANIE BRECKENRIDGE — Matthew DeCaminada — MOTION TO MODIFY PLAN — 1-2-17 [45]

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 2, 2017. By the court's calculation, 43 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is denied.

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

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on January 30, 2017. Dckt. 54. The Trustee asserts that Debtor is $1,494.00 delinquent in plan payments, which represents multiple months of the $747.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

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

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

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

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

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

16. 16-27723-E-13 DPC-1 — DARRYL/BRIDGETTE MERRITT — Pro Se — OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK — 1-19-17 [34]

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) on January 19, 2017. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing **----------**.

The Objection to Confirmation of Plan is sustained.

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

A. Debtor did not provide tax returns;

B. Debtor did not provide pay advices;

C. Debtor is delinquent;

D. The Plan contains several errors or omissions;

E. The Plan fails the liquidation analysis; and

F. The income and expenses on Schedules I and J contain several errors.

The Trustee's objections are well-taken.

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

The Trustee asserts that Debtor is $2,053.00 delinquent in plan payments, which represents one month of the $2,053.00 plan payment. According to the Trustee, the Plan in § 1.01 calls for payments to be received by the Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Debtor has not paid anything into the Plan. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

The Trustee alleges that Debtor's plan contains several errors or omissions. Under Class 1 debts, Section 2.08 of the Plan lists a debt to "Rulduph, Inc." for an unidentified vehicle that should have been listed in section 2.09 of the Plan. Also under section 2.08, the debt listed to "Angelo Ginnikais" should have been disclosed in the Schedules. Additionally, Debtor should have disclosed a month-to-month rental residence at real property at 419 Regency Circle, Vacaville, California, on Schedule E/F as an unsecured debt. Under Class 5 debts, the Trustee alleges Direct TV, AT&T, and Kimball & Tirey are unsecured debts that are not properly listed. Next, the Trustee asserts that section 2.15 failed to list the total unsecured debts and the percentage to be paid to unsecured creditors. Without this information, the Trustee cannot determine feasibility of the plan. Lastly, the Trustee points out that only one of the Co-Debtors signed the plan. These errors indicate the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

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). The Trustee states that Debtors have non-exempt assets totaling $1,000.00, and the Plan is silent regarding a dividend to unsecured claims. Schedule A/B lists property, but no exemptions have been taken on Schedule C.

While Debtor has reported non-exempt assets in the amount of $1,000.00, the Debtor is silent as to the percent dividend to unsecured creditors. The Debtor has not explained how, under the proposed plan and the schedules filed under penalty of perjury, the unsecured claimants are entitled to a zero percent dividend when there may be upward of $1,000.00 in non-exempt assets.

The Trustee also argues that Debtor's Schedules I and J contain several mathematical errors. Under Schedule I, the Trustee notes line 12 of the form lists total income as $3,200.00 per month, while the actual amount is $2,979.00. Under Schedule J, the Trustee points to line 22a listing total expenses as $1,620.00, while it should have been $3,323.00. The Trustee asserts that the monthly net income of $100.00 should have been ($344.00) with correct calculations. Those are grounds to deny confirmation. 11 U.S.C. § 1325(a)(1).

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

17. 16-28127-E-13 SDB-1 | **CARLOS/ANGEL LORTA** | **MOTION TO AVOID LIEN OF AMERICAN EXPRESS BANK, FSB**
W. Scott deBie | **1-4-17 [12]**

Final Ruling: No appearance at the February 14, 2017 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, and Office of the United States Trustee on January 4, 2017. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of American Express Bank, FSB, a federal savings bank ("Creditor") against property of Carlos Lorta and Angel Lorta ("Debtor") commonly known as 6801 Chandler Drive, Sacramento, California ("Property").

TRUSTEE'S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a Non-Opposition on January 30, 2017. Dckt. 31. The Trustee asserts that based on the Exhibit provided, the claim appears to be against only Angel Lorta. Debtor's plan represents the amount claimed by Creditor for these two claims to be $14,380.54 and $14,623.22. The Trustee notes that Schedule D provides the first claim is against Carlos Lorta, while the second is against both Co-Debtors. The Trustee alleges that the creditor has filed two unsecured claims adding up to $512.00 less than the second judgment lien, and the both are against Angel Lorta.

DISCUSSION

A judgment was entered against Debtor in favor of Creditor in the amount of $14,546.22. An abstract of judgment was recorded twice with Sacramento County on November 15, 2016, and December 1, 2016, that encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $206,000.00 as of the date of the petition. The unavoidable consensual liens that total $107,400.00 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the amount of $100,000.00 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 the 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 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 American Express Bank, FSB, a federal savings bank, California Superior Court for Sacramento County Case No. 34-2016-00193638-CL-CL-GDS, recorded on November 15, 2016, (Book 20161115 and Page 1939) and recorded on December 1, 2016, (Book 20161201 and Page 0753), with the Sacramento County Recorder, against the real property commonly known as 6801 Chandler Drive, Sacramento, 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.

18. 16-28127-E-13 SDB-2 | **CARLOS/ANGEL LORTA** | **MOTION TO AVOID LIEN OF AMERICAN EXPRESS BANK, FSB**
W. Scott deBie | **1-4-17 [18]**

Final Ruling: No appearance at the February 14, 2017 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, and Office of the United States Trustee on January 4, 2017. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of American Express Bank, FSB, a federal savings bank ("Creditor") against property of Carlos Lorta and Angel Lorta ("Debtor") commonly known as 6801 Chandler Drive, Sacramento, California ("Property").

TRUSTEE'S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a Non-Opposition on January 30, 2017. Dckt. 34. The Trustee asserts that based on the Exhibit provided, the claim appears to be against only Carlos Lorta. Debtor's plan provides for Creditor regarding two judgment liens in Class 2C, claims reduced to $0.00 based on value of collateral. Debtor's plan represents the amount claimed by Creditor for these two claims to be $14,380.54 and $14,623.22. The Trustee notes that Schedule D provides the first claim is against Carlos Lorta while the second is against both Co-Debtors. The Trustee alleges that Creditor has filed two unsecured claims adding up to $512.00 less than the second judgment lien, and they both are against Angel Lorta.

DISCUSSION

A judgment was entered against Debtor in favor of Creditor in the amount of $14,815.54. An abstract of judgment was recorded with Sacramento County on December 30, 2016, that encumbers the Property.

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of $206,000.00 as of the date of the petition. The unavoidable consensual liens that total $107,400.00 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the amount of $100,000.00 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 the 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 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 American Express Bank, FSB, a federal savings bank, California Superior Court for Sacramento County Case No. 34-2015-00176472-CL-CL-GDS, recorded on December 30, 2016, Book 20151230 and Page 0142, with the Sacramento County Recorder, against the real property commonly known as 6801 Chandler Drive, Sacramento, 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.

19.	**16-27632-E-13** **DPC-1**	**CHARLES JACKSON, AND PAMELA JACKSON** **Paul Bains**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **1-11-17 [32]**

Final Ruling: No appearance at the February 14, 2017 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on January 11, 2017. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The hearing on the Objection to Confirmation of Plan is continued to 10:00 a.m. on February 22, 2017 (specially set to the court's dismissal/conversion calendar).

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that Debtor is delinquent $6,163.08 in plan payments.

DEBTOR'S RESPONSE

Charles Jackson, Jr. and Pamela Jackson ("Debtor") filed a Response on February 1, 2107. Dckt. 40. Debtor's counsel has been unable to get ahold of Debtor since the Meeting of Creditors. Debtor's attorney requests that the Objection be overruled while he tries to contact Debtor to cure the delinquency prior to the hearing.

DISCUSSION

The Trustee's objection is well-taken. The Trustee asserts that Debtor is $6,163.08 delinquent in plan payments, which represents one month of the $6,163.08 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

The court accepts Debtor's counsel's request for a continuance so that he can continue to work diligently to try to get his client to respond to his communications concerning this case. The court recalls these two debtors from their motion to extend the stay in this case—it having been filed within a year of the

dismissal of the prior bankruptcy case on November 10, 2016. In discussing the "good faith of Debtor" in filing this case, the court's ruling includes the following:

> This is not a case where Debtor is a borderline, poverty-level income Debtor. **The gross monthly income for Debtor is $15,066.55.** Schedule I, Dckt. 13. This is consistent with the income in Debtors prior case. Debtor defaulted in the $6,600.00+ per month payments in the prior case beginning in August 2016. Debtor filed the current case on November 11, 2016. **Though over $19,000.00 of projected disposable income went into Debtors hands in August through the November 11th filing, none of it is credibly accounted for.** On Schedule B, Debtor reports having only $1,100.00 in bank accounts. Dckt. 13 at 6.
>
> A declaration stating during our last case we had several issues with our car that cost lots of money (apparently more than $19,000) is not sufficient to rebut the presumption of bad faith. In many respects, it strengthens the presumption of bad faith. It may be that the money was lost to gambling. Not a good answer, but one that could show human error. Or the $19,000.00 may be hidden with a family member or friend, showing more bad faith. **The court has not been presented with credible evidence of where the money, more than $19,000.00 has gone over a three-month period.**

Civil Minutes, Dckt. 29. In light of the significant concerns raised by the court in connection with the prior hearing on the motion to extend the stay and the catastrophic consequences that could ensue if Debtor does not communicate with counsel and prosecute this case, the court will extend counsel the courtesy of continuing this hearing.

The court also notes that the Trustee has filed a motion to dismiss (which includes conversion) of this case. It appears that a Chapter 7 Trustee may have significant non-exempt assets to sell. Such may include fractional interests in $1,050,000 of life insurance policies, several vehicles, retirement investments that may not be necessary for $15,000 a month income individuals, and unaccounted for monies from the prior bankruptcy case.

The court continues the hearing to 10:00 a.m. on February 22, 2017 (specially set to the court's dismissal/conversion calendar).

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Objection to Confirmation is continued to 10:00 a.m. on February 22, 2017 (specially set to the court's dismissal/conversion calendar).

20. 16-24337-E-13 NBC-1 | **QUAY SAMONS** | **Eamonn Foster** | **MOTION TO CONFIRM PLAN** | **12-28-16 [53]**

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on December 28, 2016. By the court's calculation, 48 days' notice was provided. 42 days' notice is required.

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

The Motion to Confirm the Amended Plan is granted.

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

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on January 25, 2017. Dckt. 61. The Trustee asserts that Quay Samons's ("Debtor") plan in Class 1 provides for arrears owed to Ditech Financial LLC in the amount of $23,458.62. The Trustee notes that the monthly dividend proposed states "See Additional Provisions," but nothing was provided.

DEBTOR'S REPLY

Debtor filed a Reply on January 30, 2017. Dckt. 64. Debtor admits that the Trustee correctly objected. The Debtor asserts that Additional Provision 6.02 should have been included to state:

> To the date that this plan was filed, Debtor has paid a total of $7,250 into the plan. Of this amount, $1,000 shall be paid towards the arrears of the Class 1 claim held by Ditech Financial LLC. Beginning with the January 25, 2017 payment, the monthly dividend for the Class 1 arrears will be $408.34 for the remainder of the plan.

Debtor alleges that if this language is included, then the Class 1 monthly installment of $1,156.95 can be paid by the Trustee, and the $408.34 can be paid toward the arrears. Debtor asserts that the proposed plan payment of $1,700.00 will leave enough for the Trustee's fees, will cure the arrears, will keep mortgage payments current, and will pay a small amount on the unsecured creditor's claims. Debtor's attorney has also waived the remainder of his no-look fees. Debtor requests this language be included in the order confirming the plan and that the plan be confirmed.

Upon review of the pleadings, and Debtor provided the court with the missing language for the Class 1 monthly dividend, the Amended Plan complies with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Amended Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Amended Chapter 13 Plan filed on December 28, 2016, is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.
>
> **IT IS FURTHER ORDERED** that the Order Confirming the Amended Chapter 13 Plan shall include the following language in Additional Provision 6.02:
>
> > To the date that this plan was filed, Debtor has paid a total of $7,250 into the plan. Of this amount, $1,000 shall be paid towards the arrears of the Class 1 claim held by Ditech Financial LLC. Beginning with the January 25, 2017 payment, the monthly dividend for the Class 1 arrears will be $408.34 for the remainder of the plan.

