

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Sacramento, California

March 1, 2016 at 3:00 p.m.

1. [15-29403-E-13](#) ROBERT BELLUOMINI MOTION TO RECONSIDER
AMN-1 Douglas B. Jacobs 2-2-16 [[25](#)]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on February 2, 2016. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion to Reconsider is conditionally granted.

Banner Bank ("Creditor") filed the instant Motion for reconsideration of Debtor's Motion to Value Collateral of Banner Bank on February 2, 2016. Dckt. 25.

The Creditor asserts that the Creditor's failure to oppose the Motion

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to Value Collateral is the result of "excusable neglect." The Creditor asserts that at the time of the Motion, the Debtor's account was transitioning from AmericanWest Bank to Creditor as the result of the latter's acquisition of the former on October 1, 2015. The Creditor asserts that due to the differences of policies, the Debtor's accounts had to be physically transferred to Creditor's office in Oregon. Additionally, the Creditor asserts that since the Creditor deemed the Debtor's account "complex" the Creditor needed to retain approval from the Vice President Portfolio Manager to obtain outside counsel. This caused a delay.

Further, Creditor asserts that it has a valid defense. The Creditor argues that the Debtor would not be prejudiced because the Debtor would not be required to file any additional papers.

Lastly, the Creditor asserts that it has received the valuation from an appraiser as to the value of the Debtor's residence and believes that there is sufficient equity to secure its second deed of trust.

DEBTOR'S OPPOSITION

The Debtor filed an opposition to the instant Motion on February 16, 2016. Dckt. 30. The Debtor asserts that the Creditor's conduct did not constitute excusable neglect. The Debtor argues that the Creditor was aware of the Motion to Value at the very latest by December 18, 2015. The Debtor states that this was 11 days prior to the deadline for opposition. The Debtor argues that Creditor could have requested an extension or a continuance but failed to do so. In fact, the Creditor retain representation only on the day of the hearing.

Furthermore, the Debtor asserts that the instant Motion was not filed until February 2, 2016, which is nearly a month after the Creditor obtained representation.

The Debtor argues that he will suffer unnecessary prejudice because the Debtor would need to delay confirmation of the Debtor's plan and would need to file a new Motion to Value.

Lastly, the Debtor argues that the Creditor failure to respond is due to the Creditor failing to establish minimum safeguards to ensure timely response. The Creditor merely asserts that due to its procedures, it was unable to respond. However, the Debtor argues that the Debtor should not be penalized for the Creditor's failure to implement safeguards to ensure responses.

CREDITOR'S REPLY

The Creditor filed a reply on February 23, 2016. Dckt. 32. The Creditor reiterates that it was the Debtor's complicated and lengthy transaction that caused the opposition to be delayed. The Creditor argues that the internal policies in place are to determine if representation is necessary, and used such processes in the instant case.

The Creditor argues that there was no delay in filing the instant Motion because the Creditor waited until the civil minutes were uploaded, the Creditor had to obtain authorization to file the Motion, and the Creditor needed to draft the Motion.

Lastly, the Creditor argues that the Debtor would not be prejudiced since the Creditor is only asking for the opportunity to file a response.

APPLICABLE LAW

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

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

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

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

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

DISCUSSION

The Creditor argues that due to the timing of Creditor's acquisition

of AmericanWest Bank and, thereby, the timing of acquiring Debtor's Line of Credit, Deed of Trust, and related loan documents, Creditor's failure to file a timely opposition to Debtor's Motion to Value Collateral should be reconsidered.

As an initial policy matter, the finality of judgments is an important legal and social interest. The standard for determining whether a 60(b)(1) motion is filed within a reasonable time is a case-by-case basis. The analysis considers the "interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties." *Gravatt v. Paul Revere Life Ins. Co.*, 101 Fed. Appx. 194, 196-197 (9th Cir. 2004); *Sallie Mae Servicing, LP v. Williams (In re Williams)*, 287 B.R. 787, 792 (B.A.P. 9th Cir. 2002).

Debtor sought to value the Subject Property located at 22670 Meadowlark, Orland, CA at a fair market value of \$90,000.00 as of the December 10, 2015 petition filing date. Dckt. 10. Debtor provided 33 days notice to Creditor of the Motion, when only 28 days notice was required. Dckt. 21. As a Local Bankruptcy Rule 9014-1(f)(1) motion, the Creditor and Creditor's counsel were required to oppose the Motion in writing at least 14-days prior to the hearing. However, Creditor and Creditor's counsel failed to file a timely objection and failed to appear at the hearing, as evidenced by the court's civil minutes on the Motion. Dckt. 21.

Creditor and Creditor's counsel claim their failure to oppose the Motion results from excusable neglect. Particularly, Creditor claims their failure to oppose arises out Creditor's acquisition of AmericanWest Bank, which held Debtor's Line of Credit, Deed of Trust, and related loan documents. Creditor acquired AmericanWest Bank and Debtor's relevant documents on October 1, 2015. Dckt. 28. Notably, Debtor filed for voluntary Chapter 13 bankruptcy on December 1, 2015. Dckt. 1.

On or around December 18, 2015, Creditor became aware of Debtor's Motion to Value and Debtor's account was designated to need outside legal counsel. Dckt. 27. There is no evidence of Creditor using internal counsel to prepare an Opposition to the Motion or request an extension to file such Opposition. Furthermore, due to Creditor's internal policies, Creditor did not obtain outside legal counsel until January 12, 2016. Dckt. 27.

On January 11, 2016, this court posted its pre-hearing tentative decisions. Creditor's counsel admits to reviewing the pre-hearing tentative decision on January 12, 2016. Dckt. 28. Creditor's counsel also admits to calling and speaking with the court's courtroom deputy, Janet Larson, and requesting an appearance at the hearing to ask for a continuance and time to value the Subject Property. Larson explained to Creditor's counsel that the tentative was a final ruling and would not be called at the hearing. Dckt. 28. Thereafter, Creditor's counsel waited until January 14, 2016 to contact a real estate brokerage company to request an estimate of the Subject Property's value. On January 18, 2016, Creditor's counsel learned the Subject Property was valued at \$139,000, Dckt. 29, which differs from Debtor's December 10, 2015 valuation of \$90,000. Subsequently, Creditor's counsel filed this Motion for Reconsideration on February 2, 2016 and asks this court to set a new hearing for Debtor's Motion to Value. Dckt. 30.

The court has made it abundantly clear in the past that it is

imperative for parties to respond to motions, especially oppositions for motions to value, either through written opposition if it is a Local Bankruptcy Rule 9014(f)(1) motion.

Creditors' Contentions of Complexity Are Not Credible

Creditor first states that the reason for the delay was that files were being transferred following the acquisition of Americanwest. But by mid-December the schedules, motion, and plan were in the hands of a "Collections Specialist with Banner Bank." Motion, p. 3:6-7. Creditor then hangs its hat on further delay because the Bankruptcy Specialist determined that Debtor's case was "complex" and required outside representation. *Id.*, p. 2:10-11.

Creditor states that it's policies are that any and all matters are "complex" if there is anything more than minimal work (such as filing a proof of claim) required by one of Creditor's employees. Here, the "complex" transaction consisted of:

- A. Creditor having a claim for \$32,000.00.
- B. The Motion stating that the collateral was securing the claim had a value of \$90,000.00.
- C. The lien securing Creditor's claim was junior to a lien securing a \$100,860.00 claim.
- D. The Debtor's Motion requested that the court value the secured claim of Creditor to be \$0.00 due to there being no value in the collateral to secure the claim.

While Creditor and its employees see this as a "complex" legal issue, it is quite simple for the other creditors who navigate the bankruptcy courts.

Rather than having a process which allowed for the prompt handling of Creditor's legal affairs, the "Bankruptcy Specialist" could not assign the matter to counsel, but the "Specialist" had to first obtain approval from a Vice President of Portfolio Management. Because of Creditor's choice of holiday vacation scheduling, the bankruptcy business of Creditor ground to a halt, and the "Bankruptcy Specialist" could not obtain authorization for engaging counsel on this "complex matter" for approximately twenty-two days. Then, even having finally obtained the authorization on January 7, 2016, the Bankruptcy Specialist waited five days until January 12, 2016 to contact counsel. (Delaying from Thursday January 7, 2016 until Tuesday January 12, 2016 to contact counsel.)

In reading the Motion, counsel for Creditor is asserted to have begun a whirlwind of activity reviewing court files and determining that Creditor slept on its rights in failing to file an opposition. By waiting until January 12, 2016, to contact counsel, the "Bankruptcy Specialist" coincidentally waited until the day of the hearing - insulating counsel from having time to either (1) contact Debtor's counsel, (2) filing a motion for a continuance, or (3) arranging to appear in court (either in person or telephonically) to appear, request the court call the matter, and explain why and how Creditor was diligently asserting its rights.

Creditor's Failure to Respond Was Not Cause By Excusable Neglect

Creditor attempts to state that the only reason for not having filed a response was excusable neglect. But Creditor admits that by December 19, 2015, the "Bankruptcy Specialist" at Creditor was fully aware of this "complex" matter and the need to immediately obtain counsel. However, the policies and procedures at Creditor worked to delay the "Bankruptcy Specialist" from getting approval to engage counsel, for what is admittedly a "complex" matter for which Creditor requires counsel, until January 7, 2016.

Though the "Bankruptcy Specialist" knew the clock was ticking and Creditor's rights were expiring, the "Bankruptcy Specialist" chose not to communicate with counsel until January 12, 2016 - the day of the hearing. The court finds this "coincidence" to be very disturbing and not indicative of a party acting diligently in good faith.

Though as of January 12, 2016, Creditor's counsel was aware that the matter had been concluded and the court's order was then filed on January 15, 2016, Creditor again slumbered until February 2, 2016, when the present motion was filed.

What is even more damning for Creditor is counsel's testimony that by January 18, 2016, Creditor's appraiser gave a valuation of the property at \$139,000.00. (In another strange coincidence, this is just enough to pay the senior lien and provide for Creditor's lien in full.) But Creditor continued to legally slumber, not filing the present motion until February 2, 2016. While not months of delay, for a Creditor who has, by its own policies and procedures has been behind the legal curve ever step of the way in this court, one would expect a good faith creditor and diligent counsel to immediately (within a day or two) to have the motion to vacate.

The court also notes that counsel for Creditor does not testify about any attempts to communicate with Debtor's counsel. It appears that Creditor's policy includes not having its counsel communicate with opposing counsel.

Relief is Conditionally Granted For Other Reasons Justifying Relief

While Creditor's intentional operation of its policies and procedures worked for it not to timely respond, and there are unexplained gaps in the "Bankruptcy Specialist" in communicating with counsel for this "complex" matter once internal authorization was obtained, the court recognizes that the law prefers making determinations on the merits.

While Debtor feels "prejudiced" that he does not get to win by default, that it no legal "prejudice." Presumably, given that the pleadings are governed by Federal Rule of Bankruptcy Procedure 9011, Debtor is confident in his pleadings and evidence on the issue of valuation.

But what Creditor has demonstrated that it has chosen to put in place policies and procedures which are inconsistent with a party diligently prosecuting its rights in bankruptcy court. In seeking this relief, the record presented by Creditor is devoid of any attempt to communicate with Debtor's counsel. Rather, Creditor, operating under its internal time schedule waited two weeks rather than immediately acting to rectify its default. In bankruptcy two weeks can be an eternity. Fortunately for Creditor, no plan has yet been

confirmed.

While the court will give Creditor its day in court, Creditor's intentional conduct and procedures have cost the court and Debtor's counsel to waste time and resources. The court estimates that Debtor's counsel has wasted from three to seven hours of time in having to address Creditor's dilatory conduct and procedures. The court will give Creditor the benefit of the doubt and err on the lowest side.

Bankruptcy Courts have the jurisdiction to impose sanctions. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990); *Miller v. Cardinale (In re DeVille)*, 631 F.3d 539, 548-49 (9th Cir. 2004). A Bankruptcy Court is also empowered to regulate the practice of law before it. *Peugeot v. U.S. Trustee (In re Crayton)*, 192 B.R. 970, 976 (B.A.P. 9th Cir. 1996). The authority to regulate the practice of law includes the right to discipline attorneys who appear before the court. *Chambers v. NASCO, Inc.* 501 U.S. 32,43 (1991); see also *Lehtinen*, 564 F.3d at 1058.

As a condition of vacating the dismissing, Creditor shall reimburse Debtor's counsel directly \$975.00 for the wasted time. At 3 hours, that equates to \$325.00 an hour, while at four hours, the effective hourly rate drops to \$243.75. The \$975.00 shall be paid on or before noon on March 10, 2016.

If paid, counsel for Creditor shall prepare an order granting this Motion and setting a briefing schedule for filing the opposition to the motion to value, the reply, and restoring the motion to value to the calendar. The order form shall be sent to Debtor's counsel who shall sign it (the signature being his certification that the \$975.00 has been received) and lodge it with the court.

If not timely paid, counsel for Debtor shall lodge with the court a final order denying the Motion to Vacate. When lodged with the court, a copy shall be served on counsel for Creditor.

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 Reconsider filed by Banner Bank ("Creditor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is conditionally granted. Because of Creditor's conduct, the court further orders that Creditor pay compensatory sanctions in the amount of \$975.00 directly to counsel for Debtor, Douglas Jacobs. The \$975.00 in compensatory sanctions shall be received by Mr. Jacobs on or before noon on March 10, 2016.

IT IS FURTHER ORDERED that if the \$975.00 in compensatory sanctions are timely paid by noon on March 10,

2016, counsel for Creditor shall prepare an order granting this Motion and setting a briefing schedule for filing the opposition to the motion to value, the reply, and restoring the motion to value to the calendar (selecting the date in concurrence with Debtor's counsel). The order form shall be sent to Debtor's counsel who shall sign it (the signature being his certification that the \$975.00 has been received) and lodge it with the court.

IT IS FURTHER ORDERED that if the \$975.00 in compensatory sanctions are not timely paid by noon on March 10, 2016, counsel for Debtor shall lodge with the court a final order denying the Motion to Vacate. When lodged with the court, a copy shall be served on counsel for Creditor.

As set forth in the Civil Minutes, the court orders the payment of the compensatory sanctions due to reasons including: (1) Creditor's intentional procedures and policies which did not allow it to timely respond to the Motion to Value; (2) failure of Creditor's employees to promptly obtain counsel when the matter at issue was determined to be a "complex matter;" (3) when the approval to engage counsel was ultimately obtained, delay of Creditor's "Bankruptcy Specialist" in waiting until the day of the hearing to contact outside counsel; and (4) counsel not making any attempt to communicate with Debtor's counsel.

2. [15-29403-E-13](#) ROBERT BELLUOMINI
Douglas Jacobs
12-1-15 [5]

CONTINUED HEARING RE:
CONFIRMATION OF PLAN

* Clerk Noticed Hearing

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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, Debtor's attorney, Chapter 13 Trustee, and creditors on December 10, 2015. By the court's calculation, 75 days' notice was provided.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Amended Plan is continued to ~~xxxxxx~~.

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

The court continued the hearing from February 23, 2016 to 3:00 p.m. on March 1, 2016 to be heard in conjunction with the Motion to Reconsider. Dckt. 34. The court conditionally granted the Motion to Reconsider on March 1, 2016.

In light of the Motion to Reconsider being conditionally granted and the Motion to Value Collateral to be reset for hearing if Banner Bank

reimburses the Debtor, the Motion to Confirm the Chapter 13 Plan is continued to 3:00 p.m. on **xxxxxx**.

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

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

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

IT IS ORDERED that the Motion is continued to 3:00 p.m. on **xxxxxx**.

3. [16-20004-E-13](#) BRYAN/BERBEL CONNEELY
JAA-1 Scott D. Hughes

OBJECTION TO CONFIRMATION OF
PLAN BY WELLS FARGO BANK, N.A.
2-3-16 [[20](#)]

Final Ruling: No appearance at the March 1, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the U.S. Trustee on February 3, 2016. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The court's decision is to dismiss the Objection, the Debtor having filed an amended plan.

Wells Fargo Bank, N.A. ("Creditor") opposes confirmation of the Plan on the basis that the Plan does not provide for the full pre-petition arrearage due to the Creditor.

DISCUSSION

A review of the docket shows that the Debtor filed a proposed amended plan and Motion to Confirm on February 18, 2016. Dckt. 23 and 26. The hearing on the Motion is set for hearing on April 5, 2016 at 3:00 p.m.

A summary review of the Motion and declaration in support appear to be consistent with the pleading requirements of Fed. R. Bankr. P. 9013 (stating grounds with particularity) and the Declaration appears to provide testimony as to facts to support confirmation based upon her personal knowledge (Fed. R. Evid. 601, 602).

The Debtor have acted to amend the plan and doing so in a manner consistent with the Federal Rules of Bankruptcy Procedure and Federal Rules of Evidence, the court construes the subsequent Motion as a withdrawal of the plan filed January 4, 2016.

Therefore, in light of the newly filed amended plan and Motion to Confirm, the objection is dismissed.

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

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

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

IT IS ORDERED that Objection is dismissed. The January 4, 2016 Plan is not confirmed, the Debtor having filed an Amended Plan on February 18, 2016, and motion to confirm, which is now set for hearing on April 5, 2016.

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on January 25, 2016. By the court's calculation, 36 days' notice was provided. 35 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). 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 court's decision is to grant the Motion to Confirm the Modified Plan.

Tonia Hailey ("Debtor") filed the instant Motion to Confirm the Modified Plan on January 25, 2016. Dckt. 87. The Debtor is proposing to reduce her plan term from 60 months to 50 months.

The Debtor states that the only creditor that was to be paid through the Debtor's prior confirmed plan as a Class 2 creditor was Nissan Motors Acceptance Corp for her 2005 Nissan Altima, with Class 7 general unsecured creditors receiving a 0% dividend. The Debtor states that the Debtor totaled the 2005 Nissan Ultima on November 30, 2015. The Debtor's insurance company paid off the loan balance on the vehicle to Nissan Motors Acceptance Corp.

Furthermore, the Debtor states that her income has fallen since the time of filing and is no longer working overtime. The Debtor alleges that her expenses are below the Internal Revenue Service standards. The Debtor also states that she is wishing to reduce her plan term length in order to better negotiate lower interest rates for a replacement vehicle.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on February 16, 2016. Dckt. 93. The Trustee objects on the ground that the Debtor's modified plan is attempting to reduce the plan term from 60 months to 50 with a total paid into the plan of \$12,180.00 through December 25, 2015.

The Trustee notes that the Debtor's Supplemental Schedules I and J reflect a decrease in income, with a monthly net income of <-\$2.67>.

The Trustee states that the proposed plan reclassifies Nissan Motor Acceptance Corp from Class 2 to Class 3 due to an accident which rendered the vehicle a total loss.

The Debtor's Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income filed at the time of filing indicated that the Debtor was an above median income debtor with an applicable plan period of 5 years.

The Trustee objects to the reduced plan term pursuant to 11 U.S.C. § 1325(d).

DEBTOR'S RESPONSE

The Debtor filed a response to Trustee's Opposition on February 23, 2016. The Debtor asserts that 11 U.S.C. § 1329 does not incorporate 11 U.S.C. § 1325(b)'s disposable income test for modified plans. Rather, the Debtor asserts that, given the facts stated in the Motion, the Debtor has made a sufficient showing that the Debtor's income has fallen substantially since the time of the initial filing and the accident which totaled Debtor's vehicle resulted in the only remaining secured creditor (Nissan) to be paid through insurance.

DISCUSSION

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. Specifically, 11 U.S.C. § 1329(b)(1) states:

Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section.

As such, § 1329 does not specifically incorporate 11 U.S.C. § 1325(b)'s projected income test to determine the length of the plan. This is further highlighted by the fact that 11 U.S.C. § 1325(a) which is incorporated into § 1329, states: "(a) Except as provided in subsection (b), the court shall confirm a plan if -."

The Ninth Circuit Bankruptcy Appellate Panel has discussed specifically the fact that 11 U.S.C. § 1329 modification does not incorporate the projected income test to determine the plan period length. The court in *Sunahara v. Burchard (In re Sunahara)* stated, "[s]imply put, the plain language of § 1329(b) does not mandate satisfaction of the disposable income test of 1325(b)(1)(B) with respect to modified plans." *In re Sunahara*, 326 B.R. 768,

781 (B.A.P. 9th Cir. 2005). However, the court did note that:

In determining whether to authorize a modification that reduces a plan term to less than 36 months without full payment of allowed claims, the bankruptcy court should carefully consider whether the modification has been proposed in good faith. See § 1325(a)(3). Such a determination necessarily requires an assessment of a debtor's overall financial condition including, without limitation, the debtor's current disposable income, the likelihood that the debtor's disposable income will significantly increase due to increased income or decreased expenses over the remaining term of the original plan, the proximity of time between confirmation of the original plan and the filing of the modification motion, and the risk of default over the remaining term of the plan versus the certainty of immediate payment to creditors.

Id. at 781-82.

Therefore, in analyzing whether a proposed plan satisfies 11 U.S.C. § 1329 for purposes of modification, the Debtor's income and finances are not taken completely out of the equation, but instead are considered in context of the other requirements of 11 U.S.C. § 1329(a), specifically 11 U.S.C. § 1325(a)(3).

Here, in reviewing the papers filed by the Debtor in connection with the Motion to Confirm, sufficient grounds to explain the change in finances and circumstances that would justify the reduction in plan term. The Debtor's only secured creditor to be paid through the plan, Nissan Motors Acceptance Corp. However, as evidenced by the Debtor, the vehicle that was securing the secured creditor's claim has been totaled and been paid off through the vehicle insurance. The confirmed plan had already proposed a 0% dividend to unsecured Class 7 claimants. A review of the Debtor's expenses and income does justifiably show that there has been a substantial change that indicates that the modified plan filed to reduce the plan term is in good faith.

While the projected income and the commitment period may be a consideration in modified plans, it does not necessarily mean a proposed modified plan should be denied confirmation due to a reduced plan term.

The court here is satisfied that the justification for the reduction in plan term is proposed in good faith and that the plan satisfies the necessary Bankruptcy Code provisions.