21. 16-27739-E-13 DPC-1 | **JASON/TERESA BINION** | **Richard Sturdevant** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** | **1-19-17 [32]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on January 19, 2017. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing ----------.

The Objection to Confirmation of Plan is sustained.

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

A. Debtor is delinquent;

B. Debtor failed to file two Motions to Value Secured Claim;

C. Debtor's Schedule I failed to list Debtor's employer information in Part 1.

The Trustee's objections are well-taken. The Trustee asserts that Debtor is $6,492.00 delinquent in plan payments, which represents one month of the $6,492.00 plan payment. According to the Trustee, the Plan in § 1.01 calls for payments to be received by the Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Debtor has not paid anything into the Plan. Delinquency indicates that 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 claims of Alaska USA Federal Credit Union and TD Auto Finance LLC. Debtor has failed to file the necessary Motions to Value the Secured Claims, however. Without the court valuing the claims, the Plan is not feasible. 11 U.S.C. § 1325(a)(6).

The Trustee alleges that Debtor's Schedule I fails to list the Debtor's employer information in Part 1. The Trustee believes this was an oversight, but without this information, the Trustee and the court cannot determine whether Debtor can make the necessary plan payments. *See* 11 U.S.C. § 1325(a)(6).

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

22. **16-27739-E-13 JHW-1** | **JASON/TERESA BINION** **Richard Sturdevant** | **OBJECTION TO CONFIRMATION OF PLAN BY TD AUTO FINANCE, LLC** **12-21-16 [20]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on December 21, 2017. By the court's calculation, 55 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing ----------.

The Objection to Confirmation of Plan is sustained.

TD Auto Finance LLC, Creditor with a secured claim, opposes confirmation of the Plan on the basis that:

A. Debtor has not filed a Motion to Value Secured Claim; and

B. Debtor's plan failed to provide the proper interest rate on Creditor's loan in conformance with 11 U.S.C. § 1325(a)(5)(B)(ii) and in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004).

The Creditor's objections are well-taken.

A review of the Debtor's Plan shows that it relies on the court valuing the secured claim of TD Auto Finance LLC. Debtor has failed to file a Motion to Value the Secured Claim of TD Auto Finance,

however. Without the court valuing the claim, the Plan is not feasible. 11 U.S.C. § 1325(a)(6). Therefore, the Objection is sustained.

Creditor objects to the confirmation of the Plan on the basis that the Plan does not provide the interest rate on its loan with Debtor. Creditor's claim is secured by a 2013 Chevrolet Suburban, VIN ending in 8822. Creditor argues that this interest rate is outside the limits authorized by the Supreme Court in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004). In *Till*, a plurality of the Court supported the "formula approach" for fixing post-petition interest rates. *Id.* Courts in this district have interpreted *Till* to require the use of the formula approach. *See In re Cachu*, 321 B.R. 716 (Bankr. E.D. Cal. 2005); *see also Bank of Montreal v. Official Comm. of Unsecured Creditors (In re American Homepatient, Inc.)*, 420 F.3d 559, 566 (6th Cir. 2005) (*Till* treated as a decision of the Court). Even before *Till*, the Ninth Circuit had a preference for the formula approach. *See Cachu*, 321 B.R. at 719 (citing *In re Fowler*, 903 F.2d 694 (9th Cir. 1990)).

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

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by a Creditor with a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

23. **16-27739-E-13** **JASON/TERESA BINION** **OBJECTION TO CONFIRMATION OF PLAN BY ALASKA U.S.A. FEDERAL CREDIT UNION**
PPR-1 **Richard Sturdevant**
1-17-17 [25]

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Chapter 13 Trustee on January 17, 2017. By the court's calculation, 28 days' notice was provided. 14 days' notice is required. The Office of the United States Trustee has not been served.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing **----------.**

The Objection to Confirmation of Plan is overruled without prejudice.

INSUFFICIENT NOTICE PROVIDED

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

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

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

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by a Creditor with a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is overruled without prejudice.

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

Alaska U.S.A. Federal Credit Union, Creditor with a secured claim, opposes confirmation of the Plan on the basis that:

A. Debtor failed to file a Motion to Value Secured Claim; and

B. Debtor's plan failed to provide the proper interest rate on Creditor's loan in conformance with 11 U.S.C. § 1325(a)(5)(B)(ii) and in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004).

The Creditor's objections are well-taken.

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

Creditor objects to the confirmation of the Plan on the basis that the Plan does not provide the interest rate on its loan with the Debtor. Creditor's claim is secured by a 2006 Chevrolet Silverado, VIN ending in 4108. Creditor argues that this interest rate is outside the limits authorized by the Supreme Court in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004). In *Till*, a plurality of the Court supported the "formula approach" for fixing post-petition interest rates. *Id.* Courts in this district have interpreted *Till* to require the use of the formula approach. *See In re Cachu*, 321 B.R. 716 (Bankr. E.D. Cal. 2005); *see also Bank of Montreal v. Official Comm. of Unsecured Creditors (In re American Homepatient, Inc.)*, 420 F.3d 559, 566 (6th Cir. 2005) (*Till*

treated as a decision of the Court). Even before *Till*, the Ninth Circuit had a preference for the formula approach. *See Cachu*, 321 B.R. at 719 (citing *In re Fowler*, 903 F.2d 694 (9th Cir. 1990)).

The court agrees with the court in *Cachu* that the correct valuation of the interest rate is the prime rate in effect at the commencement of this case plus a risk adjustment. Because the creditor has only identified risk factors common to every bankruptcy case, the court fixes the interest rate as the prime rate in effect at the commencement of the case, 3.5%, plus a 1.25% risk adjustment, for a 4.75% interest rate. The objection to confirmation of the Plan on this basis is sustained. *See* 11 U.S.C. § 1325(a)(5)(B)(ii).

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by a Creditor with a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

24. 16-27641-E-13 DPC-1 | **MONICA STEINHART** / **Marc Carpenter** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** / **1-11-17 [21]**

Final Ruling: No appearance at the February 14, 2017 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on January 11, 2017. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The hearing on the Objection to Confirmation of Plan is continued to 3:00 p.m. on February 28, 2017.

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that Debtor's plan relies on a Motion to Value Secured Claim of Golden One Credit Union, set for hearing on February 28, 2017.

A review of the Debtor's Plan shows that it relies on the court valuing the secured claim of Golden One Credit Union. That motion is set for hearing on February 28, 2017. Therefore, the court continues this matter to 3:00 p.m. on February 28, 2017, to be heard in conjunction with the Motion to Value.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Objection to Confirmation of the Plan is continued to 3:00 p.m. on February 28, 2017.

25. 12-40142-E-13 DNL-7 | **WILLIAM/BARBARA MIER** | **J. Luke Hendrix** | **MOTION TO COMPEL TURNOVER OF PROPERTY** | **1-31-17 [108]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on January 31, 2017. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion to Compel Turnover of Property is granted.

Barbara Mier ("Debtor") moves for an order compelling David Cusick, the Chapter 13 Trustee, to turn over property identified as $25,000.00 in term life insurance proceeds on the following grounds:

A. Debtor and her late spouse commenced this case on December 24, 2012.

B. Debtor's plan was confirmed on February 28, 2013.

C. Debtor's late spouse passed away on August 4, 2016, after which time Debtor received $25,000.00 in proceeds from a term life insurance policy.

D. On November 4, 2016, Debtor amended Schedule C to claim a full exemption in the life insurance proceeds under California Code of Civil Procedure § 703.140(b)(7) & (b)(11)(C).

E. On November 9, 2016, the court authorized Debtor to substitute for her deceased husband, acknowledging that the Trustee would hold the life insurance proceeds pending further order of the court.

F. The deadline to file an objection to the Debtor's claim of exemption against the insurance proceeds was December 5, 2016.

G. No objection to Debtor's claimed exemption in the insurance proceeds was filed.

TRUSTEE'S RESPONSE

The Trustee filed a Response on February 2, 2017. Dckt. 113. The Trustee states that he has no opposition and requests that the Motion be granted.

DISCUSSION

At the November 1, 2016 hearing, the court authorized Debtor to substitute for her deceased husband, and the court ordered the Trustee to hold the life insurance proceeds paid upon the death of the spouse. Dckt. 101 & 104. The court further ordered that Debtor would retain all "rights and interests" in the insurance proceeds despite the funds being turned over to the Trustee. Dckt. 104.

Debtor has established that the deadline to object to her claimed exemptions in the life insurance proceeds was December 5, 2016. No creditors objected. The Trustee concurs that the Motion be granted to turn over $25,000.00 in insurance proceeds to Debtor. Dckt. 133. Therefore, the Motion is granted, and the Trustee is ordered to turn over the life insurance proceeds to Debtor.

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 Compel Turnover of Property filed by Barbara Mier ("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 to Compel Turnover of Property is granted, and the Chapter 13 Trustee is authorized to, and shall on or before February 28, 2017, turn over to Debtor the Property identified as $25,000.00 in proceeds from a life insurance policy, listed on Schedule B, and exempted on Schedule C pursuant to California Code of Civil Procedure § 703.140(b)(7) & (b)(11)(C).

26. **16-27442-E-13** **KORIE MARTINEZ** **MOTION TO CONFIRM PLAN**
TAG-2 **Barry Spitzer** **12-27-16 [31]**

Final Ruling: No appearance at the February 14, 2017 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on December 27, 2016. By the court's calculation, 49 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Amended Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

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

Debtor filed a Motion to Confirm an Amended Plan. Debtor then filed a Notice of Conversion on February 6, 2017, however, converting the case to a proceeding under Chapter 7. Dckt. 58. The Debtor may convert a Chapter 13 case to a Chapter 7 case at any time. 11 U.S.C. § 1307(a). The right is nearly absolute, and the conversion is automatic and immediate. Fed. R. Bankr. P. 1017(f)(3); *In re Bullock*, 41 B.R. 637, 638 (Bankr. E.D. Penn. 1984); *In re McFadden*, 37 B.R. 520, 521 (Bankr. M.D. Penn. 1984). Debtor's case was converted to a proceeding under Chapter 7 by operation of law once the Notice of Conversion was filed on February 6, 2017. *McFadden*, 37 B.R. at 521.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Amended Plan filed by 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 to Confirm the Amended Plan is denied without prejudice as moot.

27.	**16-27855-E-13** **APN-1**	**FARENZO HANNON AND DIAMOND JOHNSON-HANNON** **Justin Kuney**	**OBJECTION TO CONFIRMATION OF PLAN BY WELLS FARGO BANK, N.A.** **1-19-17 [18]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on January 19, 2017. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing ----------.

The Objection to Confirmation of Plan is sustained.

Wells Fargo Bank, N.A., dba Wells Fargo Dealer Services, Creditor with a secured claim, opposes confirmation of the Plan on the basis that there is a lack of adequate protection for Creditor's secured claim under the Plan.

The objecting Creditor, who holds a security interest in a 2013 Chevrolet Camaro, VIN ending in 5793, 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.

The first prong of the Objection is that the Plan provides for paying only an $8,800.00 secured claim, while Creditor believes that the actual fair market value (based on NADA valuation) is $12,200.00. Objection, ¶ 3; Dckt. 18. The Objection does not state the actual amount of Creditor's claim or that it exceeds the $8,800.00 amount specified in the Plan. However, the proposed Plan itself states that the amount of Creditor's claim is $20,788 and it is to be reduced to $8,800.00. Chapter 13 Plan, Class 2; Dckt. 7. Though not referenced, the court notes that Creditor has also filed Proof of Claim No. 7 in which it states its claim to be $21,205.19.

The second prong of the Objection is that "Debtor has failed to acknowledge Secured Creditor has a Purchase Money Security Interest, when in fact, it does." Objection, ¶ 6 *Id.* It is unclear what the consequences are of such a *faux pas*—whether financial or social. Creditor then makes the supported assertion that this five-model-year-old Chevy Camaro will "depreciate at a much higher rate than that at which Secured Creditor will receive adequate protection payments under the Plan." *Id.*, ¶ 7. In the Objection it is stated that Creditor objects to the monthly plan payments being $150 for the first ten months and then $450 a month for the remainder of the plan for this claim. Other than a "gut reaction" to the terms, Creditor offers no evidence why the $150 a month payments do not adequately protect the creditor. Possibly the plan fails to provide for equal monthly installments (11 U.S.C. § 1325(a)(5)(B)(iii)(I)), and there is no good faith reason for such unequal payments, but that is not Creditor's objection. FN.1.