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 Chapter 13 Plan filed by the

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

1. The Debtor is delinquent \$100.00 in plan payments. The Debtor has failed to make a plan payment to date.
2. The Debtor has failed to provide the Trustee with a tax transcript or copy of his Federal Income Tax Return with attachments for the most recent pre-petition tax year for which a return was required.
3. Debtor failed to appear at the First Meeting of Creditors.
4. The Debtor's plan fails to provide a dividend to general unsecured creditors.
5. The Debtor's plan fails the Chapter 7 liquidation analysis.

The Trustee's objections are well-taken.

The basis for the Trustee's objection is that the Debtor is \$100.00 delinquent in plan payments. According to the Trustee, the Plan in § 1.01 calls for payments to be received by the Trustee not later than the 25th day of each month beginning the month after the order for relief under Chapter 13. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

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 tax transcript. This is an independent grounds to deny confirmation. 11 U.S.C. § 1325(a)(1).

The basis for the Trustee's objection was that the 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). This is cause to deny confirmation. 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). Trustee states that the Debtor has non-exempt equity totals \$5,947.00 and the Debtor's plan fails to provide a dividend to the unsecured creditors. The Debtor has not claim any exemptions on the assets listed on Schedule B. The Debtor is proposing a 0% dividend to unsecured creditors (presumably so given that the Debtor fails to state a dividend in the plan), additional equity exists. The Debtor has not explained how, under the proposed plan and the schedules filed under the penalty of perjury, that the unsecured claimants are entitled to a 0% dividend when there may be upwards of \$5,947.00 in non-exempt equity.

The court notes that this is not the Debtor's first, second, or even third Chapter 13 case in the past four years. The court records reflect the

prior cases which Debtor filed and which have been dismissed:

<p>12-33383 Chapter 13 Counsel: Michael DeDecker</p>	<p>Filed: July 20, 2012 Dismissed: September 17, 2015</p>
	<p>1. The Bankruptcy Case was dismissed due to Debtor's default of \$450.00 in payments (with \$4,400 having been made since the 2012 filing of the case). 12-33383; Civil Minutes, Dckt. 181.</p>
<p>12-26199 Chapter 13 Counsel: Peter Macaluso</p>	<p>Filed: March 29, 2012 Dismissed: July 19, 2012</p>
	<p>1. The Bankruptcy Case was dismissed due to Debtor's default in plan payments (\$624.71) and failure to file the required certificate of credit counseling. 12-26199; Civil Minutes, Dckt. 63.</p>
<p>11-43792 Chapter 13 Counsel: Joel Feinstein</p>	<p>Filed: October 2, 2011 Dismissed: February 24, 2012</p>
	<p>1. The Bankruptcy Case was dismissed due to Debtor's failure to commence making the monthly plan payments of \$315.57, failure to serve the Chapter 13 Plan and motion to confirm, failure to provide Trustee with employer payment advices, and failure to provide copies of the tax return. 11-43792; Civil Minutes, Dckt. 45.</p> <p>2. The court ordered Debtor's counsel to refund Debtor \$2,250.00 of the fee retainer paid to counsel. <i>Id.</i>; Order, Dckt. 61.</p>
<p>11-32377 Chapter 7 In Pro Se</p>	<p>Filed: May 18, 2011 Discharge Entered: September 16, 2011 Case Closed: September 28, 2011</p>

The lack of action by Debtor is reminiscent of Debtor's lack of action in prior cases.

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:

The court's decision is to sustain the Objection.

Nationstar Mortgage LLC d/b/a Champion Mortgage Company, its assignees and/or successors in interest ("Creditor") opposes confirmation of the Plan on the basis that:

1. The plan does not provide for the curing of the Creditor's pre-petition arrears.
2. The plan attempts to improperly modify the Creditor's claim.
3. The Plan is not feasible because the plan does not accurately state the amounts due.

The Creditor's objections are well-taken.

The Creditor alleges that the plan is not feasible, See 11 U.S.C. § 1325(a)(6).

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

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

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

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

Here, it appears that the Creditor is, in fact, provided for in the plan. However, the Creditor's claim is based on a reverse mortgage, not a traditional mortgage. As such, there is no payment that needs to be made to the Creditor.

The only colorable ground, therefore, in light of the lien being a reverse mortgage, is the prepetition arrears owed. The Creditor filed Proof of Claim No. 1 on February 29, 2016. The Creditor claims a prepetition arrearage amount of \$800.00. The Plan does not propose to cure this arrearage. Because

the Plan does not provide for the surrender of the collateral for this claim, the Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments. See 11 U.S.C. §§ 1322(b)(2), (b)(5) & 1325(a)(5)(B). Because it fails to provide for the full payment of the arrearage, the plan cannot be confirmed.

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

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

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

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

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

7. [13-24610-E-13](#) DAX/TINA CHAVEZ
PGM-1 Peter G. Macaluso

MOTION TO VACATE DISMISSAL OF
CASE
1-29-16 [[58](#)]

DEBTOR DISMISSED:

01/21/2016

JOINT DEBTOR DISMISSED:

01/21/2016

Final Ruling: No appearance at the March 1, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 29, 2016. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

The Motion to Vacate 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). 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 Vacate is granted and the order dismissing the case (Dckt. 55) is vacated.

Dax and Tina Chavez ("Debtor") filed the instant Motion to Vacate Dismissal on January 29, 2016. Dckt. 58.

The instant case was filed on April 3, 2013. Dckt. 1. A plan was confirmed on June 3, 2013, and an order confirming the plan was entered on April 3, 2013. Dckt. 5 and 14.

On December 15, 2015, the Chapter 13 Trustee filed a Motion to Dismiss the Case due to Debtor's delinquency in plan payments in the amount of \$2,377.00. Dckt. 47.

The Debtor filed a response on January 5, 2016, indicating that they will be current prior to the hearing. Dckt. 51.

March 1, 2016 at 3:00 p.m.

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The Debtor states that on January 19, 2016, the Debtor hand delivered the delinquency to the Trustee's office, a day prior to the hearing.

On January 20, 2016, a hearing on the Motion to Dismiss was held and the Motion was granted. Dckt. 55. The ruling was a tentative one, as the Debtor had filed an opposition. While Debtor's counsel appeared at the hearing, no evidence of the payment was provided. Rather, Debtor expected the Trustee to provide the evidence for the Debtor of a payment made less than 24 hours earlier.

The Debtor seeks to have the order dismissing the case vacated on the ground that the Debtor was current at the time of the hearing.

TRUSTEE'S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a non-opposition on February 9, 2016. Dckt. 63. The Trustee states that the Debtor brought her case current by a payment of \$4,790.00 posted by the Trustee on January 19, 2015, the day before the hearing on the Motion to Dismiss and the day after the legal holiday on January 18, 2016.

The Trustee states that although the payment was hand-carried, the records do not reflect that the Debtor made staff aware the payment was to bring the plan payment current. However, due to the Debtor now being current, the Trustee does not oppose the Motion.

APPLICABLE LAW

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

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

Red. R. Civ. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199 (5th Cir. La. 1993). The court uses equitable principals when applying Rule 60(b). See 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §2857 (3rd ed. 1998). The so-called catch-all provision, Fed. R. Civ. P. 60(b)(6), is "a grand reservoir of

equitable power to do justice in a particular case." *Compton v. Alton S.S. Co.*, 608 F.2d 96, 106 (4th Cir. 1979) (citations omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847, 863 (1988), relief under Rule 60(b)(6) may be granted in extraordinary circumstances, *id.* at 863 n.11.

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

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

DISCUSSION

As an initial policy matter, the finality of judgments is an important legal and social interest. The standard for determining whether a 60(b)(1) motion is filed within a reasonable time is a case-by-case analysis. The analysis considers "the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties." *Gravatt v. Paul Revere Life Ins. Co.*, 101 Fed. Appx. 194, 196-197 (9th Cir. 2004); *Sallie Mae Servicing, LP v. Williams (In re Williams)*, 287 B.R. 787, 792 (B.A.P. 9th Cir. 2002).

The sole ground for the Motion to Dismiss was the Debtor's delinquency. As a Local Bankr. R. 9014-1(f)(1) motion, the Debtor and Debtor's counsel were required to oppose the Motion in writing 14-days prior to the hearing. The court, the day prior to the hearing, the court posted its pre-hearing tentative decisions, in which the Debtor and Debtor's counsel had the opportunity to review. Even in light of all the notice provided concerning the Motion to Dismiss, the Debtor nor Debtor's counsel appeared at the hearing to indicate that payment was in fact made the day prior.

The Trustee admits that the Debtor is current and that the Debtor's late payment the day before the hearing created a lapse in processing.

As stated by the Debtor and confirmed by the Trustee, the Debtor was able to bring her plan current prior to the hearing. While the Debtor should not have relied on the Trustee to present their opposition for them, the curing of the delinquency and the delay in processing provides justification under Fed. R. Civ. P. 60(b)(1) for excusable neglect.

Additionally, the Debtor would be prejudiced by the dismissal standing because the Debtor has made over \$76,100.00 into plan payments already which would essentially be vitiated if the dismissal stood. The Debtor would have to start from square one if the Motion is not granted. The Debtor has acted quickly in filing the instant Motion to Vacate. The Debtor quickly brought her plan current.

Therefore, in light of the foregoing, the Motion is granted and the order dismissing the case (Dckt. 55) is vacated.

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

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

The Motion to Vacate Dismissal of Case filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and the order dismissing the case (Dckt. 55) is vacated.

8. [15-29511](#)-E-13 HOA NGUYEN
APN-1 Marc Voisenat

OBJECTION TO CONFIRMATION OF
PLAN BY PARKVIEW WEST
HOMEOWNERS ASSOCIATION
2-4-16 [[25](#)]

Final Ruling: No appearance at the March 1, 2016 hearing is required.

Local Rule 9014-1(f)(2) Motion - No 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 February 4, 2016. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

**The court's decision is to overrule without prejudice the
Objection to Confirmation.**

Parkview West Homeowners Association ("Creditor") opposes confirmation of the Plan on the basis that the Debtor's proposed amended plan does not provide interest on Debtor's pre-petition arrears. The Creditor further asserts that the plan inaccurately states that the monthly installment amount is \$540.00 when it is \$556.62.

The objecting creditor holds a deed of trust secured by the Debtor's residence. The creditor has filed a timely proof of claim in which it does not assert pre-petition arrearages but asserts that the annual interest rate is 12%. Proof of Claim No. 2. The Plan does not propose to cure these arrearages.

REVIEW OF PROOF OF CLAIM

Creditor filed its proof of claim on February 4, 2016. Proof of claim No. 2. It is a secured claim for \$42,788.14. The Chapter 13 Plan lists Creditor as having a Class 1 Claim with an arrearage of \$46,050.64 and monthly contract installments of \$540.00.

The attachments to Proof of Claim No. 2 show that the claim is for unpaid assessments by Debtor to Creditor. Attachment 1 to Proof of Claim 2 states that as of October 30, 2014, the collection agency for Creditor sent a notice (which bears the notation "ASAP Case#: 14-07063 (indicating that there is litigation pending in some court), showing that the assessments total \$17,293.81. There is \$1,522.44 in late costs, \$2,266.28 in "collection

charges," \$150.00 Agent Fee, and an unidentified \$1,770.52 in "Other." This Notice is signed by Creditor (not by agent of creditor).

Attachment 2 to the Proof of Claim shows the component part of the \$42,788.14 claim, which includes \$2,245.15 in late fees, \$5,674.21 in interest, \$4,650 for "Mgt/Agent," and \$1,505.05 for "collection charges."

OBJECTION TO CONFIRMATION

In the Objection, Creditor makes it clear that the claim is for past-due assessments. Additionally, the 12% interest being demanded is for "unpaid Association due." Creditor asserts that its entire claim - assessments, interest, late fees, collection fees, agent fees, attorneys fees, and "other" will all accrue interest at 12% per annum. That conflicts with the prior statement by Creditor that the interest is only on the unpaid assessment. Further, Creditor's contention call for the compounding of interest (the accruing interest and the late fees).

Creditor cites the court to California Civil Code § 5650(b)(3) for the proposition that the 12% interest rate is correct and that Creditor is entitled to 12% on its entire claim. However, a reading of the plain language of California Civil Code § 5650(b)(3) discloses that this statement is inaccurate:

"(3) **Interest on** all sums imposed in accordance with this section, including the **delinquent assessments, [late fee,] reasonable fees and costs of collection, and reasonable attorney's fees**, at an annual interest rate not to exceed 12 percent, commencing 30 days after the assessment becomes due, unless the declaration specifies the recovery of interest at a rate of a lesser amount, in which case the lesser rate of interest shall apply."

Creditor's Objection overreaches in trying to compound interest for this claim.

Second, Creditor asserts that the plan incorrectly provides for the "Monthly Contract Installment" by stating it is \$540.00, when the "monthly assessment is \$556.62." From the Proof of Claim and Objection to Confirmation, it appears that the "Monthly Contract Installment" is \$0.00. Rather, there are post-petition assessments coming due this Creditor. There is a pre-petition secured claim of only \$42,788.14 (some of which is pre-petition interest) which must be provided for by the Plan.

Even if 12% interest was applied to the entire \$42,788.14 secured claim, amortized over 60 months, the monthly payment is only \$951.80. (Computed using the Microsoft Excel Simple Loan Calculator.) The proposed plan over-funds payment of Creditors' secured claim. If the interest rate were reduced to 6.0% (though generous, not uncommon for secured claims with a cooperative creditor), the payment drops to \$827.21 a month.

AMENDED PLAN - RENDERING OBJECTION TO CONFIRMATION MOOT

On February 2, 2016, Debtor filed a First Amended Plan. Dckt. 23. The First Amended Plan has not been served on all creditors, the Chapter 13 Trustee, and U.S. Trustee, nor has the Debtor filed and served a motion to confirm the First Amended Plan. L.B.R. 3015-1(d).

The filing of the First Amended Plan was the de facto dismissal of the Original Chapter 13 Plan and Debtor's attempt to confirm such plan.

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

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

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

IT IS ORDERED that Objection to confirmation the Plan filed on December 22, 2015 (Dckt. 11) is overruled without prejudice as moot, Debtor having filed a First Amended Plan on February 2, 2016. The filing of the First Amended Plan constitutes a withdrawal (dismissal) of the Original Plan, which is not confirmed.

9. [15-29511](#)-E-13 HOA NGUYEN
PPR-1 Marc Voisenat

OBJECTION TO CONFIRMATION OF
PLAN BY BANK OF AMERICA, N.A.
1-28-16 [[20](#)]

Final Ruling: No appearance at the March 1, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and the Office of the U.S. Trustee on January 28, 2016. By the court's calculation, 33 days' notice was provided. 14 days' notice is required.

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

The court's decision is to dismiss the Objection and to deny confirmation of the Debtor's December 22, 2015 plan.

Bank of America, N.A., its assignees and/or successors in interest ("Creditor"), opposes confirmation of the Plan on the basis that the plan fails to provide for the secured claim of the Creditor.

On February 22, 2016, the Creditor filed a Notice of Withdrawal, stating that the Debtor filed a proposed amended plan on February 2, 2016. Dckt. 30.

Therefore, in light of the Creditor's withdrawal, no other objections pending, and independent review of the plan, the Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is overruled and the Debtor's plan filed on December 22, 2015 is not confirmed

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

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

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

IT IS ORDERED that the Objection is dismissed without prejudice and the Debtor's plan filed on December 4, 2015 is not confirmed.

10. [13-31616-E-13](#) ADAM/SHERRI NEWLAND
PGM-1 Peter G. Macaluso

OBJECTION TO NOTICE OF MORTGAGE
PAYMENT CHANGE
1-14-16 [[38](#)]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, and Office of the United States Trustee on January 14, 2016. By the court's calculation, 47 days' notice was provided. 28 days' notice is required.

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

The Objection to Notice of Mortgage Payment Change is sustained.

Adam and Sherri Newland ("Debtor") filed the instant Objection to Notice of Mortgage Payment Change Filed on October 8, 2015 on January 14, 2016. Dckt. 38. The Debtor asserts that Deutsche Bank National Trust Company, as Trustee for Harborview Mortgage Loan Trust, Mortgage Loan Pass-Through Certificates, Series 2007-5 ("Creditor") filed a Notice of Mortgage Payment Change on October 8, 2015. The Debtor states that the Creditor increases the monthly payment with no basis.

The Debtor states that the Notice indicates that the escrow payment went from \$533.11 to \$637.87, an increase of \$152.76.

The Debtor argues that the Proof of Claim No. 10 indicates that the prepetition monthly payment is \$2,053.88. The Debtor asserts this is inconsistent with the attachments on the Proof of Claim which reads "from December 1, 2013, and Borrower shall pay monthly payments of principle and

interest of \$2,576.77." The Debtor states that no previous Notice of Payment Change has been filed, and the plan was confirmed with a class 1 checklist verified on-going monthly payment of \$2,053.88 (\$2,593.46 less escrow of \$533.11).

The Debtor asserts that according to plan and based on increasing the mortgage absent a Notice of Payment Change, the Creditor has been over-collecting \$522.87 per month pursuant to the October 8, 2015 change.

Additionally, the Debtor states that there have been no evidenced provided in the Notic of Payment change other than the performing of an escrow analysis asserted on Ocwen's internal documents that hvae asserted that the property taxes in Vacaville, California have increased from \$6,397.32 to \$8,103.96, an increase of \$1,706.67.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response to the instant Objection on February 16, 2016. Dckt. 47.

The Trustee begins by reiterating the Debtor's Objection by stating that the Debtor is asserting that the Notice appears to be based on an annual escrow analysis increase of \$152.76 but then improperly increases the principle and interest by \$522.67 as well.

Unlike the Debtor, the Trustee states that the Debtor compares the language between the Escrow Account Disclosure Statement dated September 10, 2013, attached to Proof of Claim No. 10, where it states "beginning with your payments due on 10/01/2013, will be \$2,586.99 (rounded) of which \$2,053.88 will be for principal and interest and \$533.11 will go into your escrow account" and the Escrow Account Disclosure Statement dated June 4, 2015 attached to the Notice of Mortgage Payment Change filed October 8, 2015 where Debtor states it reads, "be beginning with your payment due on 10/01/2015, will be \$3,252.64 of which \$2,576.77 will be for principle and interest and \$533.11 will go into your interest account."

The Trustee reviewed the Escrow Analysis Statement attached to the Notice of Mortgage Payment Change. The Trustee asserts that the language really reads:

Therefore, the first monthly mortgage payment for the coming escrow year, beginning with the payment due on 11/01/2015, will be \$3,252.64 of which \$2,576.77 will be for principal and interest and \$675.87 will go into the escrow account.

The Trustee then reviews the Proof of Claim No. 10 of the Creditor. The Trustee states that the Proof of Claim indicates a prepetition principal and interest from October 1, 2012 through September 3, 2013. Part 1 identifies the amount of interest due over that time period and Part 3 indicates the amount necessary to cure default as of the petition date, which was \$22,592.68, of 11 installment payments of \$2,053.88.

The Trustee notes that there is a loan modification agreement offered by American Home Mortgage Servicing, Inc. that is attached to the Proof of Claim. The modification indicates that the Debtor's interest was 2.000% and

payments were \$2,053.88 (plus any amounts due for taxes and insurance) beginning January 1, 2011 for three years. At year four, the modification provides:

During the fourth year, interest will be charged on the Authorizing Amount at the years rate of 4.190% from December 1, 2013, and Borrower shall pay monthly payments of principal and interest in the amount of \$2,576.77 (plus any amounts due for taxes and insurance), beginning on the 1st day of January, 2014, and continuing thereafter on the same day of each succeeding month until the Maturity Date or until the New Principal Balance and interest on the Amortizing Amount are paid in full, whichever is sooner.

The Trustee believes that the pre-petition mortgage payments as stated in the Proof of Claim are accurate in that at the time Debtor's petition was filed, the mortgage payments had not yet increased pursuant to the loan modification and therefore, the language in the Escrow Analysis Statements appears to be accurate as well.

Lastly, the Trustee states that the Notice of Mortgage Payment Change filed on October 8, 2015 indicates Debtor's mortgage payment effective November 1, 2015 is \$3,252.64 based on an escrow account adjustment. While the change in escrow may be a legitimate adjustment, the Trustee notes that the Creditor did not file the Notice at least 21 days before the new payment amount was due as required by Fed. R. Bankr. P. 3002.1.

The Trustee notes that this is the first Notice of Mortgage Payment Change filed by the Creditor where it appears another may have been due upon the adjustment in mortgage payments pursuant to the loan modification, effective January 1, 2014, post-petition.

The Trustee states that while he adjusted the mortgage payment initially pursuant to the Notice of Mortgage Payment Change from \$2,593.46 under the confirmed plan, to \$3,252.64 effective November 1, 2015, the payments were returned to the original payment pending resolution of Debtor's objection. Two payments in the higher amount have been disbursed by the Trustee.

DISCUSSION

The instant case was filed on September 4, 2013. Dckt. 1. The Debtor entered into a loan modification with the Creditor prior to filing this bankruptcy case. Proof of Claim No. 10. The reading of loan modification attached indicates that between December 1, 2010 through December 1, 2013, the interest charged on the Amortizing amount at the yearly rate of 2.000%. Proof of Claim No. 10, pg. 24.

The loan modification then provides for computation of the monthly payment amount beginning in January 2014, that:

During the fourth year, interest will be charged on the Authorizing Amount at the years rate of 4.190% from December 1, 2013, and Borrower shall pay monthly payments of principal and interest in the amount of \$2,576.77 (plus any amounts due for taxes and insurance), beginning on the 1st day of January,

2014, and continuing thereafter on the same day of each succeeding month until the Maturity Date or until the New Principal Balance and interest on the Amortizing Amount are paid in full, whichever is sooner.

Proof of Claim No. 10, pg. 24.

When this case was filed, Creditor was correct in stating that the interest charged on the Amortizing amount at the yearly rate of 2.000% and monthly payments of principal and interest were to be \$2,053.88 (plus any amounts due for taxes and insurance).

As the Trustee indicated, the Creditor failed to timely file a Notice of Mortgage Payment Change 21 days prior to the increase as required by Fed. R. Bankr. P. 3002.1 for the increase in monthly payments in year three as described in the loan modification. It was not until October 8, 2015 that the Creditor filed a Notice of Mortgage Payment Change as to this step up interest rate in the loan modification.

The problem with the October 8, 2015 Notice of Mortgage Payment Change is that it states that there will only be a \$142.76 increase in the escrow account payment. Notice Part 1. The Notice expressly states that there is no change in the principal and interest payment based on the interest rate under a variable rate loan.

Since this bankruptcy case was commenced, no notice of any change in the interest or principal payment has been given. As discussed above, Creditor could have elected to give notice of a change in interest beginning in January 2014. Creditor has not filed such a notice.

Since the commencement of this case, the monthly principal, interest, and escrow payment is stated to be are stated by Creditor to be \$2,586.99. Of this, \$2,053.88 is the principal and interest payment, and \$533.11 is for the escrow account. On the Notice of Mortgage Payment Change Creditor states that the increase of the escrow payment is necessary to pay the projected property taxes and insurance, which will total \$8,104.02 for the year. Dividing \$8,104.02 by twelve months equals \$675.33 a month. Notice of Mortgage Payment Change, p. 4.

It appears what has happened is that Creditor has elected (or failed) to exercise the right to provide a notice of mortgage payment change and step up the interest rate effective January 1, 2014. The present Notice of Mortgage Payment Change expressly states that there is no change in the interest rate.

Therefore, the objection is sustained and the monthly mortgage payment, beginning October 1, 2015 is \$2,729.21. This is comprised of the \$2,053.88 principal and interest payment (for which no notice of mortgage payment change has been given to increase said amount) and the \$675.33 escrow account payment stated in the October 8, 2015 Notice of Mortgage payment change.

The court notes that one might be tempted to say, "judge, even you can figure out that the 'correct' interest rate under the contract, if it had been properly noticed by Creditor, is higher, so just order the higher amount to be paid." To do so would ignore the requirement that proper notice of the mortgage payment change be given. No basis for retroactive allowance of a

change for which no notice was given has been provided to the court.

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

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

The Objection to Notice of Mortgage Payment Change 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 Objection is sustained and that the monthly payment on the secured claim of Deutsche Bank, National Trust Company, as Trustee for Harborview Mortgage Loan Trust, Mortgage Loan Pass-Through Certificates, Series 2007-5 (Proof of Claim No. 10) is beginning October 1, 2015 is \$2,729.21. This is comprised of the \$2,053.88 principal and interest payment (for which no notice of mortgage payment change has been given to increase said amount) and the \$675.33 escrow account payment stated in the October 8, 2015 Notice of Mortgage payment change.

11. [16-20117-E-13](#) ROASLINA LOPEZ
MET-1 Mary Ellen Terranella

MOTION TO VALUE COLLATERAL OF
TRAVIS CREDIT UNION
2-13-16 [[12](#)]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on February 13, 2016. By the court's calculation, 17 days' notice was provided. 14 days' notice is required.

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

The Motion to Value secured claim of Travis Credit Union ("Creditor") is granted and the secured claim is determined to have a value of \$25,015.82.

The Motion filed by Rosalina Lopez ("Debtor") to value the secured claim of Travis Credit Union ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2014 Nissan Sentra ("Vehicle"). The Debtor seeks to value the Vehicle at a replacement value of \$25,016.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. See Fed. R. Evid. 701; see also *Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The lien on the Vehicle's title secures a purchase-money loan incurred in July 18, 2015, which is less than 910 days prior to filing of the petition.

Movant is requesting that the loan held by Creditor be determined to be secured in the amount of \$25,016.00 and that the negative equity carried into the loan from a trade-in of Debtor's prior vehicle in the amount of \$2,749.16 be determined to be an unsecured claim.

The Creditor filed a Proof of Claim No. 2 on February 11, 2016, claiming a secured claim in the amount of \$28,622.22. A review of the Retail Installment Contract filed as an attachment to Creditor's Proof of Claim No. 2 shows that the total amount financed by the Movant was \$29,668.29. There was a net trade-in of <-\$13,200.00> and the "Credit or Lease Balance" was \$16,949.16, leaving negative equity of \$3,749.16. Essentially, the total amount financed is two separate loans: (1) for the negative net equity in the trade-in and (2) the new financing for the Vehicle.

Out of the total amount financed, the negative equity arising from the trade-in is 12.6% of the amount financed and the remaining 87.4% is new financing secured as a purchase money security interest in the new Vehicle. Applying these percentages to the amount claimed by the Creditor in Proof of Claim No. 2, \$3,606.40 of the amount financed is to the negative net equity from the trade-in. The remaining \$25,015.82 is the amount loaned to secure the purchase of the Vehicle.

While the portion of the financing secured by the new Vehicle is a purchase money security interest acquired less than 910 days prior to the filing which prevents the Movant from valuing the claim under the hanging paragraph of 11 U.S.C. § 1325(a), the Movant is only seeking to value the portion of the financing that was for the negative net equity of the trade-in, not the actual purchase of the Vehicle.

In the 9th Circuit, negative equity is not considered a part of the price for the new vehicle, and is thus not included in the purchase money security interest. *In re Penrod*, 611 F.3d 1158,1161-62 (9th Cir 2009) *petition for rehearing denied*, 636 F.3d 1175 (2011), *cert denied* 132 S.Ct. 108 (2011). Debtor may value this portion of the loan.

The definition of a "purchase money security interest is determined by state law. *In re Penrod*, 611 F.3d 1158,1161-62 (9th Cir 2009) *petition for rehearing denied*, 636 F.3d 1175 (2011), *cert denied* 132 S.Ct. 108 (2011). Cal. Comm. Code § 9103 "does not provide a precise definition of a purchase money security interest, but rather a string of connected definitions." *In re Penrod*, 611 F.3d at 1161; Cal. Comm. Code § 9103.

In *Penrod*, the Ninth Circuit Court of Appeals quoted the plain language of the California Commercial Code, stating,

"'Purchase money collateral' means goods or software that secures a purchase money obligation." Cal. Comm. Code § 9103(a)(1). "Purchase money obligation' means an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used." Cal. Comm. Code § 9103(a)(2).

In re Penrod, 611 F.3d at 1161.

The California Commercial Code defines the term "good" to be,

"(44) 'Goods' means all things that are movable when a security interest attaches. The term includes (I) fixtures, (ii) standing timber that is to be cut and removed under a conveyance or contract for sale, (iii) the unborn young of animals, (iv) crops grown, growing, or to be grown, even if the crops are produced on trees, vines, or bushes, and (v) manufactured homes. The term also includes a computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program if (I) the program is associated with the goods in such a manner that it customarily is considered part of the goods, or (ii) by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods. The term does not include a computer program embedded in goods that consist solely of the medium in which the program is embedded. The term also does not include accounts, chattel paper, commercial tort claims, deposit accounts, documents, general intangibles, instruments, investment property, letter-of-credit rights, letters of credit, money, or oil, gas, or other minerals before extraction."

Ca. Com. Code § 9102(44). Physical "things" are included in the definition, but contracts, claims, instruments, letters of credit, and other non-physical "things" are not included.

Here, Debtor purchased a vehicle (a thing) and obtained additional credit to finance the negative equity that was in the vehicle that the seller agreed to take as a trade-in. The court organizes the various purchases and obligations as follows:

Purchase of New 2014 Chrysler 300	Source Document - Retail Installment Sale Contract. Exhibit A, Dckt. 15	
Purchase Price of Vehicle (Cash Price Day of Sale)	\$24,843.00	Price of Collateral
Document Processing	\$80.00	Documentation as part of purchase of vehicle
Sales Tax	\$1,900.38	Though This is Not a Tax Which the Purchaser is Obligated to Pay, but a Tax Which the Seller is Obligated to Pay, the Court includes it as part of the actual necessary cost in buying the vehicle. FN.1.
Electric Vehicle Registration	\$29.00	Cost with above purchase price.

Vehicle License	\$162.00	Estimated cost with above purchase price.
Registration	\$101.00	Estimated cost with above purchase.
California [illegible] fees	\$8.75	Cost with above purchase.
Total obligation incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral	\$29,668.29	

FN.1. As discussed by the California Court of Appeal in *Xerox Corp. v. County of Orange*, 66 Cal. App. 3d 746, 756 (1977), the state sales tax is not a tax on the sale, but an excise tax imposed upon the retailer for the "privilege of conducting a retail business...." See Cal. Rev. & Tax. Code § 6051 (stating that tax is imposed on retailer). A retailer is allowed to add the sales tax to the sales price under specified circumstances (which is the common practice in California). Cal. Civ. Code § 1656.1.

In addition to the credit extended for the purchase of the vehicle, the Creditor extended further creditor to purchase or finance these additional items:

Item	Source Document - Retail Installment Sale Contract. Exhibit 2, Dckt. 19	
GAP Insurance Coverage	\$795.00	This is another form of insurance that the Creditor chose to finance, rather than having the Debtor provide evidence of insurance.
Safe Credit Union, Negative Equity in Trade-In	\$3,749.16	This negative equity which Creditor chose to provide additional credit is not part of the purchase money obligation as determined by the court in <i>Penrod</i> .

Total obligation incurred not as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral	\$4,484.16	
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As discussed by the court in *Penrod*, creditors are given some extraordinary rights for purchase money financial and a purchase money lien. While extraordinary rights are given, the California Legislature carefully circumscribed the obligations which would be so protected.

The Debtor does not attempt to value the optional insurance coverage but rather just the negative net equity.

Therefore, based on the foregoing, creditor's secured claim is determined to be in the amount of \$25,015.82. See 11 U.S.C. § 506(a). The remaining \$3,606.40 is determined to be a general unsecured claim arising from the negative equity from the trade-in. 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 Rosalina Lopez ("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 Travis Credit Union ("Creditor") secured by an asset described as 2014 Nissan Sentra ("Vehicle") is determined to be a secured claim in the amount of \$25,015.82. This is the amount of the secured claim which pursuant to the "hanging paragraph" of 11 U.S.C. § 1325(a) [the unnumbered paragraph following § 1325(a)(9)], and the balance of the claim, \$5,754.81, is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is \$25,015.82 and is encumbered by liens securing claims which exceed the value of the asset.

12. [15-28322-E-13](#) LISA TOLBERT
SJS-4 Scott J. Sagaria

MOTION TO CONFIRM PLAN
1-13-16 [[41](#)]

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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 (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on January 13, 2016. By the court's calculation, 48 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). 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 court's decision is to grant the Motion to Confirm the Amended Plan.

Lisa Tolbert ("Debtor") filed the instant Motion to Confirm the Amended Plan on January 13, 2016. Dckt. 41.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on February 16, 2016. Dckt. 58. The Trustee objects on the following grounds:

1. The Debtor's plan relies on Motion to Value Collateral of Milestonz Jewelers and the Collateral of Santander Consumer USA.
2. The Debtor proposes to pay administrative expenses a monthly dividend of \$8.00 per month for 13 months. Monthly disbursement payments must normally be no less than \$15.00 per month. The

Trustee requests that this be corrected in the order confirming.

DISCUSSION

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

As to the Trustee's first objection, both Motions to Value Collateral were granted on February 23, 2015. Dckt. 61 and 63. Therefore, the Trustee's first objection is overruled.

As to the Trustee's second objection, Federal Rule of Bankruptcy Procedure 3010 states, in relevant part:

(b) Chapter 12 and chapter 13 cases

In a chapter 12 or chapter 13 case no payment in an amount less than \$15 shall be distributed by the trustee to any creditor unless authorized by local rule or order of the court. Funds not distributed because of this subdivision shall accumulate and shall be paid whenever the accumulation aggregates \$15. Any funds remaining shall be distributed with the final payment.

Fed. R. Bankr. P. 3010. The review of the plan shows that the Debtor is proposing to only pay \$8.00 per month for 13 months on administrative expenses. This is facially improper. However, given the de minimus amount of the discrepancy and consent from the Trustee to correct this in the order confirming, the court will authorize the confirmation of the plan, with the order confirming that the minimum monthly dividend to administrative expenses under § 2.07 to be \$15.00.

Therefore, after the amendment in the order confirming, 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 Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted, Debtor's Chapter 13 Plan filed on January 13, 2016 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, correcting the dividend to administrative claims under § 2.07 to \$15.00 per month for the 13 months, 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

March 1, 2016 at 3:00 p.m.

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court.

13. [15-27124-E-13](#) MARIA ZENO MOTION TO CONFIRM PLAN
SJS-2 Scott J. Sagaria 1-15-16 [[39](#)]

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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, all creditors, parties requesting special notice, and Office of the United States Trustee on January 15, 2016. By the court's calculation, 46 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). 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 court's decision is to deny the Motion to Confirm the Amended Plan.

Maria Zeno ("Debtor") filed the instant Motion to Confirm the Amended Plan on January 15, 2016. Dckt. 39.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on February 16, 2016. Dckt. 52. The Trustee opposes confirmation on the ground that the Debtor's plan is not the Debtor's best efforts. The Trustee states that the Debtor is below median income. The case was filed on September 10, 2015. The Debtor made a payment on October 28, 2015 and then no plan payments were made in November, December, or January. The Debtor has not explained why no payments were made.

The Trustee states that, without the explanation from the Debtor, the Debtor lacks the ability to make plan payments or the plan as proposed is not the Debtor's best efforts.

CREDITOR'S OPPOSITION

CAM XIII TRUST, its successors and/or assignees in interest ("Creditor") filed an opposition to the instant Motion on February 16, 2016. Dckt. 55. The Creditor objects to the instant Motion on the following grounds:

1. The Debtor improperly attempts to pay a post petition arrear in plan payments as a pre-petition debt and is unable to make the plan payments.
2. The Debtor's plan fails to pay the Creditor's claim in full.

DISCUSSION

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

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

The basis for the Trustee's objection is that the Debtor's plan is not the Debtor's best effort. The Debtor has failed to make plan payments for three months without any explanation. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

The creditor first alleges that the plan is not feasible, See 11 U.S.C. § 1325(a)(6), and violates 11 U.S.C. § 1322(b)(2) because it does not provide for the payment in full of the Creditor's secured claim.

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

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

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

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

- Plan, 11 U.S.C. § 1325(a)(5)(B), or
(3) surrender the collateral for the claim to the secured creditor,
11 U.S.C. § 1325(a)(5)(C).

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

Here, the Creditor's claim is provided for but not in the full amount. Therefore, the Creditor's objection is sustained.

Therefore, 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 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 Plan is denied and the proposed Chapter 13 Plan is not confirmed.

14. 16-20743-E-13 ANNA PETERSON
RWH-1 Ronald W. Holland

MOTION TO EXTEND AUTOMATIC STAY
2-16-16 [9]

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

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

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

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

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

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

The Motion to Extend the Automatic Stay is granted.

Anna Peterson ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond 30 days in this case. This is the Debtor's second bankruptcy petition pending in the past year. The Debtor's prior bankruptcy case (No. 15-20149) was dismissed on January 22, 2016, after Debtor failed to make plan payments and failed to propose a modified plan after the denial of the Debtor's previous plan. See Order, Bankr. E.D. Cal. No. 15-20149, Dckt. 129, January 22, 2016. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor thirty days after filing of the petition.

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). The subsequently filed case is presumed to be filed in bad faith if the Debtor failed to perform under the terms of a confirmed plan. *Id.* at § 362(c)(3)(C)(i)(II)(cc). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* at § 362(c)(3)(C).

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

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

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

Here, Debtor states that the instant case was filed in good faith and provides an explanation for why the previous case was dismissed. The Debtor asserts that in the prior case she filed the case in pro per. She later obtained counsel and believed that she would be adequately represented. However, the Debtor asserts that a dispute arose over her support obligation, where interest was later added. The Debtor asserts that due to that dispute she was unable to make the plan payments. Debtor further asserts that the interest should either not have been accruing or it should have been paid through the Plan. The Debtor states that the Debtor has not retained new counsel and will be able to make future payments.

The court notes that the Debtor filed a non-opposition to the Motion to Dismiss in the prior case.

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

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

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

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

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

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

15. [11-20146-E-13](#) TIMOTHY GAINES MOTION FOR HARDSHIP DISCHARGE
MOH-4 Michael O'Dowd Hays 2-16-16 [[102](#)]

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

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

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

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

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

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

The Motion for Hardship Discharge is granted.

Timothy Gaines ("Debtor") filed the instant Motion for a Hardship Discharge on February 16, 2016. Dckt. 102.

The Debtor states he was a below median income debtor and the instant case was filed to stop the foreclosure of the Debtor's property. The Debtor has

been in a sixty month plan since January 2, 2011 paying his ongoing mortgage (\$942.77) and mortgage arrears (\$241,05) and other debts with a monthly obligation of currently \$1,402.00.

The Debtor states that he had only three payments to go for November 25, 2015 through January 25, 2016. However, the Debtor states that as a self employed roofer, he did not have the ability to make the final three payments due to the winter months did not bring in sufficient monies.

The Debtor, without consulting attorney, obtained a new loan against his home for \$27,000.00 on or about January 5, 2016, of which \$6,460.79 was paid out of escrow to Ditech to pay off his mortgage in full. There was a net to the Debtor of \$19,856.21 of which \$1,500.00 has been sent to the Trustee to pay creditors other than Ditech. The Debtor claims that the remaining funds are for "new roof, heat & ac, carpet, drywall repairs and exteriors."

The Debtor asserts that it was a struggle to make plan payments throughout the term of the plan. This was primarily due to the seasonal loss of income. The Debtor asserts that there was no way he could complete the three final payments totaling \$4,206.00 without borrowing the funds.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on February 18, 2016. Dckt. 108. The Trustee states that, while modification of the plan is not practicable, the Debtor only owes \$2,706.00 to complete the plan.

The Trustee argues that the Debtor still has a net amount of \$19,856.21 of which \$1,500.00 was paid to the Trustee. It appears Debtor should still have over \$18,000.00 available to pay the plan in full.

The Trustee states the unsecured creditors have received a 15% dividend to date.

DISCUSSION

After confirmation of a plan, circumstances may arise that prevent a debtor from completing a plan of reorganization. In such situations, the debtor may ask the court to grant a "hardship discharge." 11 U.S.C. § 1328(b). Generally, such a discharge is available only if : (b)(1) the debtor's failure to complete plan payments is due to circumstances beyond the debtor's control and through no fault of the debtor; (b)(2) creditors have receive at least as much as they would have received in a chapter 7 liquidation case; and (b)(3) modification of the plan is not possible under 11 U.S.C. § 1329. 11 U.S.C. § 1328(b)(1)-(3).

Here, the court appreciates the concerns raised by the Trustee. It can be argued that Debtor has not satisfied 11 U.S.C. § 1328(b)(1) and (b)(2). First, the Debtor has not provided sufficient evidence that the failure to complete the plan payments is due to circumstances beyond the Debtor's control. The Debtor admits that the winter months cause a burden on the Debtor in making plan payments. However, rather than filing a modified plan or seeking authorization to incur new debt, the Debtor unilaterally elected to "go his own way" and without authorization incurred additional loan to make payments that

the Debtor deemed necessary for his personal needs. Furthermore, the Debtor indicates that he has surplus money in which the remaining plan balance could be paid.

On the other hand, we are down to the final three months of the plan. Under the Modified Chapter 13 Plan, of the \$1,402.00 monthly plan payment, \$1,183.82 would have been paid each month to Ditech on its secured claim. Approximately \$112.64 would have been paid to the Chapter 13 Trustee. That would leave \$105.54 for the other creditors. The universe of "harm" is \$316.62 in monies that are not being paid to creditors holding general unsecured claims during the final three months of the plan.

Debtor has paid the Trustee \$1,500.00, which he computes as the difference between the \$1,183.82 payment to Ditech and the \$1,402.00 full plan payment for the last three months of the plan. ($\$1,402.00 - \$1,183.82 = \$218.18$ a month.) Debtor computes this as providing for at least the 7% dividend minimum in the plan.

While the Trustee is correct in the aggregate, Debtor has made a payment sufficient to get the plan across the finish line for creditors holding general unsecured claims. The court applies the often used Latin phrase *concludo compleo volvo equus calcio*. (Loosely translated, "close enough in horseshoes.")

The court grants the motion and the clerk of the court shall issue a discharge pursuant to 11 U.S.C. § 1328(b). The 60 month term of the plan has expired and modification is not practical. Due to a drop in income, Debtor has been unable to make the final three plan payments. Debtor has obtained funds to provide for general unsecured claims in the manner provided for in the plan, as if he made the plan payments in full. Though improvident (as a legal matter), Debtor obtained those funds by refinancing and paying off the small balance left on the secured claim.

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 Hardship Discharge 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 Clerk of the Court shall issue Debtor his discharge pursuant to 11 U.S.C. § 1328(b), no further plan payments required.

16. [15-29147-E-13](#) JOHN QUIROZ
DPC-1 Richard Kwun

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

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

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

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

Local Rule 9014-1(f)(2) Motion - Continued Hearing

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

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

The court's decision is to sustain the Objection.

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

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

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

FEBRUARY 9, 2016 HEARING

At the hearing, the court continued the hearing to 3:00 p.m. on March 1, 2016. Dckt. 37.

DECLARATION FROM TRUSTEE

Christina Lloyd, an employee of Chapter 13 Trustee, filed a supplemental declaration on January 13, 2016. Dckt. 25. Ms. Lloyd states that the Debtor has still failed to provide the payment advices and the tax return information.

Ms. Lloyd does state that on January 7, 2016, an email was sent from Debtor's counsel office which contained the 2014 Federal tax transcript and Earning Statements period ending October 15, 2015 and October 30, 2015.

The Trustee restates that the Debtor remains \$100.00 delinquent in plan payments.

DISCUSSION

The Trustee's objections are well-taken.

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

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

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

OVERVIEW OF CASE

This bankruptcy case was filed on November 24, 2015. A summary of the Schedules discloses the following information:

- A. Schedule A.....No Real Property
- B. Schedule B
 - 1. Personal Property Assets.....\$24,715
- C. Schedule C
 - 1. Exemptions.....\$5,240.05
- D. Schedule D
 - 1. Hopkins Acura
 - a. \$19,475 Acura.....(\$35,515.00)
- E. Schedule E, Priority Unsecured.....(None)
- F. Schedule F, General Unsecured
 - 1.(\$292,209.00)
 - a. Includes (\$230,000) for Patricia Costley, ex-spouse for "non-support debt"
- G. Schedule I
 - 1. Xerox.....\$9,584.00 (gross)
 - 2. Deductions include
 - a. Domestic Support.....(\$1,980.00)
 - b. Taxes/SS.....(\$2,532.00)
 - 3. Monthly Income.....\$4,554.82
- H. Schedule J
 - 1. Two Dependants, Teenage
 - 2. Monthly Expenses.....(\$2,454.00)
 - 3. Includes
 - a. Rent/Mortgage of (\$2,250.00)
 - b. Transportation (fuel, maintenance, registration) of (\$200.00)
 - c. Car payment of (\$494.00)
 - 4. Net Monthly Income.....\$100.00

Dckt. 1.