FN.1. It appears that the reason for decreasing the payment to Creditor by $300 a month for ten months is because counsel for Debtor is to be paid $3,000.00 of his fees through the plan. But again, Creditor did not present this as part of the Objection to Confirmation.

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 because the phrase was only added to the section by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005). Several bankruptcy courts that have considered the issue, however, 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); *Royals v. Massey (In re Denton)*, 370 B.R. 441, 448 (Bankr. S.D. Ga. 2007). The court will apply this rule.

The objecting Creditor does not allege what percent per month that its collateral declines in value, and Creditor does not assert what amount of a monthly payment it is entitled to based on its estimate of the value of its collateral at $12,200.00. The Plan provides for a $150.00 monthly payment for ten months and then $450.00 per month thereafter. In support of its allegation regarding depreciation, the Creditor submits the Declaration of Tabitha Reel as part of its Objection to Confirmation of Debtor's Chapter 13 Plan, filed on January 19, 2017. Dckt. 20.

Debtor not having obtained an order valuing the Secured Claim pursuant to 11 U.S.C. § 506(a), Debtor cannot have the Plan pay less than the secured claim, as filed, of Creditor. The Chapter 13 Plan itself expressly states that the Proof of Claim controls as to value over the Plan. Plan ¶ 2.04, 2.09(c).

The Objection is sustained, and confirmation is denied for the failure of Debtor to provide for Creditor's secured claim in the amount set forth in Proof of Claim No. 7.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by a Creditor with a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

28.	**16-27855-E-13 DPC-1**	**FARENZO HANNON AND DIAMOND JOHNSON-HANNON Justin Kuney**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 1-19-17 [14]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on January 19, 2017. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing ----------.

The Objection to Confirmation of Plan is sustained.

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

A. Debtor has failed to file a Motion to Value Secured Claim; and

B. Debtor cannot make payments or comply with the plan, or the plan may no longer be the Debtor's best effort.

The Trustee's objections are well-taken. A review of the Debtor's Plan shows that it relies on the court valuing the secured claim of Wells Fargo Dealer Services. Debtor has failed to file a Motion to Value the Secured Claim of Wells Fargo Dealer Services, however. Without the court valuing the claim, the Plan is not feasible. 11 U.S.C. § 1325(a)(6).

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor testified at the First Meeting of Creditors held on January 12, 2017, that Co-Debtor

Farenzo Hannon is now employed, and Debtor has additional expenses listed on Schedule J. The Plan calls for increasing payments: $500.00 for seventeen months, then $635.00 for three months, and then $815.00 for sixteen months. Without an accurate picture of the Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

29. 12-24258-E-13 DARRELL WILLIAMS MOTION TO MODIFY PLAN
FF-10 Gary Fraley 12-30-16 [165]

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 30, 2016. By the court's calculation, 46 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is denied.

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

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on January 30, 2017. Dckt. 170.

The Trustee asserts that Debtor's Motion and Declaration incorrectly state "Debtor erroneously made his prior plan payments of $1,750.00 to the Trustee for the months of July, August, September and November 2016." The Debtor's payments were actually $1,616.27 for July 2016 through October 2016 and $393.00 for October 2016 and November 2016.

The Debtor's Fourth Modified Chapter 13 plan called for monthly payments of $393.00 starting July 25, 2016, including Wells Fargo Home Mortgage in Class 4 with a Monthly Contract Installment of $806.67. Two Notices of Mortgage Payment Change were filed scheduling for an October 1, 2016 change to $744.93 and a November 1, 2016 change to $1,325.90 based on a change of escrow payment asserting a higher past escrow payment than previously disclosed.

The Trustee alleges that the Debtor is requesting the Trustee to make mortgage payments to Wells Fargo Bank, N.A. for the months of July, August, September and October 2016 when the Debtor erroneously overpaid it under the terms of the Fourth Modified Plan. The Trustee states that there is a total of $3,164.94 in mortgage payments for that period plus any late fees, less than the $3,559.03 provided for in the Plan. The Trustee contends that if the $3,559.03 is allowed, then the amount paid to the creditor may be higher.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Modified Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Confirm the Modified Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

30. 12-34858-E-13 BLG-5 | **MELINA LEWIS** **Chad Johnson** | **MOTION FOR COMPENSATION BY THE LAW OFFICE OF BANKRUPTCY LAW GROUP, PC FOR CHAD M. JOHNSON, DEBTOR'S ATTORNEY(S) 1-13-17 [85]**

Final Ruling: No appearance at the February 14, 2017 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 13, 2017. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

Chad Johnson, the Attorney ("Applicant") for Melina Lewis, the Chapter 13 Debtor ("Client"), makes a Request for the Additional Allowance of Fees and Expenses in this case.

Fees are requested for the period March 20, 2015, through January 11, 2017. Applicant requests fees in the amount of $3,870.00 and costs in the amount of $97.02.

TRUSTEE'S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a Non-Opposition on January 23, 2017. Dckt. 90.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the services provided as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [professional fees and expenses] without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According to

the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including three Motions to Modify, Motion for Compensation, and subsequent related correspondence and meetings with Client. The court finds the services were beneficial to the Client and bankruptcy estate and were reasonable.

"No-Look" Fees

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

> (a) Compensation. Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c). The failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall signify that the attorney has opted out of Subpart (c). When there is an objection or when an attorney opts out, compensation shall be determined in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017, and any other applicable authority."
> . . .
> (c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.
>
> (1) The maximum fee that may be charged is $4,000.00 in nonbusiness cases, and $6,000.00 in business cases.
>
> (2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.

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

The Order Confirming the Chapter 13 Plan expressly provides that Applicant is allowed $4,000.00 in attorneys' fees, the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Dckt. 85. Applicant prepared the order confirming the Plan.

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

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

FEES AND COSTS & EXPENSES REQUESTED

Fees

Applicant provides a task billing analysis and supporting evidence for the services provided, which are described in the following main categories.

General Case Administration: Applicant spent 0.5 hours in this category. Applicant wrote emails and provided documents to the Trustee's office.

Motion to Modify BLG-1: Applicant spent 5.4 hours in this category. Applicant communicated with Client and Trustee's office, prepared the motion and plan, and attended a hearing.

Motion to Modify BLG-3: Applicant spent 4.8 hours in this category. Applicant communicated with Client and Trustee's office, prepared the motion and plan, and attended a hearing.

2004 Exam: Applicant spent 6.7 hours in this category. Applicant communicated with Client and Trustee's office and prepared and attended the hearing.

Motion to Modify BLG-4: Applicant spent 6.5 hours in this category. Applicant communicated with Client and Trustee's office, prepared the motion and plan, and attended a hearing.

Motion for Compensation: Applicant spent 2.0 hours in this category. Applicant prepared motion for additional attorney fees.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Chad Johnson, attorney	23.6	$350.00	$8,260.00
Jennifer Walden, paralegal	2.0	$185.00	$370.00
Lindsey Sloan, legal assistant	0.3	$85.00	$25.50
Total Fees for Period of Application			$8,655.50

Applicant seeks to be paid a single sum of $3,870.00 for its fees.

Costs and Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $97.02 pursuant to this application.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Postage		$52.72
Copies	$0.05	$44.30
Total Costs Requested in Application		$97.02

FEES AND COSTS & EXPENSES ALLOWED

Fees

The unique facts surrounding the case, including three Motions to Modify, Motion for Compensation, and subsequent related correspondence and meetings with Client, raise substantial and unanticipated work for the benefit of the Estate, Debtor, and parties in interest. The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. The request for additional fees in the amount of $3,870.00 is approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Plan in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

Costs & Expenses

Costs in the amount of $97.02 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case.

Applicant is allowed, and the Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	$3,870.00
Costs and Expenses	$97.02

pursuant to this Application as final fees pursuant to 11 U.S.C. § 330 in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Chad Johnson ("Applicant"), Attorney having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Chad Johnson is allowed the following fees and expenses as a professional of the Estate:

Chad Johnson, Professional Employed by Chapter 13 Debtor

Fees in the amount of $3,870.00
Expenses in the amount of $97.02,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 13 Debtor.

IT IS FURTHER ORDERED that the Trustee is authorized to pay the fees allowed by this Order from the available Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case.

31. 17-20460-E-13 RJ-1 | **STACY JOHNSON** **Richard Jare** | **MOTION TO VALUE COLLATERAL OF SANTANDER CONSUMER USA 1-31-17 [12]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, and Office of the United States Trustee on January 31, 2017. 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. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Value Secured Claim of Santander Consumer USA ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $8,750.00.

The Motion filed by Stacy Johnson ("Debtor") to value the secured claim of Santander Consumer USA ("Creditor") is accompanied by Debtor's Declaration. Debtor is the owner of a 2011 Mazda CX-7("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $8,750.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on February 2, 2017. Dckt. 17. The Trustee states that Debtor has included Santander Consumer USA on Schedule D and in Class 2B of the proposed plan, but the Creditor has not filed a proof of claim regarding the claim in this matter.

NO PROOF OF CLAIM FILED

The court has reviewed the Claims Registry for this bankruptcy case. No Proof of Claim has been filed by a creditor that appears to be for the claim to be valued.

The lien on the Vehicle's title secures a purchase-money loan incurred on March 18, 2014, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $13,700.00. Therefore, the Creditor's claim secured by a lien on the asset's title is under-collateralized. The Creditor's secured claim is determined to be in the amount of $8,750.00, the value of the collateral. *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 Stacy Johnson ("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 Santander Consumer USA ("Creditor") secured by an asset described as a 2011 Mazda CX-7 ("Vehicle") is determined to be a secured claim in the amount of $8,750.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is $8,750.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

32. **16-27761-E-13** **DORIAN BELLAN** **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK**
DPC-1 **Candace Brooks** **1-12-17 [47]**

Final Ruling: No appearance at the February 14, 2017 hearing is required.

The Chapter 13 Trustee having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Objection to Confirmation of Plan was dismissed without prejudice, and the matter is removed from the calendar.**

33. **16-26070-E-13** **STEPHANIE RUSCIGNO** **CONTINUED MOTION TO CONFIRM PLAN**
PGM-3 **Peter Macaluso** **11-11-16 [43]**

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

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

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

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

The Motion to Confirm the Amended Plan is denied.

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

TRUSTEE'S OPPOSITION

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

DEBTOR'S REPLY

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

JANUARY 10, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on February 14, 2017, to allow the Trustee and Debtor to conclude the continued Meeting of Creditors.

TRUSTEE'S STATUS REPORT

The Trustee filed a Status Report on February 1, 2017. Dckt. 101. The Trustee maintains his objection to the Plan. Debtor appeared at the continued Meeting of Creditors on January 26, 2017, but Debtor is Delinquent $600.00 under the Plan.

DISCUSSION

The Trustee's objection for not appearing at the Meeting of Creditors has been resolved.

The Trustee asserts that Debtor is $600.00 delinquent in plan payments, which represents multiple months of the $200.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6). Unfortunately for the Debtor, a promise to become current on plan payments is not evidence of such. The Motion is denied on the ground of Debtor's delinquency under the proposed plan.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Amended Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Confirm the Amended Plan is denied.

34. **16-26070-E-13** **STEPHANIE RUSCIGNO**
PGM-4 **Peter Macaluso**

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

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

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

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

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

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

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

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

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

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

B. Mandates the terms of the Chapter 13 Plan as to Creditor's Claim.

C. In the event of a default in any payments to Creditor, Debtor will be assessed a $75.00 late fee.

D. In the event of a default and a failure to cure within ten days, Creditor is entitled to *ex parte* relief from the automatic stay.

E. If Creditor seeks relief from the stay, the notice requirements of Federal Rule of Bankruptcy Procedure 3002.1 are waived.

F. If Creditor seeks relief from the automatic stay, the fourteen-day stay of enforcement pursuant to Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived.