The Statement of Financial Affairs includes the following additional information:

- A. Question 1, Income From Employment
 - 1. 2015 YTD Xerox/Bank of America.....\$ 95,431
 - a. Ten Months
 - 2. 2014 Xerox.....\$153,597
 - 3. 2013 Xerox.....\$ 70,634
- B. Question 4, Suits and Administrative Proceedings
 - 1. *Costley v. Quiroz*, Family Law 8/18/2015 hearing
- C. Question 10, Other Transfers
 - 1. Hopkins Acura, 2010 Mercedes traded in, \$3,000 credit
 - 2. Progressive, two beds.

Dckt. 1.

The Debtor's Chapter 13 Plan filed on November 24, 2015, provides for the following:

- A. Monthly Plan Payments By Debtor.....\$100.00
- B. Term of Plan.....60 months
- C. Total Plan Funds.....\$ 6,000.00
- D. Distributions
 - 1. Chapter 13 Trustee (Est. 8%).....(\$ 480.00)
 - 2. Debtor's Counsel.....(\$2,000.00)
 - 3. Class 1.....(None)
 - 4. Class 2.....(None)
 - 5. Class 3.....(None)
 - 6. Class 4
 - a. Hopkins Acura Car Loan
 - (1) \$495 (10% of Net Income)
 - 7. Class 5.....(None)
 - 8. Class 6.....(None)

9. Class 7 General Unsecured
 - a. 0.00% dividend \$291,209 Claims..(None)
 - b. Possible 1.2% Dividend

Dckt. 7.

On January 6, 2016, Debtor filed Amended Schedules I and J. Dckt. 22. For Amended Schedule I, Debtor states under penalty of perjury that he is employed by "Strategy Execution," and has been so employed for three months. Amended Schedule I, *Id.* at 1. Amended Schedule I is dated January 6, 2015 [sic], which the court understands to be 2016, with misstating of the new year a common error. *Id.* at 5. Three months prior would be October 6, 2015.

Debtor states that as of the January 6, 2016 filing of Amended Schedule I, his gross income is \$9,584.00. This is exacting the same amount which he stated on Original Schedule I was his income when working for Xerox. Dckt. 1. Debtor lists exactly the same deductions and Monthly Income on Amended Schedule I as on Original Schedule I.

On Amended Schedule J Debtor again states that he has \$4,454.82 in monthly expenses and has only \$100.00 of Monthly Net Income with which to fund a plan. Dckt. 22 at 4. While the total expense amount is exactly the same, several expense items have changed. Debtor's Rent/Mortgage is stated on Amended Schedule J to be (\$2,000.00) a reduction of \$250.00. Nothing indicates that Debtor has changed his living location. Debtor increases his transportation expense by \$84.00 to (\$284.82). Debtor also has increased his vehicle insurance by \$66.00 to (\$220.00). No explanation is provided as for these changes from the information provided under penalty of perjury on Original Schedules I and J, and then the changed information 43 days later on Amended Schedules I and J.

But Debtor is consistent that out of \$9,584.00 a month in gross income, he has only \$100.00 a month to fund a plan.

DEBTOR'S STATUS REPORT

On February 24, 2016, Debtor Filed a Status Report in connection with his Motion for Sanctions sought against his ex-wife. Dckt. 63. This Status Report was required by the court, to explain why and how what were presented as significant violations of the automatic stay in the Motion (Dckt. 14), were dismissed with prejudice without disclosure on any resolution or order authorizing a settlement by which Debtor waived, with prejudice, such rights of the Debtor and possibly Bankruptcy Estate. Order, Dckt. 46.

In support of the Motion for Sanctions, Debtor provided his declaration, in which he states under penalty of perjury:

"I am seeking to 1) refute my ex-spouse's claim of disability and her request for additional spousal support for the rest of her life and 2) expose my ex spouse's lies and concealment of a great deal of money that was not disclosed during our divorce notwithstanding her purchasing a house in cash."

Debtor's Declaration, ¶ 3; Dckt. 16.

Debtor reports that his ex-wife sought to assert claims for property settlement, sanctions pursuant to the California Family Code, and attorneys' fees in connection with their divorce proceedings. Report, p. 1:22-27.5; Dckt. 63. He further reports that there has been a "lengthy acrimonious history surrounding the dissolution." *Id.*; p. 1:28.5, 2:1.

Those claims were set to go to trial January 6, 2016, and Debtor's ex-wife and her counsel would not agree to a continuance, because they "thought the trial was continued too many times." *Id.*, p. 2:3.5-4.5. Debtor states that he sought a continuance because he was unrepresented in the family law proceedings.

Debtor reports that he filed the Motion for Sanctions in response to his ex-wife and her counsel seeking to proceed with the family law matter. In his Motion for Sanctions, Debtor (with the assistance of counsel) states with particularity that his ex-wife, along with her counsel, in an unidentified "nonbankruptcy tribunal steadfastly refuses to abide by the automatic stay." Motion for Sanctions, Dckt. 14. No reference is made to the "nonbankruptcy tribunal" being a family law proceeding or that it relates to a determination of sanctions or attorneys' fees. The Motion does state that the court is directed to read the points and authorities to divine other information which is not stated with particularity (as required by Fed. R. Bank. P. 9013) in the Motion for Sanctions.

In his Report, Debtor states that there has been a "Quid Pro Quo Resolution" of the Motion for Sanctions. This resolution was to continue the state court hearing on the condition that Debtor dismissed his Motion for Sanctions with prejudice. Report, p. 2:11-15.5. Debtor concludes that no approval of a "compromise" was required, because Debtor unilaterally determined that whatever damages would have been incurred by the estate and sanctions order would have been claimed as exempt by Debtor. Thus, the Debtor having made that determination, the court's involvement appears to have been determined superfluous with respect to alleged violations of the automatic stay.

STATE OF CLAIMS AND CREDITORS

Patricia Costley, Debtor's ex-wife has filed Proof of Claim No. 2 in the amount of \$353,937.00. Debtor disputes this Claim amount, stating that there has been no final determination of the dissolution of the marital rights and obligations of Debtor and Ms. Costley. Objection to Claim, Dckt. 51. Only a tentative ruling was issued by the state family law court, for which the final hearing has not been conducted.

Debtor is correct with respect to Ms. Costley stating a claim which is based on a "tentative ruling." In response to Question 8 (basis of claim) for Proof of Claim No. 2, Debtor's ex-wife states that the basis of the claim is,

"Monies owed per Final Divorce Judgment Dated 8/28/13. Order confirmed in Tentative Ruling and Proposed Statement of Decision dated 6/30/2014."

Patricia Costley and Debtor commended their dissolution proceeding on December

17, 2009. Four years later, a judgment was entered on August 28, 2013 dissolving their marriage. All issues relating to custody, visitation, and division of property reserved for further proceedings. A trial was commenced on October 11, 2013 for these issues, and on June 30, 2014 (five years after the dissolution proceedings were commenced) the state court family law judge issued a tentative ruling on domestic support and division of property.

Debtor states that the tentative ruling was not made final because Patricia Costley filed an objection, but no hearing has been conducted on that objection. Debtor does not state that he filed any objection to the family law judge's tentative ruling. As stated by Debtor, Ms. Costley's objections were: (1) the money to be paid back into the children's college fund by Debtor (a total of \$4,500.00, see Tentative Ruling attached to Proof of Claim No. 2, p. 13.) was not specified to be by a date certain, (2) that \$1,250.00 property equalization payment be ordered because due to the limits on wage garnishments a lump sum judgment amount was not collectable, and (3) that after each child turns 18 years old the payment amount be \$2,914.00 by Debtor to Ms. Costley.

It appears that Ms. Costley acknowledges that the ruling is tentative, but now may believe that it accurately states her rights, though not reduced to a final ruling (in the same manner as any creditor asserts a dollar amount claim, even though it has not been reduced to a judgment).

The Claims Bar Date in this case is April 6, 2016, leaving approximately one month for non-governmental claims to be filed. So far, the following claims have been filed:

- A. Proof of Claim No. 1 Ally Bank,
 - 1. Secured Claim.....\$27,037.56
 - 2. Collateral.....2010 Acura
- B. Proof of Claim No. 3, Connor Quiroz, by Patricia Costley
 - 1. Unsecured Claim.....\$1,500.00
 - 2. Based on Family Court Tentative Ruling (appears to be one of the \$1,500.00 children's college fund payments)
- C. Amended Proof of Claim No. 4, Sean McLean Jones
 - 1. Unsecured Claim.....\$ 1,500.00
 - 2. Original Proof of Claim filed by Patricia Costley
 - 3. Based on Tentative Ruling (appears to be one of the \$1,500.00 children's college fund payments)
- D. Proof of Claim No. 5, Michael Quiroz, by Patricia Costley
 - 1. Unsecured Claim.....\$1,500.00
 - 2. Based on Family Court Tentative Ruling (appears to be one of the \$1,500.00 children's college fund payments)

E. Proof of Claim No. 6, Capital One Bank (USA), N.A.

1. Unsecured Claim.....\$20,002.14

In reviewing Schedule F, the other major debt listed by Debtor is for "Chase Card," for \$22,143.00 unsecured claim.

It appears from Proofs of Claim Nos. 2, 3, 4, and 5, the vast majority of the potential debts in this case relate to Debtor's divorce. As it now sits, significant time and expense has been consumed in the state court action, which is now almost seven years old. A tentative ruling has been issued, but is sitting idle because Patricia Costley filed an objection to the tentative ruling, but Ms. Costley (nor the Debtor) has not prosecuted it to a final ruling.

It appears that it will be necessary for there to be determinations in the state court proceeding before this court can have a plan advance in this bankruptcy case. As the Supreme Court has recognized, there are areas of state law that federal courts should not unnecessarily intrude upon. One of the principal areas of law in which the Supreme Court has directed that the lower courts carefully consider the exercise of federal court jurisdiction arises with respect to domestic relation (family law) matters. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 12 (2004). "Thus, while rare instances arise in which it is necessary to answer a substantial federal question that transcends or exists apart from the family law issue, see, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 432-434, 80 L. Ed. 2d 421, 104 S. Ct. 1879 (1984), in general it is appropriate for the federal courts to leave delicate issues of domestic relations to the state courts." *Id.* at 13.

A copy of the Tentative Ruling of the State Court Judge in the dissolution proceeding is attached to Proof of Claim No. 2. The tentative ruling (to which Debtor does not state he objected) is to:

- a. Debtor pay \$1,500.00 to each of the three children to reimburse them for their college fund accounts. (This was for \$1,000.00 in monies wrongfully withdrawn by Debtor and an additional \$500.00 in sanctions, each.)
- b. For the 401-K Roll Over Account, as stipulated by Debtor and Ms. Costley, had a value of \$374,784.95 as of the date of separation, and that a QDRO divided that amount equally - \$187,392.00 each. At the time the 401-K Roll Over Account was transferred to Ms. Costley, it had only \$62,642.00 remaining in it, leaving Ms. Costley unpaid by \$124,750.00.
- c. Debtor had not paid \$229,187.00 for an equalizing payment.
- d. Ms. Costley did not show that the Ciello Winery Property was given as security for the obligation due her by Debtor.
- e. Pursuant to the QDRO, 50% of the Motorola Solutions Pension Fund for the period from the date of marriage to date of separation has been assigned to Ms. Costley.

- f. Ms. Costley was to prepare an earnings withholding order.
- g. Each party would bear its own attorneys' fees.

From the face of the tentative, the State Court judge was prepared to enter judgment for \$4,500.00 to be paid to the three children (\$1,500.00 each); \$353,937.00 to Ms. Costley for the monies due from Debtor for the 401-K Roll Over Account and the equalizing payment; Ms. Costley was assigned 50% of the Motorola Solutions Pension Fund; and that this obligation was not secured by the Ciello Winery Property.

There is little reason for this bankruptcy court to re-litigate what has been a time consuming, extensive state court process. If Ms. Costley now accepts the tentative ruling and Debtor did not object to it, then getting that reduced to a final order and judgment would appear to be of little moment. If there were improprieties with respect to those proceedings, the State Court judge is well able to address such conduct.

At this juncture, the court is presented with a nominal monthly payment, no distribution to creditor's plan. The monthly plan payment of \$100.00 is 1.0% of Debtor's \$9,584.00 gross income.

It appears that the present bankruptcy case has little to do with a restructuring of debt. Rather, it appears that the purpose is to move the battle from the family law court, where it appears to have been unproductively (at least from the perspective of getting a final order and judgment) prosecuted over the past seven years, to this bankruptcy court to determine the rights of Debtor and his ex-wife.

From the charges and counter charges, the court is reminded of the *War of the Roses*, a 1998 Moving directed by Danny DeVito which stars Michael Douglas, Kathleen Turner, and Danny DeVito. The storyline for the movie relates to the unrelenting campaign spouses wage against the other in a divorce battle over who will be victorious in retaining their home, and successfully punishing the other. One description of the plot line is,

"In an effort to win the house, Oliver offers his wife a considerable sum of cash in exchange for the house, but Barbara still refuses to settle. Realizing that his client is in a no-win situation, Gavin advises Oliver to leave Barbara and start a new life for himself. In return, Oliver fires Gavin and takes matters into his own hands. At this point, Oliver and Barbara begin spiting and humiliating each other in every way possible, even in front of friends and potential business clients. Both begin destroying the house furnishings; the stove, furniture, Staffordshire ornaments, and plates. Another fight results in a battle where Barbara nearly kills Oliver by using her monster truck to ram Oliver's antique automobile. In addition, Oliver accidentally runs over Barbara's cat in the driveway with his car. When Barbara finds out, she retaliates by trapping him inside his in-house sauna, where he nearly succumbs to heatstroke and dehydration."

Www.Wikipedia.org and www.imbd.com.

Such battles are not permitted to be transported to federal court. Additionally, to the extent that the parties are seeking to efficiently and effectively litigate the issues, there is little reason to start the litigation all over in federal court. Such would be not only a tremendous waste of judicial resources, but would not be consistent with the comity given by federal courts to the state court

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

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

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

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

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

17. [15-29147-E-13](#) JOHN QUIROZ
DPC-1 Richard Kwun

OBJECTION TO CONFIRMATION OF
PLAN BY PATRICIA COSTLEY
2-16-16 [[39](#)]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on February 16, 2016.

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

The court's decision is to ~~xxxxxx~~ the Objection.

Patricia Costley ("Creditor") filed an opposition to the Debtor's plan on February 16, 2016.

The Debtor filed an opposition to the instant Objection on February 18, 2016. Dckt. 108.

The Objection states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013, upon which the request for relief is based:

PATRICIA COSTLEY, CREDITOR, objects to confirmation of the Debtor's plan and does not recommend its confirmation. The

First Meeting of Creditors was held on January 7, 2015 at 11:00 a.m. and was concluded on February 4, 2016 at 11:00 am. Some of my questions were raised, and time did not permit others to be raised. Some questions were answered, but many were not, I requested information from Debtor's counsel Mr. Kwun via email, but received no response.

Problems in the following areas of Debtor's bankruptcy case and plan will be fully detailed in my accompanying Declaration:

1. "Exceeds the unsecured debt limit."
2. "Non-disclosure and under-reporting of income."
3. "Non-disclosure of assets and under-reporting of assets."
4. "Real property."
5. "Liquidation test."
6. "Non Compliance with Income Tax Return Submission and Large Refunds."
7. "Over claiming insurance expenses."
8. "Income available after child support cases."

No deadline was noticed for filing objections to confirmation. Rather, due to a clerical error, the Clerk's Office set the plan for a confirmation hearing, at which time the court can be orally notified of objections to confirmation.

Creditor provides a lengthy declaration in which she improperly includes exhibits, the Creditor still failed to properly state with particularity the grounds for relief in the Opposition.

As discussed by this court in connection with the Trustee's objection to confirmation, Ms. Costley and her ex-husband, the Debtor, have been in a prolonged, relatively non-productive (other than delay) dissolution proceeding in State Court for seven years. Other than Ms. Costley and three children, there are really no other creditors to be addressed in this case.

Therefore, the objection is **xxxxxxxxxxxxxx**.

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 Patricia Costley having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and

good cause appearing,

IT IS ORDERED that Objection to confirmation the Plan is
~~XXXXXXXXXXXXXXXXXXXXX~~.

18. 15-27854-E-13 DELANOYE ROBERTSON CONTINUED MOTION FOR RELIEF
KB-1 Richard L. Jare FROM AUTOMATIC STAY
1-26-16 [[45](#)]
BAYVIEW LOAN SERVICING, 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.

Correct Notice Not Provided. The court has no Proof of Service on record. However, Movant filed the motion on January 26, 2016. By the court's calculation, 28 days' before the scheduled hearing. 28 days' notice is required. In spite of no record of Proof of Service, Debtor and Trustee have filed a response to the motion.

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 denied without prejudice.

Bayview Loan Servicing LLC ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 2228 N. Chaco Trail, St.

George, Utah (the "Property"). Movant has provided the Declaration of Ju Li Roberson to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Roberson Declaration states that Debtor failed to identify Movant's claim in Schedule A of his bankruptcy plan and they are owed a debt of \$2,204,122.05 secured by the Property. Movant seeks to foreclose on the Property to collect.

Unfortunately, the Movant failed to file a Proof of Service along with the Motion. While this would typically be grounds to deny the Motion, both the Chapter 13 Trustee and the Debtor have filed responses to the instant Motion. As such, the parties have waived the defect. Therefore, the failure of the Movant to provide a Proof of Service is waived for purposes of the instant Motion.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response on February 9, 2016. Dckt. 50. The Trustee states that the Debtor's plan is not confirmed. The Debtor has paid a total of \$850.01 to date and is current under the proposed plan. The Trustee states that the Movant is not provided for in the plan per Section 6.05. Dckt. 36. The Debtor provides for \$1,400.00 per month rent or home ownership expenses on Schedule J and maintains that the Movant's claim is \$0.00 in Schedule D. Further, the Debtor has over \$800,000.00 in equity in the Property. The Trustee asserts that the Debtor appears to maintain that the Movant cannot pursue nonjudicial foreclosure based on the statute of limitation. However, due to the fact that the plan does not provide any adequate protection payments and the Debtor has not commenced an adversary proceeding to determine the rights in the Property, the Trustee has no basis to oppose the instant Motion.

DEBTOR'S OPPOSITION

Opposition has been filed by Delanoye Robertson ("Debtor") on February 10, 2016. Dckt. 53. The Debtor asserts that Movant does not have a legitimate claim because the Movant has not properly been assigned the deed of trust. The Debtor argues that MERS could not assign the note. The Debtor further asserts that Bank of America NA could not have assigned the Note to Movant because the Note has either been destroyed intentionally or lost.

The Debtor further contends that there is no lost note affidavit nor is there any evidence of transfer between MERS and Bank of America, N.A.

It is significant that Debtor offers no evidence in opposition to the Motion. Debtor offers no testimony in opposition to the Motion. Rather, Debtor's counsel merely argues that the Debtor does not think that Movant is the creditor.

MOVANT'S REPLY

The Movant filed a reply on February 17, 2016. Dckt. 61. The Movant argues that the stay should be lifted to allow the Utah judicial foreclosure action. Asserting abstention doctrines, the Movant asserts that there is good cause to allow the Movant to pursue its foreclosure action in Utah.

Next, the Movant asserts that Debtor's argument as to the ability of MERS to assign the note is not a valid argument. The Movant states that the Ninth Circuit and Utah courts have rejected the premise that MERS cannot assign the note. The Movant asserts that the deed of trust named United as lender and MERS as nominee for the lender and its successors and assigns. On November 6, 2008, MERS assigned the rights and beneficial interest under the deed of trust to Bank of America, N.A. as evidenced by the assignment of deed of trust recorded on March 4, 2009. Bank of America, N.A. assigned its rights and beneficial interest under the deed of trust to Movant on May 23, 2014, which was recorded on June 6, 2014.

Lastly, the Movant asserts that it is able to enforce the note. The Movant states that it has provided a lost note affidavit executed by Bank of America, N.A., which the Movant asserts renders the note legally enforceable. The Movant contends that based on the validity of the note and the legitimacy of the assignment, the Movant is able to enforce the rights under the note.

FEBRUARY 23, 2016 HEARING

Based on the stipulation of the parties, the court continued the hearing to 3:00 p.m. on March 1, 2016.

DISCUSSION

In order to grant a motion for relief the Movant need only show a colorable claim. They have done just that by providing a copy of an Assignment of Deed of Trust form Bank of America. Whether, Bank of America actually had legal right to assign the note is not a question to be answered through this motion.

Here, the Movant has provided authenticated evidence that the note has been assigned to the Movant and that the Movant has some colorable claim to enforce the rights under the note. The Debtor's argument concerning the statute of limitations and the validity of the note goes to the underlying issue of the claim, which can be properly adjudicated in the foreclosure action. The Debtor admits that there is an obligation secured by the Property. However, the Debtor seems to argue that the assignment has rendered the lost note affidavit ineffective.

Movant has presented a colorable claim for title to and possession of this real property. As stated by the Bankruptcy Appellate Panel in *Hamilton v. Hernandez*, No. CC-04-1434-MaTK, 2005 Bankr. LEXIS 3427 (B.A.P. 9th Cir. Aug. 1, 2005), relief from stay proceedings are summary proceedings which address issues arising only under 11 U.S.C. Section 362(d). *Hamilton*, 2005 Bankr. LEXIS 3427 at *8-*9 (citing *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740 (9th Cir. 1985)). The court does not determine underlying issues of ownership, contractual rights of parties, or issue declaratory relief as part of a motion for relief from the automatic stay Contested Matter (Fed. R. Bankr. P. 9014).

However, the Debtor has also presented a colorable objection to the claim of Movant in this case. The court has discussed this issue in detail in the rulings on the Motion to Dismiss this Case (DCN: DPC-1) and the Motion to Confirm the Second Amended Plan (DCN: RK-1). The court incorporates that discussion herein by this reference.

In short, the estate may have a very valuable real estate asset for which the debt secured by the deed of trust is not enforceable due to the expiration of the Utah Statute of Limitations. The Debtor may be able to propose a plan which provides for addressing the objection to the secured claim and a possible unsecured claim for misrepresentation and other non-contractual grounds for Movant in this case.

If the Debtor can so advance a plan, then all parties can efficiently, fairly, and properly have their claims and rights adjudicated through the bankruptcy case. It may be that pending resolution of the claims objection, the Debtor may have a plan provision to sell the real property and have the monies held in a blocked, interest bearing account. The Debtor's objection to the claim appears to center on a "simple" question of law, with there being no factual disputes concerning when the obligation secured by the deed of trust went into default (November 2007, as stated by both Debtor and Movant).

The court denies the present motion for relief from the stay in light of there being a serious issue raised as to the enforceability of the debt secured by the property. The determination of the enforceability of the debt is at the center of the claim filed by U.S. Bank, N.A. in this case. If the Debtor promptly moves forward with a Third Amended Plan to properly provide for creditor claims and the determination of U.S. Bank, N.A.'s secured claim (and unsecured claim if so filed by U.S. Bank, N.A.), then there appears to be a bona fide reason for this bankruptcy case.

If Debtor instead merely elects to use the automatic stay and a "free" injunction without addressing the U.S. Bank, N.A., Trustee, claim in this case, then cause may exist to terminate the stay and allow U.S. Bank, N.A. to proceed in state court.

The *bona fide* bankruptcy purpose addresses the abstention issues raised by Movant. Here, if the Debtor were prosecuting a plan which provided relief for creditors (all creditors) as permitted by the Bankruptcy Code, then there is a reason for the exercise of the broad grant of federal court jurisdiction pursuant to 28 U.S.C. § 1334. Having a state court make piecemeal decisions concerning bankruptcy claims and determining interest in property of the estate (for which federal courts are granted exclusive jurisdiction, 28 U.S.C. § 1334(e)) is not consistent with the uniform bankruptcy laws of the United States (U.S. Const. Art. 1, Sec. 8, Cl. 4) and the grant of federal court jurisdiction under 28 U.S.C. § 1334.

The mere fact that non-bankruptcy law determines the enforceability of the asserted rights does not mean that the matter must be tried in a state law forum. While Movant cites to various cases concerning the proper exercise of federal court jurisdiction, Movant misses; *Wellness International Network, Ltd. v. Sharif*, ___ U.S. ___, 135 S. Ct. 1932 (2015); *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014); *Stern v. Marshall*, 562 U.S. 462 (2013); , 86 S. Ct. 467, 15 L. Ed. 2d 391, and *Langenkamp v. Culp*, 498 U.S. 42 (1990); and *Katchen v. Landy*, 382 U.S. 323 (1966).

Here, the claim filed by U.S. Bank, N.A., Trustee is a core proceeding. 28 U.S.C. § 157(b). The unsecured claim, if any, for misrepresentation and other alleged "wrongs" will be a core matter if there is a dispute concerning such claim. The real property securing the asserted claim is property of the bankruptcy estate and subject to the exclusive (initially) jurisdiction of the

federal courts for the bankruptcy case. 28 U.S.C. § 1334(e).

In many respects, the "dispute" being asserted is a garden variety claims objection which bankruptcy courts address daily.

Parties Before the Court - Relief Granted

Proof of Claim No. 2 clearly identifies U.S. Bank, N.A., Trustee, as the creditor. Notices and payments are to be sent to Bayview **Loan Servicing**, LLC. This is commonly done for a business that provides the services of a "**loan servicer**." The "**loan servicer**" is an agent for the actual creditor, but not the creditor.

Here, Bayview **Loan Servicing**, LLC has mislabeled itself as "the creditor" rather than the "agent/loan servicer for Creditor U.S. Bank, N.A., Trustee." While the **loan servicer** may properly seek relief from the automatic stay for itself, its principal, and its principal's other agents, it cannot incorrectly tell the court that it is the creditor. This violates the fundamental principles underlying the exercise of federal judicial power - an actual case or controversy between the real parties in interest. U.S. Const. Art. III, Sec. 2.

Bayview Loan Servicing, LLC has request relief from the automatic stay only for itself. No relief has been requested for any principals of Bayview Loan Servicing, LLC or other agents of such principal. The specific relief requested is:

"21. Bayview requests the stay be lifted solely for purposes of pursuing a judgment allowing **it to foreclose** on the property. Bayview does not ask that the stay be lifted with respect to its claim for a deficiency judgment and it will not take any action to advance that claim in the foreclosure action unless and until this case is dismissed without a discharge

...
24. Bayview requests that this Court terminate the automatic stay as to Bayview's secured claim on the property currently imposed by 11 U.S.C. §§ 362(d)(1) and (2), and that the Court waive the requirements of Fed. R. B. P. 4001(a)(3) so Bayview may immediately proceed with alternative service of the foreclosure complaint."

If the court were to grant the motion as prayed, then U.S. Bank, N.A., Trustee, would not have relief from the automatic stay to prosecute the state court litigation. The assertion by Bayview Loan Servicing, LLC that it is the "real party in interest" is inconsistent with the Proof of Claim filed by U.S. Bank, N.A., Trustee, as the creditor holding the claim in this bankruptcy case.

The Motion is denied without prejudice.

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 Bayview Loan Servicing 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 Motion for Relief From the Automatic Stay is denied without prejudice.

19. 15-27854-E-13 DELANOYE ROBERTSON CONTINUED MOTION TO DISMISS
DPC-1 Richard L. Jare CASE
11-24-15 [21]

Tentative Ruling: The Motion to Dismiss 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 - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on November 24, 2015. By the court's calculation, 57 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor filed opposition. 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 court's decision is to deny without prejudice the Motion to Dismiss.

David Cusick, the Chapter 13 Trustee, filed the instant Motion to Dismiss on November 24, 2015. Dckt. 21. The Trustee seeks dismissal due to the Debtor being over the secured debt limit of 11 U.S.C. § 109(e), plan was not served, Debtor cannot make the payments due to the Schedules I and J do not accurately reflect the Debtor's income and expenses, there is no verification of income, no tax return has been provided, and no verification of Social

Security Number.

Delanoye Robertson ("Debtor") filed an opposition to the instant Motion on January 6, 2016. Dckt. 27. The Debtor states that due to Debtor's counsel being ill, there was a delay in filing a plan and correct schedules. The Debtor states that the original case was filed with the help of a paralegal and were incorrect. The Debtor requests that the Motion be denied.

The Debtor's counsel filed a declaration of counsel on January 18, 2016 to state that the updated documents have been sent to the Debtor for review. Dckt. 40. The Debtor's counsel states that the delay is due to his illness and apologizes.

JANUARY 20, 2016 HEARING

At the hearing, the court continued the Motion to 3:00 p.m. on March 1, 2016. Dckt. 42. The court ordered the following:

IT IS ORDERED that the Motion to Dismiss is continued to 3:00 p.m. on March 1, 2016 to be heard in conjunction with the Motion to Confirm.

IT IS FURTHER ORDERED that:

- A. On or before February 1, 2016 Debtor shall file a points and authorities and supporting evidence for the contention asserted in the Schedules and Amended Plan that the creditor whose claim is secured by the 2228 N. Chaco Trail, St. George, Utah property is an unenforceable claim and that the lien or other interest securing such claim in the property is void and unenforceable.
- B. Said points and authorities, and any pleadings relating to the Chapter 13 plan and motion to confirm not previously served, shall be served on the creditor having the alleged unenforceable claim, Bayview Loan Servicing, LLC (the apparent loan servicer for such creditor), the Chapter 13 Trustee, and U.S. Trustee, on or before February 1, 2016.

Dckt. 44.

TRUSTEE'S SUPPLEMENTAL DECLARATION

On February 16, 2016, Christina Lloyd, an employee at the Trustee's office, filed a declaration. Dckt. 58. Ms. Lloyd's declaration states that the Debtor has failed to file the Point and Authorities by the February 1, 2016 deadline.

DEBTOR'S REPLY

The Debtor filed a reply on February 24, 2016. Dckt. 66. The Debtor's counsel states that it was an oversight that he missed the deadline to file a

Points and Authority. Debtor's counsel argues that it is the court's fault that the Points and Authorities were not timely filed, stating in the Reply:

- A. "Richard Jare did not notice that Docket item 44 set a deadline for the filing of points and authorities on the motion to confirm."
- B. "While the court made it clear that the motion to confirm would not be granted without points and authorities, the court did not announce a deadline for this at the prior court hearing."
- C. "All PACER free looks are download periodically in bulk and shortly renamed thereafter. As a result of the bulk downloading process, it went unnoticed that the Civil Minute Order which was Docket item 44 apparently failed to download to my filing system in the 3rd week of January."
- D. "The deadline did not come to my attention until the receipt of the February 16th Supplemental declaration filed by the trustee."

Reply, Dckt. 66.

What the court reads here is that counsel's office practice is not to read orders issued by the court, but download documents in bulk and then store them for some reason. It was only when the Trustee told Debtor's counsel about the order did counsel go back and read the order which had been served on his office.

The Debtor continues to state that the Debtor has sufficiently shown that the Creditor's claim is barred and the lien is void pursuant to Utah law. The Debtor argues that the only basis for the Creditor's assertion that the statute of limitations has been tolled to allow the claim is due to the Debtor's misrepresentations. The Debtor argues that until that underlying determination is made, the case should not be dismissed.

Debtor incorporates by reference to an earlier pleading that the one statute relied upon is Utah Code § 78-12-23(2). Reply, Dckt. 66.

DISCUSSION

In looking at the original schedules in this case, Debtor listed a \$2,153,440 claim secured by the St. George, Utah property, which is given a value of \$900,000. Dckt. 1. On Amended Schedule D filed on January 15, 2016, that same debt is listed, but reduced to \$0.00, with the stated reason, "REDUCED TO \$0 AS THE UTAH STATUE OF LIMITATIONS FOR COLLECTION HAS RUN." Dckt. 35 at 11. These Amended Schedules were eFiled by Debtor's counsel.

The Additional Provisions of the Amended Chapter 13 Plan filed on January 15, 2016, makes the following "provision" for the claim secured by the Utah Property:

"Section 6.05 - General Conditions,
There is no provision for, Bayview Loan Servicing, LLC, as this party with a Deed of Trust is beyond the Statute of

Limitations for judicial foreclosure in Utah, and that is a state which apparently has prevented nonjudicial foreclosure under these circumstances."

Dckt. 36 at 6. The Plan does not provide for how this claim, or lien, will be addressed in the bankruptcy case. No provision is made for Debtor to commence a quiet title action as party of the bankruptcy case. No provision is made for creating a Debtor funded bond if it turns out that the interests in the real property are enforceable and the automatic stay worked an improper enjoining of the creditor. (A self-funded cash bond rather than requiring Debtor to obtain a third-party or cash up front bond as provided by Fed. R. Civ. P. 65(c) and Fed. R. Bankr. P. 7065.)

No points and authorities has been provided with the Motion to Confirm the Modified Chapter 13 Plan. No authority is provided for the proposition that the security in interest in the real property is no enforceable due to the statute of limitations having run. Rather than the plan dealing with creditors and claims, it seeks to ignore a claim which may be in excess of \$1,000,000.

In looking at Utah Code § 78-12-23(2), the LEXIS NEXIS on-line research service states that such code section no longer exists, but has been renumber/repealed. Presumably, counsel for Debtor looked up this statute before citing to the court, so apparently he used an out of date service. (This appears to be true, in that Debtor's counsel references the court to a 2002 version of the Utah statutes, but the LEXIS NEXIS states that the renumber/repeal occurred in 2008.

Given that counsel cites the court to an out of date statute puts in question the merits of the general contention that there can be no debt.

Utah Code § 78B-2-309 does provide for a six year statute of limitations for an action "upon any contract, obligation, or liability founded upon an instrument in writing [with exceptions not applicable here]..." In reviewing the annotations to this Utah Code Section, it appears that there are cases holding that a non-judicial foreclosure sale must be completed within the six year statute of limitations - unless tolled.

Attached to Proof of Claim No. 2 filed by U.S. Bank, N.A., Trustee, in this case is a copy of the note upon which the disputed secured claim is based. The Note is dated July 5, 2007. The Note provides that payments were to begin on September 1, 2007. Also attached to Proof of Claim No. 2 is a copy of a payoff statement dated December 23, 2015. It states that the total amount due on the loan is \$2,204,122.05, of which \$807,507 is interest. It further states that the loan is "due for the November 01, 2007 payment."

In the U.S. Bank, N.A., Trustee, (filed in the name of Bayview Loan Servicing, LLC, the loan servicer for the creditor) opposition to motion to confirm, it is affirmatively stated that Debtor defaulted in the Note by failing to make the payment due November 1, 2007, and all subsequent payments. Opposition, p. 2:10-12. It is also asserted that Debtor make misrepresentations on the loan application.

The court notes that in looking at the Proof of Service for the Motion, Plan, and supporting pleadings, they have not been served on a creditor for the alleged unenforceable claim, but only on the loan servicing company. Dckt. 37.

From what has been presented, there appears to be a colorable issue of whether there is an allowable secured claim by U.S. Bank, N.A., Trustee. At this juncture the court does not get into the possible arguments which U.S. Bank, N.A. may have concerning the tolling of the statute of limitations or why it may not be applicable to a non-judicial foreclosure sale.

PROSECUTION OF CASE

This is Debtor’s first bankruptcy case filed in this District. Debtor commenced this case on October 7, 2015. The Debtor’s Second Amended Plan (which is now before the court) was filed on January 15, 2016. Dckt. 36. The Second Amended Plan provides:

- a. Monthly Plan Payments of:
 - i. For two months.....\$ 300 each [\$ 600]
 - ii. For twelve months.....\$ 250 each [\$ 3,000]
 - iii. For twenty-two months.....\$ 500 each [\$11,000]
 - iv. For twenty-four months.....\$1,000 each [\$24,000]
 - v. For Total Plan Payments of \$36,600.00
- b. Payments Through the Plan
 - i. Chapter 13 Trustee Fees (Est. 8%).....(\$ 2,928)
 - ii. Debtor’s Counsel’s Fees.....(\$ 6,000)
 - iii. Class 2 Owners Assn Claim.....(\$32,149.11)
[computed with interest of 4.25% on amt in POC]
 - iv. General Unsecured Claims.....(\$3,103.00)
 - v. Total Payments Through Plan..(\$44,180.11)
- c. Over/(Underfunding) of Plan
 - i. Based on the above calculations, the Chapter 13 Plan is underfunded by (\$7,580.11).
- d. Treatment of U.S. Bank, N.A., Trustee, claim and addressing issue for property of the bankruptcy estate.
 - i. The Plan is very clear in that it makes no provision for addressing the claim filed by U.S. Bank, N.A., Trustee, the asserted deed of trust, and, by the Debtor’s statements, a very valuable piece of real property which can provide for paying creditors’ claims immediately rather than a five year, no interest (for general unsecured claims) plan. Even for the Owners Association secured claim, this is stretched out over five years.

U.S. Bank, N.A., Trustee, filed it secured claim on February 17, 2016. Proof of Claim No. 2. No objection has been filed to that Proof of Claim. 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).

Debtor's most recent statement of income and expenses is stated in the Amended Schedules I and J filed on January 15, 2016. Dckt. 35. For income, Debtor state under penalty of perjury of having gross income of \$5,700.00 a month from employment. Debtor states further net monthly income from rental property or operation of a business of \$994.01. Amended Schedule I, Dckt. 35 at 15-16.

Debtor states under penalty of perjury that he has \$4,774.01 in necessary monthly expenses for his family. This leaves only \$250.00 a month in Net Month Income. Schedule J, *Id.* at 18.

In his declaration in support of the Motion to Confirm the Second Amended Plan, Debtor offers no testimony as to how he can increase his payment 400% over the life of the Plan. Declaration, Dckt. 33. The court will not blindly approve a minimum payment plan which over the first three years does nothing more than pay Chapter 13 Trustee fees and Debtor's bankruptcy counsel's fees.

The Declaration also appears to express a gross misunderstanding of bankruptcy law and the nationwide jurisdiction of this court. In his declaration, Debtor states that he is having to pay for Utah litigation. It appears therefore that the bankruptcy case is not a plan to pay creditors, but merely a "free injunction" for state court litigation of unknown duration and expense.

While the court does not see Debtor currently proposing a viable plan, the court will not dismiss the case at this time. It is conceivable that Debtor could propose a plan which, in good faith, provides for creditors and includes using the automatic stay to quell state court litigation while the Debtor and U.S. Bank, N.A., Trustee, efficiently and effectively prosecute claim objection litigation and determination of the secured claim, if any, by U.S. Bank, N.A., Trustee.

The plan may well provide for an "self-funded" bond in-lieu of the normal up-front bond required in state court or pursuant to Federal Rule of Civil Procedure 65(c). See *In re De la Salle*, Bankr. E.D. Cal. 10-29678, Civil Minutes for Motion to Dismiss or Convert (DCN: MBB-1), Dckt. 230 (Bankr. E.D. Cal. 2011), *affirm.*, *De la Salle v. U.S. Bank, N.A. (In re De la Salle)*, 461 B.R. 593 (B.A.P. 9th Cir. 2011).

It is possible that the Plan may provide for the sale of the Utah Property, with the proceeds held pending determination of the allowability of the U.S. Bank, N.A., Trustee, secured claim. This should take care of the Owners Association secured claim, leaving only one creditor with a \$3,000 general unsecured claim.

The court denies the Motion to Dismiss without prejudice. The court elects not to continue the hearing to give the Debtor and Debtor's counsel a clean break to either propose a good faith plan, addressing the determination of the U.S. Bank, N.A. secured claim filed in this 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 Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Dismiss is denied without prejudice.

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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, all creditors, parties requesting special notice, and Office of the United States Trustee on January 16, 2016. By the court's calculation, 45 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). 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 court's decision is to deny the Motion to Confirm the Amended Plan.

Delanoye Robertson ("Debtor") filed the instant Motion to Confirm the Amended Plan on January 14, 2106. Dckt. 30.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on February 16, 2016. Dckt. 55. The Trustee objects on the ground that the Debtor cannot make payments under the plan or comply with the plan.

The Trustee asserts that Bayview Loan Servicing LLC ("Creditor") is not provided for in the plan per Section 6.05. The Debtor provides for \$1,400.00 per month rent or home ownership expense on Schedule J and maintains the Creditor's claim is \$0.00. The Debtor has approximately \$887,507.69 equity in the subject real property. The Trustee is uncertain if the Debtor is entitled to Chapter 13 relief where Schedule D was amended from listing the Debtor secured debts totally \$2,153,440.23 to owing \$24, 292.31.

The Trustee asserts that the Debtor maintains that the Creditor cannot pursue nonjudicial foreclosures based on the statute of limitations. Where the plan does not provide any adequate protection payment to the creditor and the Debtor has not commenced an adversary proceeding to determine the interest in the subject real property.

The Debtor amended Schedule J adding an expense in the amount of \$338.00. The plan does not list any treatment to or for an auto. The Trustee notes that a 2006 Honda Odyssey is listed on Schedule B.

Furthermore, the Trustee argues that the attorney's fees is not clear. The Debtor is Section 6.03 indicates that the attorney has chosen both no-look and look fee, based on whether the Debtor's plan is confirmed or not. The Debtor's attorney has not filed the Rights and Responsibilities but has filed form 2016(b). Dckt. 34.

CREDITOR'S OPPOSITION

The Creditor filed an opposition on February 17, 2016. Dckt. 60. The Creditor objects on the following grounds:

1. The plan is not filed in good faith. The Debtor fails to list Creditor, the Debtor filed the instant bankruptcy to avoid state court litigation, and the Debtor has attempted to avoid service.
2. The plan is not proposed in good faith because the plan fails to account for Creditor's claim.

DEBTOR'S SUPPLEMENTAL POINT AND AUTHORITY

On February 24, 2016, the Debtor filed a Point and Authority which attaches a copy of an order issued by Judge Waddoups of the United States District Court of Utah, Central Division. Dckt. 67.

DISCUSSION

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

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

The creditor first alleges that the plan is not feasible, See 11 U.S.C. § 1325(a)(6), and violates 11 U.S.C. § 1322(b)(2) because it contains no provision for payment of the creditor's matured obligation, which is secured by the Debtor's residence.

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

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

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

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

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

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

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

The Debtor's Second Amended Plan (which is now before the court) was filed on January 15, 2016. Dckt. 36. The Second Amended Plan provides:

A. Monthly Plan Payments of:

1. For two months.....\$ 300 each [\$ 600]
2. For twelve months.....\$ 250 each [\$ 3,000]
3. For twenty-two months.....\$ 500 each [\$11,000]
4. For twenty-four months.....\$1,000 each [\$24,000]

5. For Total Plan Payments of \$36,600.00

B. Payments Through the Plan

1. Chapter 13 Trustee Fees (Est. 8%).....(\$ 2,928)
2. Debtor's Counsel's Fees.....(\$ 6,000)
3. Class 2 Owners Assn Claim.....(\$32,149.11)
[computed with interest of 4.25% on amt in POC]
4. General Unsecured Claims.....(\$3,103.00)

5. Total Payments Through Plan..(\$44,180.11)

- C. Over/(Underfunding) of Plan
 - 1. Based on the above calculations, the Chapter 13 Plan is underfunded by (\$7,580.11).
- D. Treatment of U.S. Bank, N.A., Trustee, claim and addressing issue for property of the bankruptcy estate.
 - 1. The Plan is very clear in that it makes no provision for addressing the claim filed by U.S. Bank, N.A., Trustee, the asserted deed of trust, and, by the Debtor's statements, a very valuable piece of real property which can provide for paying creditors' claims immediately rather than a five year, no interest (for general unsecured claims) plan. Even for the Owners Association secured claim, this is stretched out over five years.

U.S. Bank, N.A., Trustee, filed its secured claim on February 17, 2016. Proof of Claim No. 2. No objection has been filed to that Proof of Claim. 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).

Debtor's most recent statement of income and expenses is stated in the Amended Schedules I and J filed on January 15, 2016. Dckt. 35. For income, Debtor states under penalty of perjury of having gross income of \$5,700.00 a month from employment. Debtor states further net monthly income from rental property or operation of a business of \$994.01. Amended Schedule I, Dckt. 35 at 15-16.