G. Debtor represents and warrants that Debtor has no claims against Creditor.

H. Debtor waives, releases, and discharges any claims it, or any successors or assigns, could have against Creditor.

I. Debtor grants Creditor a general release, of all claims, known and unknown.

J. Debtor is required to file an amended Plan on the terms dictated in the Stipulation.

Stipulation, Dckt. 33.

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

MOTION TO APPROVE STIPULATION

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

A. "Debtor owns real property located at 1660 Sharon Drive, 26 Yuba City, CA 95993."

B. "At the time of filing, the Debtor's loan to DFI Funding, 28 Inc. was due and payable. This Chapter 13 was filed in order to stop a pending foreclosure sale."

C. "The stipulation provides adequate protection payments to the creditor, while giving the Debtor time to secure a loan modification, refinance, or make arrangements to sell or surrender the property."

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

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

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

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

Motion, Dckt. 62.

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

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

TRUSTEE'S OPPOSITION

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

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

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

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

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

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

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

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

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

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

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

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

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

DEBTOR'S REPLY

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

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

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

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

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

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

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

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

JANUARY 10, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on February 14, 2017. Dckt. 79. The court ordered Debtor to file a supplemental notice of continued hearing that discloses all of the terms of the adequate protection and that Debtor will grant a release as part of the compromise.

TRUSTEE'S AMENDED RESPONSE

The Trustee filed an Amended Response on February 1, 2017. Dckt. 95. The Trustee notes that Debtor appeared at the First Meeting of Creditors and was examined. The Trustee is not aware of any unscheduled claims in this case. The Trustee no longer opposes the Stipulation.

DISCUSSION

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

The Motion does not purport to be one to compromise any rights of the estate or settle any disputes. Just one to merely provide for agreed adequate protection payments to Creditor who is willing to afford Debtor some time to either refinance or sell the Property so as to preserve her equity therein. As Creditor noted at a prior hearing, even though when the case was filed there was not an automatic stay in

effect (11 U.S.C. § 362(c)(4)), Creditor elected to voluntarily not conduct a non-judicial foreclosure sale, allowing Debtor time to get the stay imposed in this case.

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

A. Debtor shall make the following Adequate Protection Payments to Creditor:

1. One payment of $1,390.00 on October 19, 2016;

2. Ten monthly payments of $1,600.00 each, commencing on November 12, 2016, and continuing for each month thereafter through August 2017.

a. The monthly payments for November 2016 through January 2017 are authorized to be made directly by the Debtor to Creditor, and to be made by the 12th day of each month.

b. Commencing in February 2017, the $1,600.00 monthly payment shall be made through the Chapter 13 Trustee, who shall then disburse the monthly payment for February 2017 and each succeeding month at the end of the month when making the normal monthly disbursements to creditors.

3. Debtor shall make a final payment of $175,000.00 to Creditor on or before September 12, 2017, to pay Creditor's claim in full. The final payment may be made directly by Debtor or at the direction of (such as a loan or sale escrow distribution).

B. In the event that Debtor defaults in any of the required adequate protection payments specified above, and thereafter fails to cure said default within ten days of written notice thereof sent to Debtor and Debtor's Counsel of Record in this case, Creditor may request relief from the automatic stay by *ex parte* motion filed with the court.

1. The *ex parte* motion shall be based on the grounds of the default in the adequate protection payments, and be served on the Debtor, Debtor's Counsel, Chapter 13 Trustee and U.S. Trustee. When the *ex parte* motion is filed Creditor shall also lodge with the court a proposed order granting such relief.

2. The court shall issue the order on the *ex motion* if no opposition to the motion is filed within ten (10) days of service of the *ex parte* motion and the opposition party has set a hearing on the opposition to the ex parte motion for the first regularly schedule law and motion hearing date of this court not less than seven days from the filing of the opposition. The only grounds for the opposition to the ex parte motion shall be that the Debtor made the adequate

protection payment asserted to be in default or timely cured after notice of default.

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

C. The Stipulation includes the granting of a release for Creditor, resolving prior asserted disputes and threats (or what were perceived as threats by Creditor) of litigation by Debtor.

No other relief is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Status Conference for the Stipulation to determine secured claim, waive and release rights and interests of the bankruptcy estate, Debtor, and all other parties in interest, and predetermine and confirm terms for treatment of Creditors' secured claim having been conducted by the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Approve Adequate Protection Stipulation is granted on the terms provided herein:
>
> A. Debtor shall make the following Adequate Protection Payments to Creditor:
>
> 1. One payment of $1,390.00 on October 19, 2016;
>
> 2. Ten monthly payments of $1,600.00 each, commencing on November 12, 2016, and continuing for each month thereafter through August 2017.
>
> a. The monthly payments for November 2016 through January 2017 are authorized to be made directly by the Debtor to Creditor, and to be made by the 12th day of each month.
>
> b. Commencing in February 2017, the $1,600.00 monthly payment shall be made through the Chapter 13 Trustee, who shall then disburse the monthly payment for February 2017 and each succeeding month at the end of the month when making the normal monthly disbursements to creditors.

3. Debtor shall make a final payment of $175,000.00 to Creditor on or before September 12, 2017, to pay Creditor's claim in full. The final payment may be made directly by Debtor or at the direction of (such as a loan or sale escrow distribution).

B. In the even that Debtor defaults in any of the required adequate protection payments specified above, and thereafter fails to cure said default within ten days of written notice thereof sent to Debtor and Debtor's Counsel of Record in this case, Creditor may request relief from the automatic stay by *ex parte* motion filed with the court.

1. The *ex parte* motion shall be based on the grounds of the default in the adequate protection payments, and be served on the Debtor, Debtor's Counsel, Chapter 13 Trustee and U.S. Trustee. When the *ex parte* motion is filed Creditor shall also lodge with the court a proposed order granting such relief.

2. The court shall issue the order on the *ex motion* if no opposition to the motion is filed within ten (10) days of service of the *ex parte* motion and the opposition party has set a hearing on the opposition to the ex parte motion for the first regularly schedule law and motion hearing date of this court not less than seven days from the filing of the opposition. The only grounds for the opposition to the ex parte motion shall be that the Debtor made the adequate protection payment asserted to be in default or timely cured after notice of default.

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

C. The Stipulation includes the granting of a release for Creditor, resolving prior asserted disputes and threats (or what were perceived as threats by Creditor) of litigation by Debtor.

No other relief is granted.

35. 16-28072-E-13 CA-1 | **MICHAEL/JURHEE POLLARD** **Michael Croddy** | **MOTION TO VALUE COLLATERAL OF CAPITAL ONE AUTO FINANCE 1-19-17 [14]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditor, and Office of the United States Trustee on January 19, 2017. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The Motion to Value Secured Claim of Capital One Auto Finance ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $8,320.00.

The Motion filed by Michael Pollard and Jurhee Pollard ("Debtor") to value the secured claim of Capital One Auto Finance ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2010 Ford Fusion SE ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $8,320.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

TRUSTEE'S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a Non-Opposition on January 30, 2017. Dckt. 23. The Trustee notes that Creditor is provided for in Section 2.09 B. 1. of the proposed plan and has filed Claim 3-1 for $17,028.58. $8,320.00 is claimed as secured, and $8,708.58 is claimed as unsecured.

DISCUSSION

The lien on the Vehicle's title secures a purchase-money loan incurred 2010, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $12,050.00. Therefore, the Creditor's claim secured by a lien on the asset's title is under-collateralized. The Creditor's secured claim is determined to be in the amount of $8,320.00. *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 Michael Pollard and Jurhee Pollard ("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 Capital One Auto Finance ("Creditor") secured by an asset described as 2010 Ford Fusion SE ("Vehicle") is determined to be a secured claim in the amount of $8,320.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is $8,320.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

36. 14-20773-E-13 WILLIAM KENITZER MOTION TO INCUR DEBT
SLH-3 Seth Hanson 1-10-17 [44]

Final Ruling: No appearance at the February 14, 2017 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on January 10, 2017. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The Motion to Incur Debt is granted.

The Motion seeks permission to purchase real property commonly known as 5064 Glenwood Springs Way, Roseville, California, which the total purchase price is $464,970.00, with monthly payments of $3,110.00. The loan estimate from Alpine Mortgage Planning attached as Exhibit A includes the following details:

A. A loan amount of $456,548.00,

B. Interest rate of 4%,

C. Monthly principal and interest of $2,179.63,

D. Mortgage insurance of $315.00, and

E. Estimated escrow of $615.00.

TRUSTEE'S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a Non-Opposition on January 13, 2017. Dckt. 49. The Trustee states that he does not oppose the Motion, but he notes that William Kenitzer ("Debtor") has failed to explain the source of the earnest money of $16,742.00 and the down payment of $8,422.00 listed on the Closing Cost Worksheet (Exhibit A, Dckt. 47).

The Trustee notes that the Plan should complete within three months, and it provides a 100% dividend to unsecured claims.

DEBTOR'S RESPONSE

Debtor filed a Response on January 27, 2017. Dckt. 50. Debtor states that the questioned funds came from his 401k.

DISCUSSION

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

The court finds that the proposed credit, based on the unique facts and circumstances of this case, is reasonable. There being no opposition from any party in interest and the terms being reasonable, the Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Incur Debt filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and William Kenitzer ("Debtor") is authorized to incur debt pursuant to the terms of the agreement, Exhibit A, Dckt. 47.

37. **14-30673-E-13 PLG-3** | **FERNANDO/SUSANA ORTIZ** **Steven Alpert** | **OBJECTION TO CLAIM OF COMMUNITY CENTERS OF AMERICA AUBURN, LLC, CLAIM NUMBER 24 1-13-17 [90]**

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

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

Local Rule 3007-1 Objection to Claim—Hearing Required.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor, Debtor, Chapter 13 Trustee, and parties requesting special notice on January 13, 2017. By the court's calculation, 32 days' notice was provided. 30 days' notice is required. Fed. R. Bankr. P. 3007(a) (thirty-day notice); L.B.R. 3007-1(b)(2).

The Objection to Claim was properly set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Objection to Proof of Claim Number 24 of Community Centers of America Auburn, LLC is sustained, and the claim is disallowed as a priority claim and shall be paid as a general unsecured claim.

Fernando Ortiz and Susana Ortiz, the Chapter 13 Debtor ("Objector") requests that the court disallow the claim of Community Centers of America Auburn, LLC ("Creditor"), Proof of Claim No. 24 ("Claim"), Official Registry of Claims in this case, against a restaurant that Debtor used to lease from Creditor. The Claim is asserted to be priority in the amount of $5,579.96. Objector asserts that the priority portion of the claim should be disallowed and treated as a general unsecured claim because there is no basis under 11 U.S.C. § 507(a)(2) for priority.

Objector asserts that section 507(a)(2) grants priority to administrative expenses under section 503(b), of which section 503(b)(7) contains a provision making priority certain debts from non-residential

real property leases that are assumed and then rejected. Debtor stress that in this case, however, the underlying lease was never assumed first; it was rejected outright on the day that the case was filed.

Objector notes also that section 503(b)(1) does not apply because the landlord did not perform services that were necessary to preserve the bankruptcy estate. Objector states that the restaurant was shut down four weeks prior to filing for bankruptcy on October 29, 2014. Objector states that the landlord was contacted on October 30, 2014, and told that it could keep any personal property that had not been removed from the premises already. Therefore, Objector argues that because any items on the property were kept by the landlord and not liquidated for the benefit of the bankruptcy estate, then the landlord did not preserve property of the estate.

Objector states that it had been in communication with Creditor about the status of the Claim and was under the impression that Creditor was going to amend the Claim to remove the priority amount.

DISCUSSION

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

11 U.S.C. § 507(a)(2) establishes priority status for administrative expenses listed in section 503(b). Here, Objector has demonstrated that the two relevant provisions—11 U.S.C. § 503(b)(1) & (7)—do not apply because Creditor either did not incur costs and expenses to preserve the estate or because the lease for the restaurant was never assumed, but was only rejected.

Based on the evidence before the court, the creditor's claim is disallowed as a priority claim and shall be paid as a general unsecured claim. The Objection to the Proof of Claim is sustained.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Community Centers of America Auburn, LLC, Creditor filed in this case by Fernando Ortiz and Susana Ortiz, the Chapter 13 Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Proof of Claim Number 24 of Community Centers of America Auburn, LLC, is sustained, and the claim is disallowed as a priority claim and shall be paid as a general unsecured claim.

38. **17-20373-E-13** **FLOYDETTE JAMES** **MOTION TO IMPOSE AUTOMATIC STAY**
PLG-1 **Steven Alpert** **1-31-17 [13]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on January 31, 2017. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion to Impose the Automatic Stay is denied.

Floydette James ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) imposed in this case. This is the Debtor's third bankruptcy petition pending in the past year with the prior two cases having been dismissed. The Debtor's prior bankruptcy cases (Nos. 15-28596 and 16-25086) were dismissed on June 27, 2016, and December 28, 2016. No. 16-25806, Dckt. 39, December 28, 2016. Therefore, pursuant to 11 U.S.C. § 362(c)(4)(A)(i), the provisions of the automatic stay did not go into effect upon Debtor filing the instant case.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on February 7, 2017. Dckt. 20. The Trustee states that he is uncertain whether there has been a substantial change in Debtor's circumstances. The Trustee notes Debtor's difficulty securing a vehicle to get to work (discussed further below) and that Debtor has the same employment as in the past cases. The Trustee is concerned that Debtor reports to once again be borrowing a vehicle.

The Trustee also notes that there have been five prior cases filed since January 10, 2013, which were either dismissed for delinquency or for failure to confirm a plan.

DISCUSSION

Here, Debtor states that the instant case was filed in good faith and explains that the prior cases were dismissed because in the first case Debtor was borrowing a vehicle from a friend rent free, but then was not able to borrow it anymore. She rented a car on a weekly basis, costing about $180–190 per week (roughly $800 per month). Debtor tried to work with dealerships to rent a vehicle for less, but they were unwilling to work with her. Accordingly, Debtor was not able to afford her plan payments. After Debtor's case was dismissed, she was able to continue borrowing a car rent free.

In the second case, the Trustee objected that the plan was not confirmable because he had not received the Class 1 checklist and because Debtor had not filed a Motion to Value Secured Claim. The court granted a conditional motion to dismiss because a motion to value had not been filed, but before the deadline of the conditional order, Debtor filed the motion to value and submitted the Class 1 checklist. Debtor prepared an amended plan but was not able to file it when Wells Fargo filed a proof of claim listing a different amount in arrears. Debtor prepared a second amended plan, but it was rendered moot when the Trustee sent a letter stating that the plan payment would be increasing in January 2017, which was a larger increase than Debtor's counsel had projected. Debtor and her attorney prepared a third amended plan with updated budget information and filed it on December 21, 2016, set for hearing on February 7, 2017. On December 28, 2016, the Trustee submitted an order for dismissal, which was granted the same day.

Debtor asserts that she was current on the filed amended plan at the time of conditional dismissal. Debtor filed a motion to vacate the dismissal, which was denied on January 17, 2017.

Prior Bankruptcy Cases Filed by Debtor

On her Petition Debtor lists having filed many bankruptcy cases the past several years. A summary of these cases is as follows:

Current Case	Filed: January 20, 2017 Pending
Chapter 13 Case 16-25086	Filed: August 2, 2015 Dismissed: December 29, 2016
Chapter 13 Case 15-28596	Filed: November 4, 2015 Dismissed: June 27, 2016
Chapter 13 Case 14-21229	Filed: November 14, 2014 Dismissed: April 30, 2015
Chapter 13 Case 13-32247	Filed: September 19, 2013 Dismissed: October 20, 2014

Chapter 13 Case 13-20793	Filed: January 22, 2013 Dismissed: July 18, 2013

In working through these cases:

A. 13-20793; Dckts. 54, 60—dismissed due to defaults in plan payments.

B. 13-32247; Dckts. 45, 55, 59—dismissed due to defaults in plan payments.

C. 14-31229; Dckts. 57, 64—dismissed due to defaults in plan payments.

D. 15-28596; Dckts. 44, 50, 53—dismissed due to defaults in plan payments.

E. 16-25086; Dckts. 14, 29—dismissed due to failure to file amended plan after confirmation of plan denied.

Upon motion of a party in interest and after notice and hearing, the court may order the provisions imposed if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(4)(B). The subsequently filed case is presumed to be filed in bad faith if two or more of Debtor's cases were both pending within the year preceding filing of the instant case. *Id.* § 362(c)(4)(D)(i)(I). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* § 362(c)(4)(D).

Debtor's prior cases were dismissed after Debtor failed to make plan payments (No. 15-28596) and after Debtor failed to confirm an amended plan by the court's deadline (No. 16-25086).

Debtor has provided convincing arguments that the delinquency in the first case was caused by difficulty securing transportation to travel to and from work. In the second case, Debtor has demonstrated that she was pursuing an amended plan but twice was hindered by events outside of her control. At the time of dismissal, she had a plan on file, set for hearing, and under which she was current. Nevertheless, she had not achieved *confirmation* of a plan with seventy-five days of the court issuing a conditional dismissal.

If this were the scope of Debtor's "defaults," such contentions may be credible. Debtor has been "living" in bankruptcy since January 2013 and has been unable to fulfill her duties as a debtor. While obtaining the benefits of bankruptcy, she has created a "perpetual cocoon of protection," free from her obligations and the sixty-month limit of a Chapter 13 Plan.

Debtor's own filings tell a story quite different than what is not being told to try to obtain an order imposing a stay in this bankruptcy case. When Debtor began her bankruptcy odyssey in January 2013, she listed Wells Fargo Bank, N.A. having a secured claim with a $13,654.20 arrearage. 13-20793; Plan, Dckt. 6. This is consistent with the $14,188.65 stated in Proof of Claim No. 9 filed by Wells Fargo Bank, N.A.

After the passage of four years, exhausting all but one year from what was permitted for a Chapter 13 Plan beginning in Debtor's first case, the arrearage stated by Debtor for the Class 1 Wells Fargo

Bank, N.A. claim is stated to have ballooned to $46,599.97 in Debtor's Chapter 13 Plan in this current case. Plan, Dckt. 5. (This $46,599.97 figure is the same as stated in Wells Fargo Proof of Claim No. 5 filed on November 9, 2016 in Case No. 16-25086.) After four years of bankruptcy protection Debtor has, by her own account, generated $32,000.00 of further defaults on this secured claim.

In the Chapter 11 Plan filed in this case (Dckt. 5), Debtor states that the current monthly payments are $1,507.87 for the secured claim of Wells Fargo Bank, N.A. With the arrearage increasing by $32,000.00 since the January 2013 filing of the first bankruptcy case, this is the equivalent of 21 monthly payments. That is an amount equal to almost half (21 of 48) of the payments which came due since the January 2013 filing of Debtor's first bankruptcy case.

Debtor has not rebutted the presumption of bad faith that arises pursuant to 11 U.S.C. § 362(c)(4)(D). There is no clear and convincing evidence that Debtor is prosecuting or can prosecute this case in good faith.

Debtor tries to blame her attorney in the prior case for her problems. Though the court in Case No. 16-25086 had ordered that the case would be dismissed if Debtor failed to confirm a Chapter 13 plan within 75 days of denial of confirmation of her prior plan in that case, Debtor argues that the order dismissing the case should be vacated because Debtor had filed a motion to confirm a plan within the 75 days. 16-25086; Motion to Vacate, Dckt. 42. In rejecting Debtor's arguments, the court stated:

> "This case was dismissed because the Debtor failed to confirm an amended plan within the 75-day entry of the order denying confirmation of the Debtor's plan. The Debtor asserts that there were unusual circumstances that prevented the confirmation of a plan within the 75-day deadline. Specifically, the Debtor's attorney had to amend three plans over a 2-month period because Wells Fargo had filed a proof of claim listing a different amount of arrears, Wells Fargo had filed a notice of mortgage payment change stating that payment would change beginning January 2017, and the Trustee had informed the Debtor that plan payments would increase on January 25, 2017.
>
> The Debtor asserts that the court should apply Fed. R. Civ. P. 59(a)(1) and (2) to vacate its order dismissing this case. This is not the standard. Debtor's motion fails to set forth any grounds for relief from the dismissal order pursuant to Fed. R. Civ. P. 60(b) as incorporated into contested matters in bankruptcy cases by Fed. R. Bankr. P. 9024.
>
> . . .
>
> Debtor has failed to allege any facts that would amount to relief from the order dismissing case pursuant to Fed. R. Civ. P. 60(b). Debtor does not addressed why she could not and did not request from the Trustee an extension of time to confirm a plan. The court notes that such extensions are routinely granted. As such, the motion is denied.

Id.; Civil Minutes, Dckt. 48.

Debtor has had the benefit of her current attorney in the case now before the court and the two prior cases. For the other three cases filed since January 2013, Debtor had the services of another attorney for all of those cases. In all six cases now, Debtor has had the benefit of counsel.

Debtor has been afforded multiple opportunities to confirm and perform a Chapter 13 Plan. She has failed, time and time again. There is no credible evidence providing the court with a basis for rebutting the presumption of bad faith. Debtor has continued to descend deeper and deeper into default through her use of Chapter 13 over the past four years.

The Schedules filed in the current case and the first case provide a glimpse into what benefit Debtor may be deriving from the non-productive, defaulting bankruptcy cases. On Schedule A filed in the 2013 case, Debtor lists her Suisun City residence as having a value of $265,000.00. 13-20793; Dckt. 1 at 16. On Schedule D Wells Fargo Bank, N.A. is listed as having a secured claim of $388,705.00 for which the residence is the collateral. *Id.* at 23. Debtor lists Wells Fargo Bank, N.A. as being undersecured by $122,805.

Come forward four years to the current Schedules A and D and Debtor's story is that the Suisun City property has risen to $305,000 and is subject to the Wells Fargo Bank, N.A. secured claim in the amount of $405,142.00, leaving an undersecured portion of $100,000. Dckt. 1 at 12, 20.

What Debtor has accomplished over the past four years is to default in half the mortgage payments and continue to live in a home she cannot afford. While Debtor purports to have the value of the property increase, she is still six figures short of there being any equity in the property, even after the rise in real estate values over the past four years. And this "decrease" in lack of equity appears suspect. When Wells Fargo Bank, N.A. filed its proof of claim in the prior case, as of November 9, 2016, it computed its claim to be $411,184.65.

Debtor has failed to rebut the presumption of bad faith. Rather, Debtor's "vehicle" excuse ignores the defaults, Debtor's failure to prosecute the prior case, and Debtor trying to perpetuate the default by merely filing a plan on the eve of the deadline to confirm a plan in the prior case.

The Motion is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Impose the Automatic Stay filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied, and the automatic stay is not imposed pursuant to 11 U.S.C. § 362(c)(4)(B).

39. **14-24574-E-13 DJC-2** | **JULIE VILLESCAS AND DEBORAH HOWE VILLESCAS** **Diana Cavanaugh** | **MOTION TO MODIFY PLAN** **1-2-17 [34]**

Final Ruling: No appearance at the February 14, 2017 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 2, 2017. By the court's calculation, 43 days' notice was provided. 35 days' notice is required.

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Modified Plan is granted.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtor has filed evidence in support of confirmation. The Chapter 13 Trustee filed a statement of non-opposition on January 30, 2017, in which he states that the Plan is feasible and that Debtor is current on plan payments under it. Dckt. 44. The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Modified Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted, Debtor's Modified Chapter 13 Plan filed on January 2, 2017, 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.

40. 17-20174-E-13 MOH-1 | **DAVID BERMAN** / **Michael O'Dowd Hays** | **MOTION TO VALUE COLLATERAL OF AMERICREDIT FINANCIAL SERVICES, INC.** **1-31-17 [19]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, and Office of the United States Trustee on January 31, 2017. 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. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, **----------**.

The Motion to Value Secured Claim of Americredit Financial Services, Inc. dba GM Financial ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $11,850.00.

The Motion filed by David Berman ("Debtor") to value the secured claim of Americredit Financial Services, Inc. dba GM Financial ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2012 Volkswagen Jetta SEL ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $11,850.00 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 on April 2, 2014, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $16,593.36. 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 $11,850.00. *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 David Berman ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of Americredit Financial Services, Inc. dba GM Financial ("Creditor") secured by an asset described as 2012 Volkswagen Jetta SEL ("Vehicle") is determined to be a secured claim in the amount of $11,850.00, 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 $11,850.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

41. **16-27675-E-13** **DAWN BASURTO** **OBJECTION TO CONFIRMATION OF**
DPC-1 **Pro Se** **PLAN BY DAVID P. CUSICK**
1-12-17 [34]

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) on January 12, 2017. By the court's calculation, 33 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing ----------.