Debtor states under penalty of perjury that he has \$4,774.01 in necessary monthly expenses for his family. This leaves only \$250.00 a month in Net Month Income. Schedule J, *Id.* at 18.

In his declaration in support of the Motion to Confirm the Second Amended Plan, Debtor offers no testimony as to how he can increase his payment 400% over the life of the Plan. Declaration, Dckt. 33. The court will not blindly approve a minimum payment plan which over the first three years does nothing more than pay Chapter 13 Trustee fees and Debtor's bankruptcy counsel's fees.

The Declaration also appears to express a gross misunderstanding of bankruptcy law and the nationwide jurisdiction of this court. In his declaration, Debtor states that he is having to pay for Utah litigation. It appears therefore that the bankruptcy case is not a plan to pay creditors, but merely a "free injunction" for state court litigation of unknown duration and expense.

While the court does not see Debtor currently proposing a viable plan, the court will not dismiss the case at this time. It is conceivable that

Debtor could propose a plan which, in good faith, provides for creditors and includes using the automatic stay to quell state court litigation while the Debtor and U.S. Bank, N.A., Trustee, efficiently and effectively prosecute claim objection litigation and determination of the secured claim, if any, by U.S. Bank, N.A., Trustee.

The plan may well provide for an "self-funded" bond in-lieu of the normal up-front bond required in state court or pursuant to Federal Rule of Civil Procedure 65(c). See *In re De la Salle*, Bankr. E.D. Cal. 10-29678, Civil Minutes for Motion to Dismiss or Convert (DCN: MBB-1), Dckt. 230 (Bankr. E.D. Cal. 2011), affirm., *De la Salle v. U.S. Bank, N.A. (In re De la Salle)*, 461 B.R. 593 (B.A.P. 9th Cir. 2011).

It is possible that the Plan may provide for the sale of the Utah Property, with the proceeds held pending determination of the allowability of the U.S. Bank, N.A., Trustee, secured claim. This should take care of the Owners Association secured claim, leaving only one creditor with a \$3,000 general unsecured claim.

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 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 Plan is denied and the proposed Chapter 13 Plan is not confirmed.

21. [10-47165-E-13](#) WILLIAM/JANET RHOADES
SDB-3

MOTION FOR SUBSTITUTION AND/OR
MOTION FOR WAIVER OF SECTION
1328 REQUIREMENTS
1-25-16 [[57](#)]

Final Ruling: No appearance at the March 1, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 25, 2016. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

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

Joint Debtor, Janey Eileen Rhoades, seeks an order approving the motion to substitute the Joint Debtor for the deceased Debtor, William Leo Rhoades. This motion is being filed pursuant to Federal Rule Of Bankruptcy Procedure 1004.1.

The Debtor filed for relief under Chapter 13 on October 12, 2010. On December 9, 2010, the Debtor's Chapter 13 Plan was confirmed. On November 18, 2011, Debtor William Leo Rhoades passed away. The Joint Debtor asserts that she is the lawful successor and representative of the Debtor.

Pursuant to Federal Rule of Bankruptcy Procedure 1004.1, the Joint Debtor requests authorization to be substituting in for the deceased debtor and to perform the obligations and duties of the deceased party in addition to performing her own obligations and duties. The Suggestion of Death was filed on January 25, 2016. Dckt. 57. Joint Debtor is the wife of the deceased party and is the successor's heir and lawful representative. Joint Debtor states that she will continue to prosecute this case in a timely and reasonable manner.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response to the instant Motion on February 16, 2016. Dckt. 62. The Trustee states that there is additional evidence necessary to justify the relief sought:

1. Timeliness of Notification
 - a. Trustee asserts that the Debtor has not explained why the Debtor waited so long to report the deceased Debtor's death.
 - b. The order confirming required the Debtor to notify the Trustee if there is any change in employment. Debtor William Rhoades was listed on Schedule I as unemployed. The Debtor maintains they received insurance proceeds from a post-petition policy. Further, the Debtor revealed to the Trustee by letter that the policy was from Mr. Rhoades post-petition employer.
2. The Debtor does not provide specific evidence as to the following:
 - a. The Debtor has failed to furnish an insurance policy to establish the amount of the proceeds which are described as \$94,000.00.
 - b. The Debtor states she expended the proceeds in replacement of husband's lost earnings. The Debtor has failed to file a bank statement evidencing such.

DEBTOR'S REPLY

The Debtor filed a reply on February 23, 2016. Dckt. 65. In response, the Debtor states the following:

1. The Debtor was unaware that she was required to report her husband's passing. The Debtor believed her obligation was to maintain the plan payments.
2. Debtor William Rhoades became employed approximately 4 months after the petition was filed. The position was temporary and paid only \$11.00 per month more than the unemployment benefits disclosed in the initial petition. The Debtors decided to wait to see if the employment became more long term. Unfortunately, Mr. Rhoades passed away only ten months into the employment.
3. The Debtor has attached the policy summary.
4. The Debtor asserts that she has provided a copy of certain months of bank statements, as requested by the Trustee.
5. The Debtor states that, while the Trustee has submitted no evidence to refute the Debtor's statements that the proceeds were necessary, the Debtor has provided evidence that the funds

were used for expenses.

TRUSTEE'S RESPONSE

The Trustee filed a response on February 25, 2016. Dckt. 72. The Trustee states that the Debtor's reply has resolved the Trustee's concerns.

DISCUSSION

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

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

The application of Rule 25 and Rule 7025 is discussed in COLLIER ON BANKRUPTCY, 16TH EDITION, §7025.02, which states [emphasis added],

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

The motion for substitution must be made not later than 90 days following the service of the suggestion of death. Until the suggestion is served and filed, the 90 day period does not begin to run. In the absence of making the motion for substitution within that 90 day period, paragraph (1) of subdivision (a) requires the action to be dismissed as to the deceased party. However, the 90 day period is subject to

enlargement by the court pursuant to the provisions of Bankruptcy Rule 9006(b). Bankruptcy Rule 9006(b) does not incorporate by reference Civil Rule 6(b) but rather speaks in terms of the bankruptcy rules and the bankruptcy case context. Since Rule 7025 is not one of the rules which is excepted from the provisions of Rule 9006(b), the court has discretion to enlarge the time which is set forth in Rule 25(a)(1) and which is incorporated in adversary proceedings by Bankruptcy Rule 7025. Under the terms of Rule 9006(b), a motion made after the 90 day period must be denied unless the movant can show that the failure to move within that time was the result of excusable neglect. 5 The suggestion of the fact of death, while it begins the 90 day period running, is not a prerequisite to the filing of a motion for substitution. The motion for substitution can be made by a party or by a successor at any time before the statement of fact of death is suggested on the record. **However, the court may not act upon the motion until a suggestion of death is actually served and filed.**

The motion for substitution together with notice of the hearing is to be served on the parties in accordance with Bankruptcy Rule 7005 and upon persons not parties in accordance with Bankruptcy Rule 7004...

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

Here, Janet Eileen Rhoades has provided sufficient evidence to show that administration of the Chapter 13 case is possible and in the best interest of creditors after the passing of the debtor. The Motion was filed within the 90 day period specified in Federal Rule of Bankruptcy Procedure 1016, following the filing of the Suggestion of Death. Dckt. 57. Based on the evidence provided, the court determines that further administration of this Chapter 13 case is in the best interests of all parties, and that Joint Debtor, Janey Eileen Rhoades, as the wife of the deceased party and is the successor's heir and lawful representative may continue to administer the case on behalf of the deceased debtor, William Leo Rhoades. The court grants the Motion to Substitute Party.

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

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

The Motion for Substitute After Death filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause

appearing,

IT IS ORDERED that the Motion is granted and Janet Eileen Rhoades is substituted as the personal representative for the interests of the late William Leo Rhoades and is allowed to continue the administration of this Chapter 13 case pursuant to Federal Rule of Bankruptcy Procedure 1016.

22. [10-50165](#)-E-13 DONALD/LUCILE STEWART
RHM-6

MOTION FOR COMPENSATION FOR
ANNE COSTIN, SPECIAL COUNSEL,
MOTION TO PAY
1-20-16 [[124](#)]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on January 20, 2016. By the court's calculation, 41 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). 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 Allowance of Professional Fees is granted.

Anne Costin, the Special Counsel ("Applicant") for Donald Stewart, the Debtor in Possession ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period August 26, 2013 through January 20, 2016. The order of the court approving employment of Applicant was entered on July 17, 2014, Dckt. 99. Applicant requests fees in the amount of \$10,500.00 and costs in the amount of \$1,005.27.

Improperly Requests Authorization of Settlement

Throughout the body of the Motion, the Applicant is seeks for authorization for the Debtor to pay the agreed upon fee under the employment agreement. However, at the end, the Motion requests that the court authoize and approve the Settlement of Debtor and the former employer, Able Engineering.

The Motion does not plead any grounds as to why the compromise should be approved. In fact, the settlement is not even attached to the Motion. Instead, it appears that the Applicant added the request as an afterthought in the prayer. This is improper.

The court cannot and will not approve a settlement when there is no Motion to Approve pending nor when the Applicant failed to provide a signed copy of the settlement itself. Without this information, the court cannot determine if the settlement is in the best interest of the Debtor, the estate, or the creditors.

However, the court can determine whether the fee request is proper, even without first approving some unspecified settlement on unsepcificied terms.

Therefore, the Applicant has improperly attempted to join a motion for professional fee pursuant to 11 U.S.C. § 330 and a motion to approve compromise. This is improper. Each motion must assert one claim against the other party. As to the request to approve the comprmoise, the court denies without prejudice the request.

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' Committee 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 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 obtaining a successful settlement of Client's wrongful termination action against his former employer, Able Engineering. The estate has \$30,000.00 of unencumbered monies from the settlement to be administered as of the filing of the application. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Contingency Fee: Litigation

Applicant computes the fees for the services provided as a percentage of the monies recovered for Client. Applicant represented Client in litigation to pursue a wrongful termination action against Client's former employer, Able Engineering. Client agreed to a contingent fee of 40% of the gross if, as was the case here, the matter was resolved after filing of a lawsuit, but no later than 75 days before the date initially set for the trial or arbitration. However, Applicant has agreed to reduce the contingency fee request to 35%. In approving the employment of applicant, the court approved the contingent fee, subject to further review pursuant to 11 U.S.C. § 328(a). \$18,494.73 of net monies (exclusive of these requested fees and costs) was recovered for Client.

Costs and Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$1,005.27 pursuant to this applicant.

FEES AND COSTS & EXPENSES ALLOWED

Fees

Percentage Fees

The court finds that the fees computed on a percentage basis recovery for Client to be reasonable and a fair method of computing the fees of Applicant in this case. Such percentage fees are commonly charged for such services provided in non-bankruptcy transactions of this type. The court allows First and Final Fees of \$10,500.00 pursuant to 11 U.S.C. § 330 for these services provided to Client by Applicant. The Debtor is allowed to pay fees from the available settlement proceeds held by Applicant in a manner consistent with the order of distribution of the settlement proceeds.

Costs and Expenses

As to the request for costs, the Applicant fails to provide any declaration or evidence as to what expenses were advanced by the Applicant. While the court does not argue that under the employment agreement the Applicant is entitled to reimbursement, the court will not grant such reimbursement without evidence of such costs. Therefore, due to the failure to provide evidence, the court disallows \$1,005.27 of the requested costs.

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

Fees \$10,500.00

pursuant to this Application as first and 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 Anne Costin ("Applicant"), Special Counsel for the Debtor in Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Anne Costin is allowed the following fees and expenses as a professional of the Estate:

Anne Costin, Professional Employed by Debtor

Fees in the amount of \$ \$10,500.00

IT IS FURTHER ORDERED that the costs of \$1,005.27 are not allowed by the court.

The Fees and Costs pursuant to this Applicant, and Fees in the amount of \$10,500.00 approved pursuant to prior Interim Application are approved as final fees pursuant to 11 U.S.C. § 330.

IT IS FURTHER ORDERED that the Debtor is authorized to pay the fees allowed by this Order from the available settlement proceeds held by Applicant in a manner consistent with the order of distribution of the settlement proceeds.

23. 16-20465-E-13 NYKIN RESHETNYAK AND
MS-1 VALENTINA PETROVA
Mark Shmorgon

MOTION TO VALUE COLLATERAL OF
WELLS FARGO FINANCIAL NATIONAL
BANK
1-30-16 [8]

Final Ruling: No appearance at the March 1, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditor, and Office of the United States Trustee on January 30, 2016. By the court's calculation, 31 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). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the 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 Wells Fargo Financial National Bank ("Creditor") is granted and the secured claim is determined to have a value of \$500.00.

The Motion filed by Nykin Reshetnyak and Valentina Petrova ("Debtor") to value the secured claim of Wells Fargo Financial National Bank ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a child's bedroom set, desk, file cabinet, bookshelves, and a bed ("Asset"). The Debtor seeks to value the Asset at a replacement value of \$500.00 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 Assets's title secures a purchase-money loan incurred in October 14, 2013, which is more than one year prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately \$2,000.00. 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 \$500.00. *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 Nykin Reshetnyak and Valentina Petrova ("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 Wells Fargo Financial National Bank ("Creditor") secured by an asset described as child's bedroom set, desk, file cabinet, bookshelves, and a bed ("Asset") is determined to be a secured claim in the amount of \$500.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Asset is \$500.00 and is encumbered by liens securing claims which exceed the value of the asset.

24. [15-27472-E-13](#) RIGOBERTO/FELIX RODRIGUEZ MOTION TO VALUE COLLATERAL OF
PGM-4 Peter G. Macaluso CITIBANK, N.A.
1-27-16 [[83](#)]

Final Ruling: No appearance at the March 1, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditor, and Office of the United States Trustee on January 27, 2016. By the court's calculation, 34 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). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the 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 Citibank, N.A. ("Creditor") is granted and the secured claim is determined to have a value of \$500.00.

The Motion filed by Rigoberto and Felix Rodriguez ("Debtor") to value the secured claim of Citibank, N.A. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of an Apple laptop, an LG television and an iPhone 5 ("Asset"). The Debtor seeks to value the Asset at a replacement value of \$250.00 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 Assets's title secures a purchase-money loan incurred in 2013, which is more than one year prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately \$1,758.36. 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 \$250.00. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

The Motion for Valuation of Collateral filed by Rigoberto and Felix Rodriguez ("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 Citibank, N.A. ("Creditor") secured by an asset described as an Apple laptop, an LG television and an iPhone 5 ("Asset") is determined to be a secured claim in the amount of \$250.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Asset is \$250.00 and is encumbered by liens securing claims which exceed the value of the asset.

25. [12-25574-E-13](#) JASON/MARGARET KHAN
PGM-1 Peter G. Macaluso

CONTINUED MOTION FOR OMNIBUS
RELIEF UPON DEATH OF DEBTOR
10-29-15 [[52](#)]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 29, 2015. By the court's calculation, 40 days' notice was provided. 28 days' notice is required.

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

The Motion to Substitute is denied without prejudice.

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

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

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

TRUSTEE'S OPPOSITION

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

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

DEBTOR'S REPLY

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

1. Further administration of the case is possible because the Surviving Debtor is the deceased Debtor's husband and successor in interest. The Surviving Debtor states that he intends to complete the plan. Dckt. 55. Additionally, the Surviving Debtor asserts that it is in the best interest of the parties to continue the case because there is a confirmed plan.
2. The Surviving Debtor did not receive anything more than a social security death benefit of \$255.00 which was used for the funeral of the deceased Debtor.
3. The pension belongs to the Surviving Debtor and Operating Engineers.
4. The Debtor's income was based on the surviving Debtor's employment and a contribution from his deceased wife of approximately \$1,600.00 per month, less \$200.00 for taxes for 1099 work. The Debtor states that while the income from the deceased Debtor has been eliminated, the Surviving Debtor does have fewer expenses as his daughters are now 19 and 26 years of age and no longer require food and other expenses originally contemplated in the 2012 budget. The Debtor acknowledges the need to amend Schedules I and J to ensure the ongoing feasibility of the plan.

March 1, 2016 at 3:00 p.m.

DECEMBER 8, 2015 HEARING

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

TRUSTEE'S RESPONSE

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

SUPPLEMENTAL SCHEDULE I AND J

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

<u>Schedule I</u>	<u>May 1, 2012</u>	<u>January 29, 2016</u>	<u>Difference</u>
Employment:	Grade Setter at Top Grade Construction (8 months)	Labor at Kdw Construction (2 years and 8 months)	
Gross Wages	\$6,988.28	\$3,917.33	<\$3,070.95>
Payroll Deductions	\$1,686.79	\$1,089.92	<\$596.87>
Monthly Income (including deceased spouse)	\$6,717.74	\$2,827.14	<\$3,890.60>

<u>Schedule J</u>	<u>May 1, 2012</u>	<u>January 29, 2016</u>	<u>Difference</u>
Rent/Mortgage	\$1,312.26	\$1,305.69	<\$6.57>
Electricity, heat, natural gas	\$250.00	\$280.00	\$30.00
Water and sewer	\$82.00	\$83.26	\$1.36
Telephone, cable, cell phone, internet	\$395.00	\$152.00	<\$243.00>
Pest Control	\$26.00	\$0.00	<\$26.00>

Clothing, Laundry, Dry Cleaning	\$260.00	\$10.00	<\$250.00>
Transportation	\$550.00	\$125.00	<\$425.00>
Recreation, clubs, and entertainment	\$0.00	\$8.00	\$8.00
Insurance	\$173.46	\$173.46	\$0.00
Tax	Tax Withholdings for 1099 - \$200.00	Vehicle Reg - \$125.00	<\$175.00>
Time Share Installment	\$178.68	\$0.00	<\$178.68>
Maintenance	\$48.46	\$0.00	<\$48.46>
Registration	\$52.88	\$0.00	<\$52.88>
Food	\$1,075.00	\$100.00	<\$975.00>
Home Maintenance	\$250.00	\$0.00	<\$250.00>
Medical and Dental	\$350.00	\$6.00	<\$344.00>
Personal Care	\$210.00	\$0.00	<\$210.00>
Pet Food and Expenses	\$130.00	\$0.00	<\$130.00>
TOTAL	\$6,173.74	\$2,283.41	<\$3,890.33>

DEBTOR'S REPLY

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

FEBRUARY 9, 2016 HEARING

At the hearing, the court continued the hearing to 3:00 p.m. on March 1, 2016. Dckt. 78.

DISCUSSION

The Debtor has failed to file any supplemental papers in connection with the instant Motion to explain the changes in expenses..

Federal Rule of Bankruptcy Procedure 1016 provides that, in the event the Debtor passes away, in the case pending under chapter 11, chapter 12, or chapter 13 "the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded

in the same manner, so far as possible, as though the death or incompetency had not occurred." Consideration of dismissal and its alternatives requires notice and opportunity for a hearing. *Hawkins v. Eads*, 135 B.R. 380, 383 (Bankr. E.D. Cal. 1991). As a result, a party must take action when a debtor in chapter 13 dies. *Id.*

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

The application of Rule 25 and Rule 7025 is discussed in COLLIER ON BANKRUPTCY, 16TH EDITION, §7025.02, which states [emphasis added],

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

The motion for substitution must be made not later than 90 days following the service of the suggestion of death. Until the suggestion is served and filed, the 90 day period does not begin to run. In the absence of making the motion for substitution within that 90 day period, paragraph (1) of subdivision (a) requires the action to be dismissed as to the deceased party. However, the 90 day period is subject to enlargement by the court pursuant to the provisions of Bankruptcy Rule 9006(b). Bankruptcy Rule 9006(b) does not incorporate by reference Civil Rule 6(b) but rather speaks in terms of the bankruptcy rules and the bankruptcy case context. Since Rule 7025 is not one of the rules which is excepted from the provisions of Rule 9006(b), the court has discretion to enlarge the time which is set forth in Rule 25(a)(1) and which is incorporated in adversary proceedings by Bankruptcy Rule 7025. Under the terms of Rule 9006(b), a motion made after the 90 day period must be denied unless the movant can show that the failure to move within that time was the result of excusable neglect. 5 The suggestion of the fact of death, while it begins the 90 day period running, is not a

prerequisite to the filing of a motion for substitution. The motion for substitution can be made by a party or by a successor at any time before the statement of fact of death is suggested on the record. **However, the court may not act upon the motion until a suggestion of death is actually served and filed.**

The motion for substitution together with notice of the hearing is to be served on the parties in accordance with Bankruptcy Rule 7005 and upon persons not parties in accordance with Bankruptcy Rule 7004...

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

Local Bankruptcy Rule 5009-1(b) requires the filing with the court Form EDC3-190 Debtor's 11 U.S.C. § 1328 Certificate. Local Bankr. R. 1016-1 permits a movant, in a single motion, to request for the substitution for a representative, the authority to continue the administration of a case, and waiver of post-petition education requirement for entry of discharge.

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

Supplemental Schedules

First, it is worth noting that the Debtor delayed in filing supplemental Schedules as ordered by the court. The Debtor was ordered to file the supplemental Schedules by the extended January 22, 2016 deadline. Dckt. 71. The Debtor did not file the Schedules until January 29, 2016 (which was the deadline for the Trustee to file responses to the supplemental Schedules). Dckt. 75.

Debtor does not provide any declaration to substantiate the dramatic changes in Schedules I and J, especially in light of there being three years between the updated information. As discussed *supra*, the Debtor's Schedules I and J appear dramatically different, with numerous expenses either being dramatically reduced or eliminated. While it is clear this is due to the death of the deceased Debtor and also the fact Debtor's family moved out of the house, the Debtor has still failed to provide a declaration or testimony substantiating this changes.

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

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

The instant Motion has been continued twice already to afford the Debtor the opportunity to provide sufficient information. The Debtor has failed to provide such information to date. This Motion was filed on October 29, 2015. The time for the Debtor to supplement the instant Motion has come and gone.

Some of the glaring holes in the financial information include: (1) Debtor spending only \$10 a month over two years for clothing and laundry; (2) Debtor spending only \$0.00 for home maintenance (decreased from a necessary \$250.00 a month); (3) Debtor spending only \$100.00 a month on food (decreased from \$1,075.00 for two persons), which for a 31 day month is only \$1.07 per meal; and (4) \$0.00 for personal care (decreased from \$210.00 for two persons).