The Objection to Confirmation of Plan is sustained.

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

A. Dawn Basurto ("Debtor") is delinquent $300.00 in plan payments, having paid nothing into the Plan.

B. On Form 122C-1, Debtor reports income for herself and for her non-filing spouse. Combined monthly gross income is $7,187.00 ($86,244.00 annually), which puts Debtor above median income for a four-member household. Debtor has failed to file Official Form 122C-2, however.

C. Debtor, above median income, has proposed a plan of thirty-six months with no dividend to unsecured claims, but the plan should be sixty months.

D. The Plan is not Debtor's best efforts.

1. Schedule I appears to contain miscalculated income and deductions. Debtor's income is reported as $3,300.74 with deductions of $250 for taxes and $80 for mandatory retirement contributions. That net amount is $2,970.74, but Debtor reports net income of $1,813.00. For Debtor's non-filing spouse, $3,840 is reported in income with $250 withheld for taxes and $150 withheld for mandatory retirement contribution. That net amount is $3,440, but Debtor reports $2,100. Therefore, line 12 on Schedule I is off by $2,497.74 and should state $6,410.74.

2. Schedule J is incorrect. Debtor reports disposable income of $834.00. The total amount of expenses should be $3,229, but Debtor reports $3,079 as the total.

3. Disposable income is miscalculated because of the errors on Schedules I & J. Disposable income should be $3,181.74.

E. Debtor lists a priority claim on Schedule E/F for the Internal Revenue Service ("IRS") in the amount of $15,170.67, but the Plan does not provide for that claim.

F. All parties may not have received notice.

1. Debtor filed this case with a Master Address list that includes only Carrington Mortgage Services and Specialized Loan Servicing, LLC.

2. When the Summary of Schedules and Schedules A–J were filed on November 30, 2016, Debtor listed IRS, Kohls, and the U.S. Department of Education on Schedule E/F, each without an address.

3. When the Notice of Plan and Meeting of Creditors was issued on December 5, 2016, the parties added to Schedule E/F were not provided notice, and Debtor has not amended the Master Address List to include all creditors and parties in interest.

4. Carrington Mortgage is listed on Schedule D without an address, despite the Master Address List including an address.

5. The IRS has not been provided notice according to the Roster of Governmental Agencies.

G. The Plan does not comply with the Code because it is blank. No payments have been proposed for any claims in Classes 1–6, no dividend has been proposed in Class 7, and no attorney fees are listed in Section 2.06 even though Debtor is pro se.

H. The Plan fails the liquidation analysis because Debtor's non-exempt equity totals $6,080.00 while no dividend has been proposed. Debtor has not claimed any exemptions on Schedule C for the property listed on Schedule A/B.

I. Debtor has not provided proof of income for the sixty days preceding the petition date.

J. Debtor has not provided a tax transcript or a tax return for 2015.

K. Debtor has not listed a prior bankruptcy case (No. 11-33759, filed on June 1, 2011) on the petition.

The Trustee's objections are well-taken. The Trustee asserts that Debtor is $300.00 delinquent in plan payments, which represents one month of the $300.00 plan payment, Debtor having paid nothing into the Plan. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

The Trustee filed a Motion to Dismiss based on the Debtor's failure to file Form 122C-1. Without the Debtor submitting the required documents, the court and the Trustee are unable to determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325. That is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

The Plan violates 11 U.S.C. § 1325(b)(4)(B) because the Plan will complete in less than the permitted sixty months without providing full payment of all allowed unsecured claims. Debtor has proposed a plan term of thirty-six months, but she has not proposed a dividend to unsecured claims.

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

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

The Plan does not propose a dividend for unsecured claims, though the Debtor's projected disposable income under 11 U.S.C. § 1325(b)(2) totals $3,181.74 according to the Trustee's calculations.

The Trustee alleges that the Plan violates 11 U.S.C. § 1325(a)(6) because Debtor has not provided for all claims. Debtor listed a priority claim for the IRS on Schedule E/F, but the Plan does not account for that claim. Therefore, Debtor cannot make all plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6).

Federal Rule of Bankruptcy Procedure 2002(b)(2) requires twenty-eight days' notice "for filing objections and the hearing to consider confirmation of a . . . chapter 13 plan." Fed. R. Bankr. P. 2002(b)(2).

On November 30, 2016, Debtor listed creditors on Schedule E/F (i.e., IRS, Kohls, and U.S. Department of Education) without providing addresses for them. Debtor has not amended the Master Address List to account for missing creditors. Accordingly, not all creditors were served with notice of the Plan when such notice was sent out on December 5, 2016. That failure to provide notice violates Federal Rule of Bankruptcy Procedure 2002(b)(2).

11 U.S.C. § 1325(a)(1) provides for confirmation of a plan if it complies with Chapter 13 provisions and other applicable Code provisions. Here, Debtor has proposed a plan that is woefully lacking in compliance with the Bankruptcy Code. Debtor has proposed a plan payment of $300.00 but has not proposed any other terms in the Plan, including payments to Classes 1–6 or a dividend amount to Class 7. The Plan does not comply with 11 U.S.C. § 1325(a)(1).

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). Debtor has reported non-exempt equity in the amount of $6,080.00, but the Debtor is not proposing a dividend to unsecured claims. Debtor has not explained how, under the proposed plan and the schedules filed under penalty of perjury, the unsecured claimants are not entitled (apparently) to a dividend when there may be upward of $6,080.00 in non-exempt equity.

The Debtor has not provided the Trustee with employer payment advices for the sixty-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv). Also, the Trustee argues that the Debtor did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required, specifically 2015. *See* 11 U.S.C. § 521(e)(2)(A); 11 U.S.C. § 1325(a)(9); Fed. R. Bankr. P. 4002(b)(3). Debtor has failed to provide all necessary pay stubs and has failed to provide the tax transcript. Those are independent grounds to deny confirmation. 11 U.S.C. § 1325(a)(1).

The Trustee reports that Debtor failed to disclose a prior bankruptcy case (Case No. 11-33759, filed on June 1, 2011) on the petition. Debtor was required to report any bankruptcy cases filed within the prior eight years. Debtor reported three cases (Case Nos. 16-22462, 16-26235, and 16-26830), but she did not report Case No. 11-33759.

GOOD FAITH

Though not raised explicitly by the Trustee, his Objection alludes to good faith not existing in this case and in this Plan. Good faith is essential to every confirmable Chapter 13 plan. *In re Rose*, 101 B.R. 934, 938 (Bankr. S.D. Ohio 1989) (citations omitted).

In the Ninth Circuit, the court analyzes whether the debtor "acted equitably" in proposing the plan. *Goeb v. Heid (In re Goeb)*, 675 F.2d 1386, 1390 (9th Cir. 1982). For that inquiry, the court applies a totality of the circumstances test that considers "(1) whether the debtor misrepresented facts, unfairly manipulated the Bankruptcy Code or otherwise proposed the plan in an inequitable manner; (2) the history of the debtor's filings and dismissals; (3) whether the debtor intended only to defeat state court litigation; and (4) whether the debtor's behavior was egregious." *Drummond v. Welsh (In re Welsh)*, 465 B.R. 843, 851 (B.A.P. 9th Cir. 2012) (citing *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1224–25 (9th Cir. 1999)).

When a debtor's actions are questionable, but not quite dishonest, a court may exercise discretion to impose remedies that fit the facts and circumstances of the case consistent with a good faith determination under 11 U.S.C. § 1325. *See In re Okoreeh-Baah*, 836 F.2d 1030, 1033 (6th Cir. 1988) (citing *In re Harkai*, 68 B.R. 990, 992–93 (Bankr. E.D. Mich. 1987)) (citations omitted). When considering whether the petition itself was filed in bad faith, Congress's insertion of 11 U.S.C. § 1325(a)(7) appears meant to provide courts with an alternative to dismissal called for under 11 U.S.C. § 1307(c). *In re Hall*, 346 B.R. 420, 426 (Bankr. W.D. Ky. 2006).

The good faith requirement must be met separately from the other provisions in 11 U.S.C. § 1325(a)(3). *See In re McLaughlin*, 217 B.R. 772, 775 (Bankr. W.D. Tex. 1998) (determining good faith independent of the liquidation analysis).

Here, Debtor's actions in filing this case and Plan indicate that Debtor has not acted in good faith. Debtor proposed a plan that was essentially blank—except for specifying a plan payment amount—and lacked any indication of how various classes of claims are to be treated. Debtor filed Schedules that the Trustee discovered contained miscalculations as to both Debtor's and the non-filing spouse's incomes and expenses. Debtor is above median income but has not filed the required Form 122C-2, and Debtor has failed the liquidation analysis. Debtor has not provided tax returns and pay advices to the Trustee. Debtor is delinquent for the very first plan payment and has provided no evidence that any payment has been made in this case. In fact, Debtor has not provided any evidence or response to the Objection that would indicate a willingness to prosecute this bankruptcy case.

A review of Debtor's prior four bankruptcies shows that they were all dismissed as follows:

A. Case No. 11-33759
   1. Filed: June 1, 2011
   2. Chapter: 13
   3. Representation: Peter Macaluso
   4. Dismissed: March 13, 2014
   5. Reason for Dismissal: Failure to cure delinquency of $48,075.00. Case No. 11-33759, Dckt. 132.

B. Case No. 16-22462
   1. Filed: April 19, 2016
   2. Chapter: 13
   3. Representation: Pro Se
   4. Dismissed: June 27, 2016
   5. Reason for Dismissal: Failure to appear at the Meeting of Creditors, failure to provide tax returns, failure to provide pay advices, failure to complete credit counseling, and failure to report prior bankruptcy filings. Case No. 16-22462, Dckt. 34.

C. Case No. 16-26235
   1. Filed: September 20, 2016
   2. Chapter: 13

3. Representation: Pro Se
4. Dismissed: October 11, 2016
5. Reason for Dismissal: Failure to file a Chapter 13 plan, failure to file Form 122C-1, failure to file Schedules A–J, failure to file Summary of Assets and Liabilities. Case No. 16-26235, Dckt. 15.

D. Case No. 16-26830
1. Filed: October 14, 2016
2. Chapter: 13
3. Representation: Pro Se
4. Dismissed: November 1, 2016
5. Reason for Dismissal: Failure to file Form 122C-1, failure to file Schedules A–J, failure to file Summary of Assets and Liabilities. Case No. 16-26830, Dckt. 21.

Debtor has repeatedly filed these nonproductive bankruptcy cases. As discussed in the court's ruling on a creditor's motion to confirm that no automatic stay was in effect in this case due to the repeated filings and dismissals of bankruptcy cases by Debtor, the court noted that it is not just the Debtor, but also Debtor's spouse who has been filing a series of six nonproductive bankruptcy cases. Civil Minutes, Dckt. 31.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

42. **14-30877-E-13** **TROY HARDIN** **MOTION TO APPROVE LOAN MODIFICATION AND/OR MOTION TO BIFURCATE PAYMENTS TO CHAPTER 13 TRUSTEE**
PGM-4 **Peter Macaluso** **1-11-17 [109]**

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on January 11, 2017. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Motion to Approve Loan Modification is granted.

The Motion to Approve Loan Modification filed by Troy Hardin ("Debtor") seeks court approval for Debtor to incur post-petition credit. Seterus, Inc. ("Creditor"), whose claim the Plan provides for in Class 1, has agreed to a loan modification that will reduce Debtor's mortgage payment from the current $1,590.34 per month to $1,288.87 per month. The terms of the modification itself have not been sent to Debtor yet. Exhibit A, Dckt. 112, p.8.

Additionally, the Motion requests court approval to make bifurcated payments on the trial loan modification. $1,288.87 would be paid directly to Creditor on the trial loan payments, and the remaining $891.93 would be paid to the Trustee.