If the court were to grant the Motion, it would be a situation where the court merely rubber stamps whatever Debtor's counsel puts in front of the court, irrespective of the obviously financial illogic.

Therefore, the Motion is denied without prejudice. The surviving Debtor and his counsel can go back, put together supporting evidence to explain Debtor's current financial situation, and show the court how the Debtor can perform the plan or will move to modify the plan. The court declines the opportunity to grant part of the Motion and designate the surviving Debtor as the personal representative in light of the gross failure to provide any explanation for \$100 a month food expense, no home maintenance, and a disappearing personal care expense. Debtor's statements on the Supplemental Schedules may well demonstrate an inability to sufficiently understand his finances or serve as the personal representative for the deceased Debtor's interests.

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

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

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

IT IS ORDERED that the Motion is denied without prejudice.

26. [15-29675-E-13](#) TOMMY/LINDA THOMAS
DPC-1 Bruce Charles Dwigins

OBJECTION TO DISCHARGE BY DAVID
P. CUSICK
2-3-16 [[17](#)]

Tentative Ruling: The Objection to Discharge has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4003(b). The failure of the Debtor 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 as consent to the granting of the motion. 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 Objection and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on February 3, 2016. By the court's calculation, 27 days' notice was provided. 28 days' notice is required.

The Objection to Discharge has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4003(b). The failure of the Debtor 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 as consent to the granting of the motion. Cf. *Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Objection to Discharge is overruled.

David Cusick, the Chapter 13 Trustee ("Objector"), filed the instant Objection to Debtor's Discharge on February 3, 2016. Dckt. 17.

Unfortunately, the Objector has not provided sufficient notice. The Objector states that the Objection is being made pursuant to Local Bankr. R. 9014-1(f)(1), which requires a minimum of 28-days notice. Here, the Objector only provided 27 days.

Therefore, due to the insufficient notice, the Objection is overruled.

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

Findings of Fact and Conclusions of Law are stated in the

Civil Minutes for the hearing.

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

IT IS ORDERED that Objection to Discharge is overruled.

**THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING
IF MOVANT CAN SHOW PROPER GROUNDS FOR WHICH THE REQUESTED
RELIEF MAY BE ENTERED IN LIGHT OF THE FORGOING ISSUES**

ALTERNATIVE RULING

David Cusick, the Chapter 13 Trustee ("Objector"), filed the instant Objection to Debtor's Discharge on February 3, 2016. Dckt. 17.

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

The Debtor filed a Chapter 7 bankruptcy case on January 8, 2015. Case No. 15-20106. The Debtor received a discharge on December 11, 2015. Case No. 15-20106, Dckt. 17.

The instant case was filed under Chapter 13 on December 17, 2015.

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

Here, the Debtor received a discharge under 11 U.S.C. § 727 on December 11, 2015, which is less than four-years preceding the date of the filing of the instant case. Case No. 15-20106, Dckt. 17. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), the Debtor is not eligible for a discharge in the instant case.

Therefore, the objection is sustained. Upon successful completion of the instant case (Case No. 15-29675), the case shall be closed without the entry of a discharge and Debtor shall receive no discharge in the instant case.

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

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

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

IT IS ORDERED that Objection to Discharge is sustained.

IT IS ORDERED that, upon successful completion of the instant case, Case No.

15-29675, the case shall be closed without the entry of a discharge.

27. 16-20777-E-13 MICHELE WILLIAMS MOTION TO EXTEND AUTOMATIC STAY
PGM-1 Peter G. Macaluso 2-16-16 [7]

**APPEARANCE OF PETER MACALUSO, COUNSEL FOR DEBTOR
REQUIRED FOR MARCH 1, 2016 HEARING**

NO TELEPHONIC APPEARANCE PERMITTED FOR COUNSEL

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

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

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

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

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

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

The Motion to Extend the Automatic Stay is denied.

Michele Williams ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond 30 days in this case. This is the Debtor's second bankruptcy petition pending in the past year. The Debtor's prior bankruptcy case (No. 14-23385) was dismissed on November 9, 2015, after Debtor was delinquent in plan payments in the amount of \$8,940.00. See Order, Bankr. E.D. Cal. No. 14-23385, Dckt. 138, November 9, 2015. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor thirty days after filing of the petition.

Here, Debtor states that the instant case was filed in good faith and provides an explanation for why the previous case was dismissed. The Debtor asserts that good cause exists to extend the stay to allow Debtor to prevent a foreclosure on her house and to protect the Debtor's assets. The Debtor's Declaration declares that her circumstances have changed because she is currently looking for a second job or, in the alternative, rent out a room in her house.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on February 23, 2016. Dckt. 13. The Trustee objects on the grounds that the Debtor failed to list all cases filed in the past 8 years, omitting the most recent prior case, and the basis for the instant Motion.

Additionally, the Trustee objects on the ground that the Debtor's declaration is misleading. Specifically, the Debtor declares "I have not acquired any new debt since my previous case was dismissed." Dckt. 9. However, Santander Consumer USA filed a proof of claim on February 19, 2016, which indicates the Debtor entered into a retail installment sale contract on November 8, 2015 for a used vehicle, with a monthly payment of \$631.01.

DISCUSSION

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). The subsequently filed case is presumed to be filed in bad faith if the Debtor failed to perform under the terms of a confirmed plan. *Id.* at § 362(c)(3)(C)(i)(II)(cc). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* at § 362(c)(3)(C).

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

1. Why was the previous plan filed?

2. What has changed so that the present plan is likely to succeed?

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

In the instant case, the Debtor has not sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay. The Debtor does not indicate how, after being delinquent nearly \$9,000.00 in the prior case which led to the dismissal of the Debtor's case, now the Debtor can propose the instant case in good faith. This is only further exasperated by the Debtor failing to report all bankruptcy cases filed in the past eight year and the Debtor's misleading statement as to additional debts incurred.

The court might assume that the Debtor's failure to list the Debtor's most recently dismissed prior case was due to there being only three spaces available on the Official Form 101, Part 2, #9 and that the Debtor's counsel accidentally forgot to attach an additional page with the case. This is Debtor's fifth case since 2009.

Debtor's first Chapter 13 case, 09-40428 (in pro se), was filed on September 23, 2009, and dismissed on November 19, 2009. Debtor follow up two months later, filing her second Chapter 13 case, 10-2333 (in pro se) on February 12, 2010. The second Chapter 13 case was converted to one under Chapter 7 by Debtor on February 26, 2010. Debtor was granted a discharge on July 30, 2010.

Debtor's third Chapter 13 case was filed on September 9, 2011, 11-41829 (represented by counsel, Peter Macaluso). That case was dismissed on March 24, 2014. Debtor confirmed a plan which required her to may two payments of \$100.00 each and then fifty-eight payments of \$3,000.00 each. The Chapter 13 Plan sought to cure the \$30,000.00 pre-petition arrearage and \$6,500.00 post-petition arrearage on the claim secured by the first deed of trust recorded against Debtor's property and restructure Debtor's car loan. 11-41829; Plan, Dckt. 43. The order confirming the Plan was filed on February 21, 2012. On February 10, 2012, (even before the order confirming the prior plan was filed) Debtor filed a proposed Modified Plan and Motion to Confirm the modified plan. Debtor sought to increase the Plan payments to \$4,330.00 a month. *Id.*; Modified Plan, Dckt. 69.

The court denied the motion to confirm the Modified Plan, which was necessary because the Debtor was delinquent on the prior confirmed plan \$3,000.00, even before the order confirming was filed by the court. *Id.*; Civil Minutes, Dckt. 87. In addition, Debtor was \$1,330.00 delinquent on the proposed Modified Plan. *Id.*

In the third Chapter 13 Case Debtor ran a Second Modified Plan by the court and creditors, with the motion to confirm being granted by order dated June 25, 2012. By September 13, 2012, two months later, the Chapter 13 Trustee had filed a Notice of Default under the Second Modified Plan. *Id.*, Dckt. 102. As of September 13, 2012, Debtor was \$1,935.00 delinquent in plan payments (\$1,035.00 monthly plan payments).

Debtor then filed a proposed Third Modified Plan, which would forgive the prior defaults and require \$1,035.00 payments for forty-eight months. *Id.*, Dckt. 108. The court confirmed the Third Modified Plan by order filed on

December 20, 2012. *Id.*, Dckt. 113.

Eight months later the Chapter 13 Trustee filed a Notice of Default in Plan payments. *Id.*, Dckt. 114. As of August 14, 2013, Debtor was \$3,105.00 delinquent in payments (June and July 2013 payments). In response on September 12, 2013, Debtor filed a Fourth Modified Plan. *Id.*, Dckt. 116. The Debtor would start remaking payments with a \$1,045.00 payment in September 2013 and continuing for thirty-six months thereafter. On November 1, 2013, the court confirmed Debtor's Fourth Modified Plan. *Id.*; Order, Dckt. 129.

By January 2014, merely one month after confirmation, the Trustee filed a Notice of Default. *Id.*, Dckt. 130. The Trustee gave notice that Debtor was \$2,090.00 delinquent in payments (the November and December 2013 plan payments). Upon confirmation of the Fourth Modified Plan, Debtor immediately defaulted.

On March 24, 2014, the court dismissed Debtor's Third Chapter 13 case. *Id.*; Order, Dckt. 133.

With the March 24, 2014 dismissal, Debtor then immediately commenced her fourth Chapter 13 case; 14-23385, counsel Peter Macaluso; on April 1, 2014. Debtor's Chapter 13 Plan in the fourth case required monthly plan payments of \$2,895.00 for forty-two months and then payments of \$3,065.00 for twelve months. *Id.*; Plan, Dckt. 5. The court filed its order confirming the plan on June 18, 2014. *Id.*, Dckt. 56.

On December 22, 2014, the Chapter 13 Trustee filed a Notice of Default in the fourth Chapter 13 case. *Id.*, Dckt. 61. The Notice states that Debtor was delinquent \$5,790.00 in payments (October and November 2014). These defaults occurred three months after confirmation of the Plan in the fourth Chapter 13 case.

Debtor responded with a First Modified Plan in the fourth Chapter 13 case. *Id.*; First Modified Plan, Dckt. 67. The First Modified Plan forgave the defaults, required a \$1,500.00 payment for January 2015, then twelve payments of \$2,000.00, then thirteen payments of \$2,095.00, and then twenty-six payments of \$2,180.00. The court denied confirmation of the First Modified Plan. *Id.*; Order, Dckt. 77. In denying the motion, the court recounted the history of Debtor's prior filing of cases and defaults. *Id.*; Civil Minutes, Dckt. 75. The court's findings include the following:

"In seeking the various modifications, the Debtor has some routine and some extraordinary emergencies which have arisen. Each of these has derailed the Debtor in performing what she had promised. While the court is sympathetic to consumers dealing with everyday real life struggles, **the Debtor and her counsel have demonstrated that the Debtor is not a credible witness with respect to her finances.** It appears that Debtor and her counsel create whatever plan is the Debtors dream, not one based on financial reality.

...

The Trustees objection concerning the adequate protection payment is well-taken. A review of the proposed plan and the supplemental pleadings show that the Debtor has not explained or provided information as to how the proposed adequate

protection payments are sufficient. The Debtor, in her reply, does not provide any information on the sufficiency or adequacy of the proposed payment but instead only addresses the Trustees first part of the objection concerning the escrow. The court cannot determine, based on the information provided, if the proposed payments is sufficient.

...

The Debtors response to the inaccurate expense information is not credible. This Debtor has been represented by counsel for three year, through multiple plan modifications, multiple defaults, and multiple preparation of financial information. Merely stating that the Debtor did not understand that the expenses were to reflect her real, accurate expenses as averaged over the year is not sufficient. **To say so implies that the Debtor believe she could make up a budget choosing the expenses from whatever month is lower to mislead the court, Trustee, and creditors.**

...

Using the information from Schedules I and J filed by Debtor in April 2014, the court considers the feasibility of the Debtor performing this modified plan (which following in the footsteps of five prior plans which have failed). While the Debtor reports have good income from a stable employer, **the expenses listed on Schedule J are not reasonable as documented by the Debtors bankruptcy history.** Debtor has a child with significant medical issues. Debtor only budgets only \$75.00 a month. **Debtor has a son who is unemployed, living at home, and dependant on the Debtor not only for his needs, but his minor daughter. Debtor has not budgeted for that.**

Debtor's plan requires her to make payments for two vehicles. One is a 2006 Land Rover, to repay a \$12,000 debt. This vehicle is now 9 years old, and it is likely that the next extraordinary event explaining a default is that there has been a major vehicle expense. The Debtor is also choosing to pay for a 2009 Dodge Charger. **While repeatedly defaulting in her Chapter 13 Plan, it is necessary for this Debtor to be paying for two cars...."**

Civil Minutes, *Id.* (emphasis added).

Debtor responded with a Second Modified Chapter 13 Plan. *Id.*, Dckt. 82. The court denied confirmation of the Second Modified Plan. *Id.*; Order, Dckt. 92. In denying confirmation, in addition to findings as with the prior Plan, the court states,

"The Debtor has not shown that yet another modification of a Chapter 13 Plan will result in a feasible plan that can be performed. While the Debtor may desire to have a plan, she has shown that she cannot perform the plan. **It is concerning to the court that both Debtor and Debtor's counsel have not addressed these concerns as they have been on notice of such inadequacies in the proposed plans for awhile.** The Debtor

seeks a continuance to provide information that the Debtor should have provided the first time she sought to modify the plan. The court will not grant a continuance."

Civil Minutes, Dckt. 90.

Debtor bounced back and filed a Fourth Modified Chapter 13 Plan in her fourth Chapter 13 case. *Id.*; Fourth Modified Plan, 97. In denying the Motion to Confirm the Fourth Modified Plan, the court findings included (in addition to findings consistent with denial of the prior motions to confirm the prior plans in the fourth Chapter 13 case) the following:

"The Debtor filed a reply on September 29, 2015. Dckt. 118. The Reply is Debtors counsels arguments, for which no declarations or other evidence has been presented. However, **the Reply purports to argue facts for which no evidence is presented.**

...
The Trustees objection concerning the adequate protection payment is well-taken. A review of the proposed plan and the supplemental pleadings show that the **Debtor has not explained or provided information as to how the proposed adequate protection payments are sufficient.** The Debtor, in her reply, **merely states this is proper without any evidence or citations to justify the Debtors calculation.** The objection by the Trustee, however, should not have come as a surprise given the fact that the Trustee raised the same exact objection on the Debtors last attempt to confirm a modified plan. The Debtor still has not provide any evidence that this amount, however, actually does protect the creditor, outside of merely saying it does. The court cannot determine, based on the information provided, if the proposed payments is sufficient.

...
Finally, the proposed adequate protection payment based on 31% of Debtors income bears no relationship to what a plausible modified loan payment would be for Debtor. Just because Debtor can only afford to pay \$1,698.01 a month for a payment doesn't mean that it is adequate for the secured claim. Proof of Claim No. 7 states as of the commencement of this case the secured claim was \$403,795.48. When the case was filed, Debtor stated the property had a value of \$316,000.00. Schedule A, Dckt. 1.

If the Creditor were to modify the loan to capitalize all of the pre-petition arrearage, waive the post-petition arrearage and reamortize the obligation over 30 years at 3.5% interest per annum (as if Debtor had a high credit score and had placed a 20% down payment, not 100% financing), the monthly principal and interest payment alone would be \$1,813.22."

Id.; Civil Minutes, Dckt. 127.

On November 9, 2015, the court filed its order dismissing the fourth Chapter 13 case. *Id.*, Dckt. 138.

Three months later, Debtor commenced the current (fifth in the last six years) Chapter 13 case. As evidence in support of the present Motion, Debtor provides her declaration. Dckt. 9. Most of the motion appears to be a copy of the prior declarations used in support of the many motions to confirm amended and modified plans in the prior four Chapter 13 cases.

The only testimony is that Debtor received a raise (amount not stated in declaration), Debtor is looking for a second job, and Debtor is encouraging her two kids (ages 19 and 21) to get jobs. Debtor offers no evidence of any ability to prosecute this fifth bankruptcy case in good faith.

First, Debtor makes a material misstatement as to not having incurred any new debt. In addition to the 2009 Dodge Charger and 2006 Land Rover Rsport that Debtor wants to pay for, Debtor has added a 2013 Mercedes-Benz C-Class to her stable of vehicles. Schedules B, Dckt. 18. For these three vehicles, Debtor's secured debt has grown to more than \$79,000.00 - for one Debtor.

The Debtor now has an additional car payment in the amount of \$631.01 a month. If the Debtor had already been unable to afford the plan payments in the prior plan, the Debtor does not provide sufficient evidence that the instant case will be successful.

In her declaration, Debtor indicates that this (fifth) time in bankruptcy she is serious about prosecuting a case and performing a plan. Talk has become cheap in the Debtor's parade of bankruptcy cases. Merely stating she has moved her mother into her sister's house and Debtor's daughter is getting ready to college do not credible statements make. FN.1. Debtor's further statement, "I have reached out to other family members, letting go of my pride, and everyone in on board to help with any and everything." Declaration, ¶ 15; Dckt. 9.

FN.1. In reviewing the schedules filed in the prior cases:

- A. In the fourth Chapter 13 bankruptcy case, Debtor did not list her mother as part of the household, identifying any expenses for the mother, and did not disclose the mother contributing any income to the household. 14-23385; Schedules I and J, Dckt. 1.
- B. In the third Chapter 13 bankruptcy case, Debtor did not list her mother as part of the household, identifying any expenses for the mother, and did not disclose the mother contributing any income to the household. 11-41829; Second Amended Schedules I and J, Dckt. 64; First Amended Schedules I and J, Dckt. 35; and Schedules I and J, Dckt. 19.
- C. In the second Chapter 13 bankruptcy case (converted by Debtor to one under Chapter 7), Debtor did not list her mother as part of the household, identifying any expenses for the mother, and did not disclose the mother contributing any income to the household. 10-23333; Schedules I and J, Dckt. 14.
- D. In the first Chapter 13 bankruptcy case, Debtor did not list

her mother as part of the household, identifying any expenses for the mother, and did not disclose the mother contributing any income to the household. 09-40428; Schedules I and J, Dckt. 15.

This statement says much more than Debtor probably intended. First, it is pregnant with Debtor having made statements and represented her finances inaccurately to the court out of pride and hubris. To get what the Debtor wanted in prior cases, Debtor would say whatever she wanted to say. Second, there are no declarations from anyone about providing any financial support or their ability to provide such support. Again, Debtor makes an empty representation to try and lead (or mislead) the court into extending Debtor's bankruptcy protection into a seventh year (when the maximum period for a bankruptcy plan is only five years).

The Declaration closes with the Debtor stating that she will now complete this plan and "never jeopardize losing my house again." *Id.*, ¶ 16. This statement is of little, if any, credibility. Debtor, over four prior bankruptcy cases spanning six years repeatedly threw her house into default. Debtor has continuously had repeated things to spend her money on other than her plan and her house (and arrearage) payments. FN.2.

FN.2. This house, that the Debtor swears she really intends to try and keep in this fifth Chapter 13 case, is described on Schedule A as having a value of \$316,000.00. Schedule A/B, Dckt. 18 at 1. However, Debtor also states that the property is subject to a first deed of trust securing an obligation of (\$393,828.30). *Id.*

In the fourth Chapter 13 case, Debtor stated that this property had exactly the same value, \$316,000.00, and was subject to secured claims totaling \$410,000.62. 14-23385; Schedule A, Dckt. 1 at 17. Wells Fargo Bank, N.A. filed Proof of Claim No. 7, stating that its claim secured by this property was in the amount of \$403,795.48.

In the third Chapter 13 case, Debtor stated that this property had a slightly higher value, \$339,900.00, and was subject to secured claims totaling (\$339,900.00). 11-41829; Schedule A, Dckt. 16 at 3. On the same Schedule A Debtor also lists a second property, and states under penalty of perjury that its value is \$170,000.00, which is exactly the same amount as what Debtor says were the claims secured by that second property - (\$170,000.00) Wells Fargo Bank, N.A. filed Proof of Claim No. 9, stating that its claim secured by this property was in the amount of \$364,463.05.

After Proof of Claim No. 9 was filed in the third Chapter 13 case, Debtor amended Schedule A, reducing the value of the property to \$300,000.00 and increasing the secured claims (Wells Fargo Bank, N.A.) to (\$408,448.77). Amended Schedule A, Dckt. 35 at 4.

In the second Chapter 13 case (converted to Chapter 7), Debtor stated that this property had a significantly lower value, \$210,000.00, and was subject to secured claims totaling (\$412,048.00). 10-2333; Schedule A, Dckt. 14 at 3.

In her first Chapter 13 case Debtor stated that this property had a significantly lower value, \$210,000.00, and was subject to secured claims totaling (\$412,048.00). 09-2333; Schedule A, Dckt. 15 at 13.

To the extent that Debtor's opinions as to value have any credibility, Debtor's six years of Chapter 13 filings have been to try and save a property that has a negative equity between (\$202,000.00) to (\$100,000.00).

The court also notes that while the Debtor professes a commitment to saving the house, she has demonstrated that there are higher priorities for her. On the eve of this bankruptcy case Debtor chose to purchase a 2013 Mercedes-Benz C Class and take on a \$631.00 car payment, with full knowledge that her budgets were faulty and her four prior Chapter 13 cases ended in failure.

The Chapter 13 Plan filed in this case on February 25, 2016, requires monthly plan payments of \$2,900.00 each for months one and two, and then \$2,980 each for the next forty-eight months. Plan, Dckt. 17. Debtor, now having purchased a 2013 Mercedes-Benz, proposes to surrender the 2009 Charger and 2006 Land Rover. While making the current \$2,092.74 mortgage payment and \$430.00 arrearage payment for the claim secured by her home, through the plan, Debtor will make her \$631.01 payment for her 2013 Mercedes-Benz C-Class directly to the creditor. Other than the home, the Plan only provides for paying \$956 in priority taxes. Creditors holding general unsecured claims are provided for a 0.00% dividend.

Debtor has not rebutted the presumption of bad faith. Debtor's declaration and her conduct in buying a 2013 Mercedes-Benz C-Class on the eve of filing her fifth bankruptcy case scream bad faith. Debtor was not content with buying a modest, financially responsible vehicle. Instead, she chooses to rub in the face of her creditors holding general unsecured claims that she can drive in a late model Mercedes-Benz purchased on the eve of bankruptcy while insuring that those creditors get a 0.00% dividend.