The Motion is supported by the Declaration of Troy Hardin. Dckt. 111. The Declaration affirms Debtor's desire to obtain the post-petition financing and reasserts that his Plan will distribute 100% to unsecured claims still.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on January 30, 2017. Dckt. 121. The Trustee notes that the Motion seeks approval of a trial loan modification, for permission to adjust Debtor's plan payments under the confirmed plan to allow Debtor to make the trial payments directly, and to avoid a plan payment increase of $1,320.00 scheduled for March 2017. The Trustee states that Debtor's explanation that the plan payment should not increase in March 2017 because the pending loan modification makes it unnecessary is an insufficient argument because it does not explain why Debtor cannot afford the increase in plan payments.

The Trustee notes that the Frequently Asked Questions in Exhibit A indicates that any difference between the amount of the trial period payments and the regular mortgage payment will be added to the balance of the loan when it is modified, including any other past-due amounts as permitted by the loan documents.

The Trustee states that Debtor's Class 1 mortgage payment is $1,590.34 with a principal due currently of $3,042.33, which consists of one payment at $1,451.00 for November 2016 and one payment of $1,590.34 for December 2016. The Trustee disbursed the November payment to Seterus, Inc. On December 15, 2016. That disbursement was returned by Arvest Central Mortgage Co. indicating that the disbursement was received in error and was not payable to Arvest Central Mortgage Co. The Trustee does not know how the disbursement to Seterus went to Arvest Central Mortgage when there does not appear to be any kind of transfer on file with the court and with the trial loan modification being offered by Seterus.

The Trustee notes that Debtor has not submitted an order confirming the modified plan, which was to resolve an increased claim for arrears on or before the twenty-eighth month of the Plan.

As to the request to make bifurcated payments on the trial loan modification, the Trustee does not oppose Debtor making mortgage payments directly. The Trustee has placed a hold on the ongoing mortgage payments and arrears in Class 1. The Trustee notes that while there is a sufficient balance to disburse the principal due to date of $3,042.33, he is unclear whether those amounts will be incorporated into the loan modification along with any other past-due amounts.

DEBTOR'S REPLY

Debtor filed a Reply on February 7, 2017. Dckt. 124. Debtor states that the total in unsecured claims in this case is $2,665.20 and priority of $400.00. Debtor asserts that any increase sought is not needed because the $3,042.33 available can be used for the Plan.

DISCUSSION

The Motion is granted, and the court authorizes the Debtor to enter into the trial loan modification on the terms set forth in Exhibit A, Dckt. 112. The court further authorizes the Debtor to make the monthly trial loan modification payments of $1,288.87 per month for the months of February through June 2017 directly to the creditor, reducing the plan payment required under the Chapter 13 Plan by

$1,288.87 for those months. The Chapter 13 Trustee shall not make any distribution on the Class 1 Claim of "Seterus/Federal Nat'l Mortgage" for the months of February through June 2017.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Loan Modification filed by Troy Hardin having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and the court authorizes the Debtor to enter into the trial loan modification on the terms set forth in Exhibit A, Dckt. 112. The court further authorizes the Debtor to make the monthly trial loan modification payments of $1,288.87 per month for the months of February through June 2017 directly to the creditor, reducing the plan payment required under the Chapter 13 Plan by $1,288.87 for those months. The Chapter 13 Trustee shall not make any distribution on the Class 1 Claim of "Seterus/Federal Nat'l Mortgage" for the months of February through June 2017. The authorization for Debtor to make the direct payment to the creditor terminates, unless extended by further order of the court, on June 30, 2017.

43. **14-30877-E-13** **TROY HARDIN** **MOTION FOR COMPENSATION FOR**
PGM-5 **Peter Macaluso** **PETER G. MACALUSO, DEBTOR'S ATTORNEY**
1-12-17 [115]

Final Ruling: No appearance at the February 14, 2017 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on January 12, 2017. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

The hearing on the Motion for Allowance of Professional Fees is continued to 3:00 p.m. on February 28, 2017.

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

Fees are requested for the period October 6, 2015, through January 10, 2016. Applicant requests fees in the amount of $5,430.00.

TRUSTEE'S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a Non-Opposition on January 23, 2017. Dckt. 120.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the services provided as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [professional fees and expenses] without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According to

the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including multiple Motions to Dismiss, Oppositions to Motion to Dismiss, Motions to Modify plan, Oppositions to Modify, amending Proof of Claim, and subsequent correspondence and meetings with Client. The court finds the services were beneficial to the Client and bankruptcy estate and were reasonable.

"No-Look" Fees

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

> (a) Compensation. Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c). The failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall signify that the attorney has opted out of Subpart (c). When there is an objection or when an attorney opts out, compensation shall be determined in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017, and any other applicable authority."
> . . .
> (c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.
>
> (1) The maximum fee that may be charged is $4,000.00 in nonbusiness cases, and $6,000.00 in business cases.

> (2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.
>
> (3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor's attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6).

The Confirmed Amended Plan expressly provides in Section 2.06 that Applicant will file and serve a motion for attorneys' fees in accordance with 11 U.S.C. §§ 329 & 330 and Federal Rules of Bankruptcy Procedure 2002, 2016, and 2017.

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

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

FEES REQUESTED

Applicant has not provided a task billing analysis describing the categories of services provided, the time, and the charges for each such category. The relevant categories appear to be as follows:

Motion to Dismiss (DPC-2): Applicant spent xxxx hours in this category. Applicant xxxx.

Motion to Modify Plan (PGM-1): Applicant spent xxxx hours in this category. Applicant xxxx.

Motion to Dismiss (DPC-3): Applicant spent xxxx hours in this category. Applicant xxxx.

Motion to Modify Plan (PGM-2): Applicant spent xxxx hours in this category. Applicant xxxx.

Motion to Dismiss (DPC-4): Applicant spent xxxx hours in this category. Applicant xxxx.

Motion to Modify Plan (PGM-3): Applicant spent xxxx hours in this category. Applicant xxxx.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Peter Macaluso, attorney	18.10	$300.00	$5,430.00
Total Fees for Period of Application			$5,430.00

The court finds helpful, and in most cases essential, for professionals to provide a basic task billing analysis for the services provided and fees charged. This has long been required by the Office of the U.S. Trustee, and it is nothing new for professionals in this District. The task billing analysis requires only that the professional organize his or her task billing. The simpler the services provided, the easier it is for Applicant to quickly state the tasks. The more complicated and difficult to discern the tasks from the raw billing records, the more evident it is for Applicant to create the task billing analysis to provide the court, creditors, and U.S. Trustee with fair and proper disclosure of the services provided and fees being requested.

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

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

the billing system could sort the entries and automatically produce a billing report that separates the activities into the different tasks.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Professional Fees filed by Peter Macaluso ("Applicant"), Attorney for the Chapter 13 Debtor having been presented to the court, no task billing analysis having been provided in support of the Application, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion for Allowance of Professional Fees is continued to 3:00 p.m. on February 28, 2017. Applicant shall file a supplemental declaration and supporting documents as necessary, to provide the court, U.S. Trustee, and other parties in interest requesting copies of such supplemental pleadings, with an explanation of the fees requested and a task billing analysis that specifically groups the time and charges by the various task areas for such services.

44. **15-26886-E-13** **DANA THOMPSON** **MOTION TO MODIFY PLAN**
MJD-1 **Matthew DeCaminada** **1-4-17 [26]**

Final Ruling: No appearance at the February 14, 2017 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 4, 2017. By the court's calculation, 41 days' notice was provided. 35 days' notice is required.

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Modified Plan is granted.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtor has filed evidence in support of confirmation.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on January 30, 2017. Dckt. 37. The Trustee reports that Section 6.01 of the Plan states incorrectly that Debtor has paid $20,485.00 through December 2016. The Trustee notes that in fact $21,170.00 has been paid through December 2016. The Trustee does not oppose a correction in the order modifying plan.

The Trustee's suggested modification is warranted, given that his files indicate a different amount has been paid into the Plan through December 2016. The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed as modified to reflect that $21,170.00 has been paid into the Plan through December 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 Motion to Confirm the Modified Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted, Debtor's Modified Chapter 13 Plan filed on January 4, 2017, 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. The order confirming the Plan shall reflect in Section 6.01 that $21,170.00 has been paid into the Plan through December 2016.

45. **16-27288-E-13** **SHANE/JESSICA BARNER** **OBJECTION TO CONFIRMATION OF**
DPC-1 **Pro Se** **PLAN BY DAVID P. CUSICK**
1-12-17 [19]

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) on January 12, 2017. By the court's calculation, 33 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing ----------.

The Objection to Confirmation of Plan is sustained.

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

A. Shane Barner and Jessica Barner ("Debtor") failed to attend the Meeting of Creditors;

B. Debtor is delinquent $333.72 under the plan;

C. The plan relies on a Motion to Value Secured Claim of Capital One Auto Finance, but no such motion has been filed;

D. The plan relies on a Motion to Value Secured Claim of Westlake Financial, but no such motion has been filed;

E. Debtor has not provided proof of income for the sixty days preceding filing this bankruptcy case; and

F. Debtor has not provided a tax transcript or a tax return for 2015.

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

The Trustee asserts that Debtor is $333.72 delinquent in plan payments, which represents one month of the $333.72 plan payment. Delinquency indicates that 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 Capital One Auto Finance and the secured claim of Westlake Financial. Debtor has failed to file a Motion to Value Secured Claim for either creditor, however. Without the court valuing the claims, the Plan is not feasible. 11 U.S.C. § 1325(a)(6).

The Debtor has not provided the Trustee with employer payment advices for the sixty-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv). Also, the Trustee argues that the Debtor did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required, specifically 2015. *See* 11 U.S.C. § 521(e)(2)(A); 11 U.S.C. § 1325(a)(9); Fed. R. Bankr. P. 4002(b)(3). The Debtor has failed to provide all necessary pay stubs and has failed to provide the tax transcript. Those are independent grounds to deny confirmation. 11 U.S.C. § 1325(a)(1).

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

46. **16-26590-E-13** **LA TONYA ROSBORO** **MOTION TO CONFIRM PLAN**
CJY-1 **Christian Younger** **12-15-16 [28]**

Final Ruling: No appearance at the February 14, 2017 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 15, 2016. By the court's calculation, 61 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Amended Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Amended Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Debtor has provided evidence in support of confirmation. The Chapter 13 Trustee filed a statement of non-opposition on December 19, 2016. The Amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Amended Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Amended Chapter 13 Plan filed on December 15, 2016, is confirmed. Counsel for the Debtor shall

prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

47. **16-27694-E-13** **TRACY ELLINGSON** **OBJECTION TO CONFIRMATION OF**
DPC-1 **James Keenan** **PLAN BY DAVID P. CUSICK**
1-11-17 [12]

Final Ruling: No appearance at the February 14, 2017 hearing is required.

The Chapter 13 Trustee having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Objection to Confirmation was dismissed without prejudice, and the matter is removed from the calendar.**

48. **14-30097-E-13** **IRVIN/THERESA WHITE** **MOTION TO MODIFY PLAN**
TLA-5 **Thomas Amberg** **1-3-17 [106]**

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 3, 2017. By the court's calculation, 42 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is denied.

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

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on January 30, 2017. Dckt. 120. The Trustee notes that the bankruptcy case is currently in month twenty-seven of the confirmed plan. Irvin White and Theresa White ("Debtor") have disclosed in the declaration to this Motion that co-debtor Irvin White was terminated from his employment on January 27, 2017. Dckt. 108. While Debtor proposes to use the severance package of $53,311.00 to fund the proposed plan at $3,350.00 per month, the Trustee is unsure how Debtor plans to fund the proposed plan after the severance funds run out in 15.9 months. Dckt. 120.

DEBTOR'S RESPONSE

Debtor filed a Response on February 1, 2017. Dckt. 126. Debtor states that Co-Debtor Irvin White is actively seeking new employment, and Debtor will notify the Trustee of any changes to employment.

DISCUSSION

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor has proposed to use funds from a severance package to fund the Plan, but Debtor has not provided any information about how the Plan will be funded after the severance funds run out in 15.9 months. Debtor has not supplied information about any unemployment benefits and whether Debtor is seeking new employment. Without an accurate picture of the Debtor's financial reality, the court cannot determine whether the Plan is confirmable. Therefore, the Objection is sustained.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Modified Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Confirm the Modified Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

49. **16-27697-E-13** **BRIAN OKAMOTO** **OBJECTION TO CONFIRMATION OF**
DPC-1 **Peter Macaluso** **PLAN BY DAVID P. CUSICK**
1-12-17 [34]

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on January 12, 2017. By the court's calculation, 33 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing ----------.