Rather than "swallowing her pride," Debtor (and her counsel) is puffing out her chest and thumbing her creditors in the eye. FN.3.

FN.3. It is significant that through most of her Chapter 13 failures Debtor has been represented by counsel. Counsel has filed Schedules which clearly did not provide for reasonable expenses. Counsel has repeated filed pleadings professing Debtor's commitment to a Chapter 13 Plan, which have been shown by events to be false. This has not been a poor, unsophisticated consumer who has merely stumbled, but a consumer who has engaged counsel to repeated file inaccurate documents under penalty of perjury. This is a consumer who has engaged counsel to repeated present the court with defective plans. This is a consumer who has engaged counsel to confirm a plan, immediately default, and then have that counsel quickly throw up another plan, after plan - which were ultimately doomed to failure.

While the court could give counsel the benefit of the doubt once or twice when the Debtor "stumbled," here counsel clearly has to be aware that the Debtor is providing materially inaccurate financial information and that counsel is filing documents (which filings are subject to Fed. R. Bankr. P. 9011) which contain materially inaccurate financial information.

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

IT IS ORDERED that the Motion is denied.

28. [15-28582-E-13](#) LYNN SANSOM
PPR-1 Gerald B. Glazer

MOTION TO APPROVE STIPULATION
RESOLVING PLAN TREATMENT
2-11-16 [[53](#)]

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

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

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

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

Correct Notice NOT Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee on February 11, 2016. By the court's calculation, 19 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(3), 21 day notice.)

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

The Motion For Approval of Compromise is denied.

U.S. Bank, N.A., as Trustee for Harborview Mortgage Loan Trust 2005-8, Mortgage Loan Pass-Through Certificates, Series 2005-8, its agents, assignees and/or successors in interest ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Lynn Marie Sansom ("Settlor"). The claims and disputes to be resolved by the proposed settlement is the treatment of Movant in the Settlor's Chapter 13 Plan.

Movant and Settlor has resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the

court (the full terms of the Settlement is set forth in the Settlement Agreement filed as Dckt.31):

- A. No disbursements are to be made by the Chapter 13 Trustee towards Movant's pre-petition arrears on Proof of Claim No. 2
- B. Upon approval of the stipulation, the Objection to Chapter 13 Plan is deemed withdrawn.
- C. Upon approval of the Stipulation, the Notice of Taking Deposition Duces Tecum is deemed withdrawn.
- D. Movant may, at its option, amend the Proof of Claim to reflect that there are no pre-petition arrears; however, should Movant decide not to amend the Proof of Claim, this Stipulation and Order shall control over the treatment of Movant's pre-petition arrearages.
- E. In the event that the instant case is dismissed or discharged, this Stipulation and the Order based thereon shall be terminated; however, Movant will apply all payments received to principal, interest and the Escrow Advance and to no other fees that may arise.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Construction)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-425 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

- 1. The probability of success in the litigation;
- 2. Any difficulties expected in collection;
- 3. The complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and
- 4. The paramount interest of the creditors and a proper deference to their reasonable views.

In re A & C Props., 784 F.2d 1377, 1381 (9th Cir. 1986); *In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

The Motion does not state any claims to be compromised. Rather, it merely states that Debtor filed bankruptcy, at the time of bankruptcy a mortgage payment was due and not paid. Debtor made the payment after the bankruptcy case was filed, but Movant listed the amount as being an "arrearage" as of the commencement of the case.

What the Motion really seeks is a piecemeal approval of plan terms. Debtor does not current have a proposed plan before the court. On February 11,

2016, the court filed its order confirming the Debtor's Chapter 13 Plan. Dckt. 52. That Plan provides for Class 4 treatment for the Nationstar Mortgage secured claim - with a monthly post-petition payment in the amount of \$1,478.67 to be made directly by Debtor. The authorized payment is for the claim for which Movant received the post-petition payment from Debtor. Proof of Claim No. 2 filed for Movant lists Nationstar Mortgage, LLC as the person to whom payments are to be made and notices provided.

The "Stipulation" and the current "Motion" indicate to the court that there is no actual case or controversy between Debtor and Movant. Rather, it appears that the "Stipulation" and "Motion" have been made well after the bell has rung.

While the "Stipulation" provides that Movant's objection to confirmation is withdrawn, the court overruled that objection long ago. January 19, 2016 Order, Dckt. 39. There is no objection before the court.

The "Stipulation" appears to have other mischief in it. Rather than the parties responsibly terminating the Notice of Deposition, they want the court to do it for them. Further, Movant wants the court to absolve it from correcting Movant's proof of claim if it is inaccurate. If it is accurate, then it is inaccurate. If Movant needs to amend it to make it accurate, Movant needs to do so.

This is nothing more than a run of the mill situation where a Debtor was current on the mortgage payments when the case was filed - the grace period for the November 2016 payment not having expired. Hidden from the court is when the Debtor made the payment. Whether it was timely or belated.

The Motion to Approve the Stipulation 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 Approve Compromise filed by U.S. Bank, N.A., as Trustee for Harborview Mortgage Loan Trust 2005-8, Mortgage Loan Pass-Through Certificates, Series 2005-8, its agents, assignees and/or successors in interest, ("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 Motion is denied.

29. [12-30588-E-13](#) DIANE/OSVALDO MALDONADO
ET-10 Matthew R. Eason

MOTION TO MODIFY PLAN
1-15-16 [[213](#)]

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on January 15, 2016. By the court's calculation, 46 days' notice was provided. 35 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). 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 court's decision is to deny the Motion to Confirm the Modified Plan.

Diane and Osvaldo Maldonado ("Debtor") filed the instant Motion to Confirm the Modified Plan on January 15, 2016. Dckt. 213.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on February 16, 2016. Dckt. 218. The Trustee objects on the following grounds:

1. The plan will complete in more than 60 months due to the increase in dividend to Class 7 claimants.
2. The Debtor does not state why the plan is being modified, failing to comply with Fed. R. Bankr. P. 9013.

3. The Trustee believes the Debtor intended the new plan payment of \$324.25 commence in January 2016, which is what the Debtor paid. The Trustee believes Debtor may have meant to propose a plan payment of \$17,413.15 through month 42 (December 2015, where the Trustee's records reflect Debtor's actual payments to the Trustee through December were \$17,413.05 and the plan was signed January 15, 2016 by the Debtor), then \$324.25 for 18 months.

DEBTOR'S SUPPLEMENTAL DECLARATION

Debtor Diane Marie filed a supplemental declaration on February 25, 2016. Dckt. 321. The Debtor states that the Debtor has continued to retain reserve funds as part of our for this Chapter 13 plan. The Debtor states that she believes they have sufficient funds to make up the \$2,308.88 at the end of the plan.

The Debtor further asserts that at the time of filing, the budget proposed was very tight. The expenses have grown and has required that the Debtor propose an amended plan. The Debtor testifies that the budget for utilities is better reflected as \$625.00.

As to the Trustee's third objection, the Debtor agrees with the correction proposed by the Trustee in the order confirming.

DISCUSSION

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

The Trustee's objections are well-taken.

While the Trustee's third objection appears to be a scrivener's error, the remaining two objections go to the feasibility and viability of the plan. The court concurs with the Trustee that the Motion itself does not comply with Federal Rule of Bankruptcy Procedure 9013, requiring that the motion state with particularity the grounds for which relief is sought. Here, the Debtor does not state with particularity the reasons for the instant Motion to Modify. The Debtor's Declaration and Supplemental Declaration does give further guidance, it is not in the Motion as required.

This is further exasperated by the Debtor's supplemental declaration which states that there are "reserve funds" and that the \$2,308.88 in delinquency will be paid at the end of the plan. The Debtor does not offer any evidence that they have sufficient funds to make up the delinquency. This is not sufficient.

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 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 Plan is denied and the proposed Chapter 13 Plan is not confirmed.

30. [15-27296-E-13](#) HOWARD THOMAS MOTION TO CONFIRM PLAN
WSS-1 W. Steven Shumway 1-13-16 [[38](#)]

Final Ruling: No appearance at the March 1, 2016 hearing is required.

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

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

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Amended Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Debtors have provided evidence in support of confirmation. No opposition to the Motion has been filed by the Chapter 13 Trustee or creditors. The amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

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

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

IT IS ORDERED that the Motion is granted, Debtor's Chapter 13 Plan filed on January 13, 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.

31. [15-25098](#)-E-13 NESTOR ROCES
BLG-2

MOTION FOR COMPENSATION BY THE
LAW OFFICE OF BANKRUPTCY LAW
GROUP, PC FOR PAULDEEP BAINS,
DEBTORS ATTORNEY
2-2-16 [[77](#)]

Final Ruling: No appearance at the March 1, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 2, 2016. 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). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties 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.

Pauldeep Bains, the Attorney ("Applicant") for Nestor Roces, the Chapter 13 Debtor ("Client"), makes a First Interim Request for the Allowance of Fees and Expenses in this case. FN.1.

FN.1. The Motion states that the Applicant is making the Motion pursuant to 11 U.S.C. § 330, which deals with final requests for compensation. However, this case having been filed less than a year ago and being converted to a Chapter 13 case, the court believes that this is a scrivener's error on part of the Applicant. The court sua sponte corrects the Motion to read as a first interim request.

The period for which the fees are requested is for the period September 2, 2015 through January 27, 2016. Applicant requests fees in the amount of \$5,190.00 and costs in the amount of \$0.00.

David Cusick, the Chapter 13 Trustee, filed a non-opposition to the instant Motion on February 4, 2016.

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' Committee 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 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 prepare and attend hearing on the Motion to Convert, communicate with Client on the best course of action, whether conversion from a Chapter 7 to Chapter 13 is in the best interest of the client, and preparing the instant Motion for Compensation. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

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 12.3 hours in this

category. Applicant assisted Client with preparation of the petition, correspondence with the Debtor and Trustee concerning case administration, review Motion for Compensation filed by the Trustee, and attend the Meeting of Creditors.

Motion to Convert: Applicant spent 4.1 hours in this category. Applicant prepared the Motion to Convert, corresponded with client concerning the Motion, traveled and attended the hearing, and emailed client over the granting of the Motion to Convert.

Motion for Compensation: Applicant spent 1.5 hours in this category. Applicant prepared the instant Motion for Compensation.

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, Esq.	7.5	\$350.00	\$2,625.00
Pauldeep Bains, Esq.	7.7	\$350.00	\$2,695.00
Jennifer Walden, Paralegal	2	\$185.00	\$370.00
Lindsey Sloan, Office Assistant	.7	\$85.00	\$0.00
	0	\$0.00	\$0.00
	0	\$0.00	\$0.00
	0	\$0.00	<u>\$0.00</u>
Total Fees For Period of Application			\$5,690.00

The Applicant previously received \$500.00 from the Debtor pre-petition, and is requesting authorization for the \$5,190.00.

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. First Interim Fees in the amount of \$5,190.00 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 are approved and authorized to be paid by the Trustee from the available funds of the Plan Funds 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	\$5,190.00
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pursuant to this Application as interim fees pursuant to 11 U.S.C. § 331 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 Pauldeep Bains, the Attorney ("Applicant") for Nestor Rocas, the Chapter 13 Debtor ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Pauldeep Bains is allowed the following fees and expenses as a professional of the Estate:

Pauldeep Bains, Professional Employed by Chapter 13 Debtor

Fees in the amount of \$5,190.00

The fees and costs are allowed pursuant to 11 U.S.C. § 331 as interim fees and costs, subject to final review and allowance pursuant to 11 U.S.C. § 330.

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

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 21, 2015. By the court's calculation, 36 days' notice was provided. 35 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). 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 court's decision is to deny the Motion to Confirm the Modified Plan.

William and Diane Catlett ("Debtor") filed the instant Motion to Confirm on December 21, 2015. Dckt. 79.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on January 8, 2016. Dckt. 92. The Trustee opposes confirmation because the plan is not the Debtor's best efforts. The plan proposes "\$117,913.72 through 11-15, \$415 x 7 starting 12-15" with a 2% dividend to unsecured creditors.

The Plan attempts to reclassify Class 1 claimant Shellpoint for Debtor's residence to Class 4 to be paid outside the plan. The Trustee states

that under the current confirmed plan, the Trustee was paying the ongoing mortgage monthly installment amount of \$1,862.43. The Debtors are attempting to modify the loan to reduce the payment to \$1,474.12, a difference of \$388.22.

The Trustee states the following as grounds for why the plan is not the Debtor's best efforts:

1. The Debtor is seeking to reduce the plan payment by \$1,610.00, an additional \$135.88 beyond what the Debtor had indicated they had available.
2. The Debtors' declaration (Dckt. 81) indicates that the plan continues to have an expense of \$259.00 a month for "Vehicle Tax/License" which should be explained by the Debtor as this represents \$3,108.00 per year for "Vehicle Tax/License" which the Trustee argues appears high.
3. The Debtor has not addressed as to any tax refund expected for 2015.
4. The Debtor also states adjusted changes to the Debtors' budget as follows:

<u>Expense</u>	<u>Original Expense</u>	<u>Adjusted</u>	<u>Reason</u>
Food	\$700.00	\$1,200.00	We have 3 ground children who eat more each year
Education	\$100.00	\$600.00	Daughter has gymnastic class. Other daughter is on a traveling soccer team that involves more monthly fees and travel expenses.
Home Main	\$50.00	\$200.00	Our home is almost 100 years old need continuous repairs. The sewer has needed to be cleaned out, toilet replaced, stucco redone, windows recauled [sic], washing machine
Clothing	\$50.00	\$150.00	We have three children that need seasonal clothing, now winter jackets and shoes. Clothes don't last more than a year with growth spurts
Personal	\$75.00	\$150.00	We have five persons that need haircuts, hair products, facial and body care
Entertainment	\$36.00	\$98.00	We have a family of five, including a teenager with expenses with friends
Water/Sewer	\$110.00	\$143.00	City bill has increased every year

According to the listed changes, the Debtor's expenses have increased by \$1,410.00, but no specific proof supporting the increase has been filed. The Trustee highlights the \$500.00 increase per month in monthly education costs.

5. The Debtor's amended Schedule I (Dckt. 82) lists a monthly income of \$5,777.90. Compared to the last filed Schedule I (Dckt. 1) that list a monthly income of \$4,508.57, it appears the Debtor's income has increased by \$1,269.33.

DEBTOR'S REPLY

The Debtor filed a reply on January 19, 2016. Dckt. 98. The Debtor requests a continuance of the hearing to allow the Debtor the opportunity to address the Trustee's concerns.

JANUARY 26, 2016 HEARING

At the hearing, the court continued the hearing to 3:00 p.m. on February 23, 2016. Dckt. 103. The Debtor was ordered to file and serve any supplemental papers on or before February 9, 2016. Any objections or responses were ordered to be filed and served on or before February 16, 2016.

DEBTOR'S SUPPLEMENTAL DECLARATION

The Debtor filed a supplemental declaration on February 9, 2016. Dckt. 109. The Debtor states that William Catlett is on a fixed income of \$4,400.00 a month through workman's compensation and Debtor Diane Catlett has a part time job of approximately 20 hours per week at \$10.00 per hour. The Debtor declares that the modification is necessary to deal with the mortgage on the restricted income.

The Debtor declare that they have three children which requires the Debtor to incur expense in food, clothing, sports participation, and personal hygiene. The Debtor states that one daughter takes gymnastics classes and the other does competitive traveling soccer, which requires fees, registration, hotel, and other expenses.

The Debtor states that they live frugally and do not take vacations. The Debtor asserts that their money is spent on the necessities of the children and of the home.

The Debtor asserts that they do not expect to receive a tax refund for 2015, since Debtor William Catlett only worked three months that year.

The Debtor believes that there was a typo for the vehicle tax/license amount. The Debtor declares that they have two vehicles which they pay \$118.00 for the van and \$120.00 for a truck. However, the document says that they pay \$3,108.00 per year at \$25.00 a month.

The Debtor also declares that they provide school supplies to the elementary school for two children. The Debtor states that they have field trips this year and their son has an outdoor week-long education camp with the school that the Debtor wish to send their son. They also restate that they have expenses as to their daughter's soccer, in hope that she will be able to play

in college and receive a scholarship.

FEBRUARY 23, 2016 HEARING

At the hearing, the court continued the hearing to 3:00 p.m. on March 1, 2016. Dckt. 111.

DISCUSSION

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

Since the continued hearing, the Debtor has failed to file any supplemental papers in connection with the instant Motion.

While the Debtor's supplemental declaration does provide explanation as to some of the concerns of the Trustee, the Debtor admitted that the supplemental budget has errors, namely the license fee.

The Debtor failed to address another issue, which goes to the heart of whether the case is being prosecuted in good faith. In the Motion to Confirm, Debtor states,

Due to a loan modification, Debtors cannot complete the plan as originally confirmed as stated under penalty of perjury in the accompanying Declaration of Debtors. In that Declaration Debtors state, "'We have secured a permanent loan modification with our lender and have been remitting that payment directly to the servicing agent, pursuant to the terms of the modification.'"

Dckt. 79. While the court authorized the modification on January 26, 2016, the Debtor states that they are intentionally violating the confirmed plan and diverting plan payments to the lender rather than making the payments to the Trustee.

This case was filed in 2011. The Debtors are in the fifty-fourth month of the Plan (when the motion was filed). On January 27, 2016, the court filed its order approving the loan modification, which reduced the Debtor's monthly mortgage payment by \$388 a month.

Under the prior confirmed plan, which included the mortgage payment, Debtor was paying \$2,025.00 a month for the final 13 months of the Plan. Of this, creditors with general unsecured claims were to receive a dividend of not less than 0.00%. First Modified Plan, Dckt. 58. This \$2,025.00 payment was allocated to pay the following:

Class 1 - Mortgage.....	\$1,862.34
US Trustee Fees (est 8%).....	\$ 162.00

The proposed Second Modified Plan now before the court chops the monthly plan payment to \$415.00 a month for the final seven months of the plan. Dckt. 83. Now, creditors holding general unsecured claims are to receive a 2.00% dividend (computed on general unsecured claims totaling \$84,786.62), for an aggregate distribution of \$1,695.72. With seven plan payments of \$415.00, there will be \$2,905.00 paid into the plan. Estimating Chapter 13 Trustee fees

of 8%, that administrative expense will be \$232.40. After paying the \$232.40 and \$1,695.72 for the guaranteed minimum unsecured claim dividend, there is an "extra" \$1,928.12 for distribution to creditors holding general unsecured claims or payment of other administrative expenses.

One way to look at the situation is that the creditors are receiving a dividend by virtue of the reduced mortgage payment - a 2% dividend. The Trustee's Opposition goes to whether the Debtor having obtained a \$388 a month reduction in the mortgage payment is improperly seeking to underfund the plan by concocting phantom expenses.

The declaration provided by Debtor in support of confirmation (Dckt. 81) plays into this contention. While having confirmed the original plan and the First Modified Plan with testimony under penalty of perjury that they could properly maintain their household on monthly expenses of plan based on the expenses of \$2,483.57 a month (Exhibit 2, schedule of expenses; Dckt. 57), now (for the last seven months of the Plan) Debtor's expenses have grown to \$3,888.57 (Exhibit 2, new schedule of expenses; Dckt. 82) - a 56% increase).

The best Debtor can muster for this dramatic increase in "necessary" expenses for the final seven months of the plan is: (1) our three growing children are eating more, so we will increase our food expense by 71%; (2) our daughter has a gymnastics class so we need to increase our educational expense 600%; (4) our home is now 100 years old, as opposed to 95 years old when we told you our home repair expense under penalty of perjury earlier, so we need to increase our home maintenance expense 300%; and (5) because we have the same number of people who need haircuts we need to increase our personal care expense 200%.

A more plausible response would have been that Debtor had stripped the budget to the bone to keep the house, and to this point they have done without some basic necessities to perform their plan. Debtor could have provided testimony of such. Debtor has failed (or refused) to provide any such testimony under penalty of perjury. Rather, they have taken the attitude that the court will ignore their prior statements under penalty of perjury and merely rubberstamp their request to reap the benefit of the loan modification reduction in payments, and then some additional monies into their own pockets.

Even for Debtor in the fifty-third month of a plan, such conduct is reflective of a party not dealing in good faith. This puts into doubt the veracity of prior testimony under penalty of perjury given by Debtor upon which the court relied.

Debtor has failed to provide credible testimony that Debtor's projected disposable income for the last seven months of the Plan is only \$415.00. The court does not know if Debtor got greedy and assumed by throwing out some dividend (the apparently "2% solution) the court and Trustee would blinding sign whatever new plan was thrown out. Possibly Debtor does have higher expenses and can shown how and why either they have changed since confirming the prior plans or how Debtor has done without for four years and five months. But Debtor has chosen not to provide any such explanation, but instead merely tell the court - "give me more money."

Debtor's counsel may plead, "judge, it's obvious that Debtor's family needs \$1,200 a month for the final seven months for food (a 71% increase) or

that one of the Debtor's children wants to do gymnastics and soccer so the educational expense needs to be increased for the final seven months (a 600% increase). It is not obvious and up to the Debtor to provide credible evidence to carry Debtor's burden of proof.

Just these two line items alone over the remaining seven months of the plan each divert \$500 a month from the plan to Debtor. This aggregates \$7,000.00 over the final seven months of the plan. Instead of a 2% solution dividend, general unsecured claims would receive a 9.5% dividend (\$8,135 aggregate payment).

The court also notes the coincidence that the food expense and education expense each "need" to be increased by \$500.00. This coincidence is indicative of expenses which are created to achieve a pre-conceived end result of a minimum payment into a plan rather than a truthful, accurate statement of expenses. The Debtor has significantly understated the proposed disposable income in this case and fails to provide for payment of the projected disposable income to creditors. From the evidence presented, the projected disposable income for the final months of the plan would be at least \$1,415.00 a month - if the financial information of the Debtor can be believed.

This also raises serious issues concerning the good faith prosecution of this case, the good faith prosecution of the prior plans, and the good faith filing of this bankruptcy case. Having gotten to month fifty-three of the plan, it appears that Debtor may well have imperiled the bankruptcy case in its entirety and the ability to confirm any modified plan. This proposed plan has not be advanced in good faith by the Debtor.

The proposed 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 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 Plan is denied and the proposed Chapter 13 Plan is not confirmed.