The Objection to Confirmation of Plan is sustained.

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

A. Debtor is delinquent $1,000.00 in plan payments, and

B. The proposed plan relies on a Motion to Value Secured Claim of OneMain Financial Services, Inc., which if not granted, would cause there to be insufficient monies to pay the claim in full.

The Trustee's objections are well-taken. The Trustee asserts that Debtor is $1,000.00 delinquent in plan payments, which represents less than one month of the $2,300.00 plan payment. Debtor has paid $1,300.00 into the plan so far. Delinquency indicates that 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 OneMain Financial Services, Inc. That Motion has been granted on this February 14, 2017 calendar date. Therefore, this portion of the Trustee's objections has been resolved.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

50. **16-27697-E-13** **BRIAN OKAMOTO** **MOTION TO VALUE COLLATERAL OF**
PGM-2 **Peter Macaluso** **ONEMAIN FINANCIAL SERVICES, INC.**
1-6-17 [29]

Final Ruling: No appearance at the February 14, 2017 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditor, and Office of the United States Trustee on January 6, 2017. By the court's calculation, 39 days' notice was provided. 28 days' notice is required.

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

The Motion to Value Secured Claim of OneMain Financial Services, Inc. ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $0.00.

The Motion to Value filed by Brian Okamoto ("Debtor") to value the secured claim of OneMain Financial Services, Inc. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 8905 Boreal Way, 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).

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

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

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

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

NO PROOF OF CLAIM FILED

The court has reviewed the Claims Registry for this bankruptcy case. No Proof of Claim has been filed by a creditor that appears to be for the claim to be valued.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on January 30, 2017. Dckt. 42. The Trustee states that he does not oppose the Motion. The Trustee notes that Creditor has been listed on Schedules A and D, as well as Class 2C of the proposed plan, and no proof of claim has been filed.

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $288,365.00. Creditor's second deed of trust secures a claim with a balance of approximately $46,571.00. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value Secured Claim filed by Brian Okamoto ("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 OneMain Financial Services, Inc. secured by a second in priority deed of trust recorded against the real property commonly known as 8905 Boreal Way, Elk Grove, 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 $245,000.00 and is encumbered by a senior lien securing a claim in the amount of $288,365.00, which exceeds the value of the Property that is subject to Creditor's lien.

51. 13-32199-E-13 NBC-3 | **DEWITT/JEANNE MARPLE Eamonn Foster** | **MOTION TO RE-ENTER ORDER CONFIRMING PLAN NUNC PRO TUNC 1-30-17 [51]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 30, 2017. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

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

The Motion to Re-Enter Order Confirming Plan Nunc Pro Tunc is granted.

DeWitt Marple and Jeanne Marple ("Debtor") move for the court to re-enter the Order Confirming the Plan nunc pro tunc to resolve a scrivener's error relating to the length of the plan term. Debtor asserts that the plan called for thirty-six months' of payment, which the parties acknowledged at the confirmation hearing. The Order Confirming the Plan lists sixty months as the term, however.

TRUSTEE'S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a Non-Opposition on February 2, 2017. Dckt. 57.

DISCUSSION

Nunc pro tunc amendments are usually used to correct errors in the record and are extremely limited in scope. *Sherman v. Harbin (In re Harbin)*, 486 F.3d 510, 515 n. 4 (9th Cir. 2007). Federal Rule of Bankruptcy Procedure 9024 incorporates Federal Rule of Civil Procedure 60(a), which allows for the court to "correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record."

Here, the court acknowledged at the December 17, 2013 hearing that the plan term was thirty-six months, but the Order Confirming inadvertently listed sixty months as the plan term. *Compare* Dckt. 35, *with* Dckt. 38. An error having arisen in the Order Confirming, and Debtor having moved for its correction by a Motion to Re-Enter Order Confirming Plan, the Motion is granted, and the court shall re-enter the order confirming with the correct plan term of thirty-six months.

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 Re-Enter Order Confirming Plan 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 court shall re-enter the Order Confirming Debtor's Plan of September 17, 2013, reflecting that the plan term is thirty-six months.

52. **13-31975-E-13 PLC-11** | **JACK/LINDA GANAS** **Peter Cianchetta** | **MOTION TO SUBSTITUTE PARTY ON ORDER TO SELL REAL ESTATE O.S.T. 2-6-17 [209]**

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

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

Local Rule 9014-1(f)(3) Motion—Hearing Required.

Correct Notice 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 February 6, 2017. By the court's calculation, 8 days' notice was provided. The court required 8 days' notice. Dckt. 214.

The Motion to Substitute Party on Order to Sell Real Estate was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing ----------.

The Motion to Sell Property is granted.

The Bankruptcy Code permits the Chapter 13 Debtor ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movant proposes to sell the real property commonly known as 613 Mcdevitt Drive, Wheatland, California ("Property").

The proposed purchaser of the Property is Karen Simpton and Edward Simpton, and the terms of the sale are:

A. Purchase price of $255,000.00

B. Each of Movant's and Purchaser's brokers will receive a commission in the amount of $6,375.00.

C. Wells Fargo Bank, N.A., holder of a first mortgage, will receive an estimated $89,338.00, which is the principal balance stipulated to in a related adversary proceeding.

D. The sale will generate an excess of $138,916.32.

Additionally, Movant requests that the brokers' commissions and Wells Fargo be paid directly from escrow. Movant also requests that $20,000.00 be paid to the Trustee to cover all claims and fees outstanding.

DISCUSSION

At the time of the hearing the court announced the proposed sale an requested that all other persons interested in submitting overbids present them in open court. At the hearing the following overbids were presented in open court: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

Based on the evidence before the court, and the court having approved a similar proposed sale in this case previously, the court determines that the proposed sale is in the best interest of the Estate.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Sell Property filed by Jack Ganas and Linda Ganas, the Chapter 13 Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Jack Ganas and Linda Ganas, the Chapter 13 Debtor, are authorized to sell pursuant to 11 U.S.C. § 363(b) to Karen Simpton and Edward Simpton or nominee ("Buyer"), the Property commonly known as 613 Mcdevitt Drive, Wheatland, California ("Property"), on the following terms:
>
> 1. The Property shall be sold to Buyer for $255,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit B, Dckt. 212, and as further provided in this Order.
>
> 2. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.
>
> 3. The Chapter 13 Debtor be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.

4. The Chapter 13 Debtor be and hereby is authorized to pay a real estate broker's commission in an amount equal to $6,375.00 of the actual purchase price upon consummation of the sale. A $6,375.00 commission shall be paid to the Chapter 13 Debtor's broker, American Home Real Estate, and a six percent commission shall be paid to the Purchaser's broker, Keller Williams Elk Grove.

5. Wells Fargo Bank, N.A., shall be paid directly from escrow an amount of $89,338.00 in satisfaction of the principal balance of its claim.

6. $20,000.00 of the sales proceeds shall be disbursed directly from escrow to David Cusick, the Chapter 13 Trustee, with such monies to be disbursed through the Chapter 13 Plan in this case.

7. No proceeds of the sale, including any commissions, fees, or other amounts, shall be paid directly or indirectly to the Chapter 13 Debtor. Within fourteen days of the close of escrow the Chapter 13 Debtor shall provide the Chapter 13 Trustee with a copy of the Escrow Closing Statement. Any monies not disbursed to creditors holding claims secured by the property being sold or paying the fees and costs as allowed by this order, shall be disbursed to the Chapter 13 Trustee directly from escrow.

53. **17-20497-E-13** **JOSE CHAPA** **MOTION TO EXTEND AUTOMATIC STAY O.S.T.**
SNM-1 **Stephen Murphy** **2-6-17 [15]**

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

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

Local Rule 9014-1(f)(3) Motion—Hearing Required.

Correct Notice 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 February 6, 2017. By the court's calculation, 8 days' notice was provided. The court required 8 days' notice. Dckt. 23.

The Motion to Extend the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing ----------.

The Motion to Extend the Automatic Stay is granted.

Jose Chapa, Jr. ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond thirty days in this case. This is the Debtor's second bankruptcy petition pending in the past year. The Debtor's prior bankruptcy case (No. 15-25816) was dismissed on March 24, 2016, after Debtor requested that the case be dismissed without prejudice. *See* Order, Bankr. E.D. Cal. No. 15-25816, Dckt. 86, March 24, 2016. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor thirty days after filing of the petition.

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed after Debtor lost income from a workplace injury and could not afford plan payments anymore.

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). The subsequently filed case is presumed to be filed in bad faith if one or more of Debtor's

cases was pending within the year preceding filing of the instant case. *Id.* § 362(c)(3)(C)(i)(I). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* § 362(c)(3)(C).

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

A. Why was the previous plan filed?

B. What has changed so that the present plan is likely to succeed?

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

Debtor has established that he could not make plan payments in his prior case after suffering a workplace injury, and he moved the court for a voluntary dismissal without prejudice. 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.

54. **15-29404-E-13** **TAEVONA MONTGOMERY** **MOTION TO SELL O.S.T.**
PGM-1 **2-9-17 [172]**

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

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

Local Rule 9014-1(f)(3) Motion—Hearing Required.

Correct Notice 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 February 9, 2017. By the court's calculation, 5 days' notice was provided. The court required 5 days' notice. Dckt. 177.

The Motion to Sell Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing ----------.

The Motion to Sell Property is granted.

The Bankruptcy Code permits Taevona Montgomery, the Chapter 13 Debtor, ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movant proposes to sell the real property commonly known as 6106 Camden Street, Oakland, California ("Property").

The proposed purchaser of the Property is Ryan Burk of In The Now Investments, LLC, and the terms of the sale are:

A. Purchase price of $425,000.00, paid in all cash;

B. Closing date of February 17, 2017;

C. Movant to pay the following fees:

1. Natural hazard zone disclosure report,

2. County transfer tax, and

3. Half of city transfer tax;

D. Buyer to pay the following fees:

1. Escrow fee,

2. Owner's title insurance policy, and

3. Half of city transfer tax;

E. Buyer does not intend to occupy the Property as a primary residence;

F. Broker's commissions of $10,625.00 to Independent Realty-DeMattei & Associates and $10,625.00 to J. Rockcliff Realtors;

G. Payoff of Wells Fargo's Home Mortgage loan, principal balance in the amount of $309,862.29, secured by a first deed of trust; and

H. Short sale of Wells Fargo's second deed of trust.

DISCUSSION

At the time of the hearing, the court announced the proposed sale and requested that all other persons interested in submitting overbids present them in open court. At the hearing, the following overbids were presented in open court: xxxxxxxxxxxxxxx.

Based on the evidence before the court, the court determines that the proposed short sale is in the best interest of the Estate because it provides for the complete payoff of creditor Wells Fargo's secured claim and will reduce Movant's liabilities in this bankruptcy case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Sell Property filed by Taevona Montgomery, the Chapter 13 Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Taevona Montgomery, the Chapter 13 Debtor, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Ryan Burk of In The Now Investments, LLC, or nominee ("Buyer"), the Property commonly known as 6106 Camden Street, Oakland, California ("Property"), on the following terms:

A. The Property shall be sold to Buyer for $425,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit B, Dckt. 175, and as further provided in this Order.

B. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.

C. The Chapter 13 Debtor is authorized to execute any and all documents reasonably necessary to effectuate the sale.

D. The Chapter 13 Debtor is authorized to pay a real estate broker's commission in an amount equal to 2.5% percent of the actual purchase price upon consummation of the sale. The 2.5% percent commission shall be paid to the Chapter 13 Debtor's broker, .

E. No proceeds of the sale, including any commissions, fees, or other amounts, shall be paid directly or indirectly to the Chapter 13 Debtor. Within fourteen days of the close of escrow, the Chapter 13 Debtor shall provide the Chapter 13 Trustee with a copy of the Escrow Closing Statement. Any monies not disbursed to creditors holding claims secured by the property being sold or paying the fees and costs as allowed by this order, shall be disbursed to the Chapter 13 Trustee directly from escrow.