UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

March 7, 2017, at 3:00 p.m.

1.	**15-22301-E-13** **WSS-3**	**GAIL/ROBERT STEVENS** **W. Steven Shumway**	**MOTION TO MODIFY PLAN** **1-27-17 [41]**

APPEARANCE OF W. STEVEN SHUMWAY, COUNSEL FOR DEBTOR, REQUIRED FOR MARCH 7, 2017 HEARING

TELEPHONIC APPEARANCE PERMITTED

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on January 27, 2017. By the court's calculation, 39 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is denied.

Gail Stevens and Robert Stevens ("Debtor") seek confirmation of the Modified Plan to implement changes in Debtor's financial situation due to the approval of a loan modification on their principal residence by The Bank of New York Mellon Trust Company, N.A. as trustee on behalf of the FDIC 2013-RS Asset Trust. Dckt. 41. The Modified Plan capitalizes the delinquency and adds it to the existing principal balance of the loan. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on February 17, 2017. Dckt. 50.

The Trustee asserts that Debtor is $1,107.00 delinquent in plan payments, which represents one month of the $1,107.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Earnings from 2016 Records Higher Than Stated by Debtor

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor's gross income for 2016 was $103,291.00 or on average of $9,606.00 per month as filed in Exhibit A with supplemental Schedule I. Debtor also filed Exhibit B, a pay advice reflecting Debtor's earnings in 2016 as $128,873.14, which equals $1,133.43 greater in monthly earnings than the amount reported on the supplemental Schedule I.

The Trustee notes that Debtor claims that expenses and costs of transportation have increased. Additionally, the last plan payment posted was on October 26, 2016, and Debtor failed to state a reason why no payments have been made since. Debtor's payment under the previously confirmed plan was $5,400.00, which included monthly contract installment and Class 1 arrearage dividend totaling $3,567.42 leaving $1,832.58 for all other creditors. Debtor proposes a $1,107.00 plan payment. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

Also, the Trustee asserts that the Plan states in § 2.06 that $2,000.00 was paid prior to filing. This conflicts with the original plan, which states $2,500.00 was paid in attorneys' fees.

Review of Debtor's Testimony Under Penalty of Perjury

In the Motion, Debtor merely alleges that Debtor's expenses have changed. It is further stated that amended (presumably supplemental) income and expense statements are being filed.

Debtor Robert Stevens has provided his testimony through his declaration filed on January 27, 2017. Dckt. 43. As this court has commented previously in other cases, a declaration presents most likely the best testimony a person can give in support of his or her motion. It is prepared in the calm of his or her attorney's office. The declarant can review the declaration sitting at home, in the peace and quiet of his or her home. Any errors can be corrected, and the most comprehensive testimony can be provided.

In his declaration, Robert Stevens provides the following testimony relating to the income and expenses of Debtor:

A. "5. I have reviewed our income and expenses. I have included an income and expense report on the court approved forms and included them as Exhibit A to this declaration."

B. "7. I have included my last pay advices as Exhibit B. I am a commissioned sales person, so my income fluctuates during the year. October through December are my best income months. My gross income for 2016 was $103,291. This breaks down to an average monthly gross income of $9,606.00."

At this point, the court reviews Exhibit B filed by Debtor. Dckt. 44 at 7–8. Though Debtor testifies under penalty of perjury that his "gross income" (without stating what he means by that term) is $103,291 per month, Exhibit B tells a different tale. It actually states gross income of $128,873.34. In stating that he has gross income, Debtor (and Debtor's counsel) are actually stating Debtor's take-home income of $103,291.25, after deductions for:

1. 401K Deductions
2. Union Dues
3. Tax Withholding
4. Social Security, Medicare Withholding
5. Disability Withholding

If the court were to use $103,291 as the monthly take-home income of Debtor (and not his gross income), then Debtor misstates the monthly amount of such take-home income. Under penalty of perjury, Debtor states that his $103,291.25 of take-home income results in an average monthly take-home income of $9,606.00.

That statement is incorrect. $103,291.25/12 months = $8,607.58 per month, a thousand dollars per month less than Debtor is seeking to use as the number necessary to fund the Chapter 13 Plan.

C. "8. We have been taking care of the deferred maintenance on our house. I averaged the maintenance and repairs costs incurred in 2016. The average expense is $275.00 per month."

In the Declaration, Debtor fails (or is unwilling) to disclose what is such "deferred maintenance." The court has no idea of what such "deferred maintenance" consists of, with Debtor and Debtor's counsel merely stating that Debtor gets an extra $275.00 per month, "because . . . ."

Additionally, Debtor testifies that he has already been paying this "extra" amount for deferred maintenance for the past year, being able to fund it from the prior budget without any increase for such an expense.

D. "9. Our electricity and propane cost have increased. The average for the past 12 months is $400.00."

Though making this statement, Debtor offers no monthly utility statements or evidence of payment. Further, Debtor once again admits that this bill has been paid from the past year from the monthly expenses as previously budgeted, testifying that there is no need to increase this budget item - having apparently overstated other budget items.

E. "10. Water costs have also increased. The average for the past 12 months is $250.00.

Though making this statement, Debtor offers no monthly utility statements or evidence of payment. Further, Debtor once again admits that this bill has been paid from the past year from the monthly expenses as previously budgeted, testifying that there is no need to increase this budget item—having apparently overstated other budget items.

F. "12. Gasoline costs have risen and I have driving more in my job. I am also working six days per week instead of five. This has caused our gasoline costs to rise to $900.00 per month."

Though making this statement, Debtor offers no monthly utility credit card statements or evidence of payment of higher amounts. Debtor offers no evidence for his conclusion that gas prices have risen significantly since the prior budget.

Debtor also offers the explanation that he is now working six days per week. On Original Schedule I filed in this case, Debtor stated having monthly gross income of $9,734.67. Dckt. 1 at 34. (This is actual "gross income," before taxes and deductions. With gross income of $128,873.14 shown for 2016 on Exhibit B, Debtor's gross income would be $10,739. Debtor's gross income in 2016 was approximately 10% higher than that stated under penalty of perjury on Original Schedule I in March 2015. It is not clear if the additional cost for gas for working an additional day, and the additional income therefrom, has been incurred in the past year or is a future expense, as well as future increase in income.

To the extent this gas expense, and increase in income, already exists and was incurred in 2016, Debtor once again admits that this bill has been paid from the past year from the monthly expenses as previously budgeted, testifying that there is no need to increase this budget item—having apparently overstated other budget items.

G. "11. Our boys are bigger and eating more. Food costs have increased to $1,100.00 per month."

On Original Schedule J, Debtor states under penalty of perjury that the two sons were ages sixteen and eighteen in March of 2015. Debtor offers no explanation how adding one year of age to a sixteen- year-old or eighteen-year-old causes them to eat more food. If children were going from ages six-to-eight to ten-to-thirteen and entering adolescence, one might find such to be a logical statement.

H. "13. Both my sons and I have both incurred moving violations in the past 12 months. This has caused our vehicle insurance to increase to $650.00 per month.

In reviewing Schedule B, Debtor lists owning three vehicles. It appears that through the Plan Debtor continues to operate, insure, and pay for the three vehicles. It may be that in light of Debtor's finances, it is not financially prudent or reasonable to continue to operate the three vehicles.

Additionally, one of the Debtor's sons is now twenty years old. No testimony is provided as to what income he is earning and what expenses he is paying toward any vehicle he is driving. FN.1.

FN.1. The court notes that on the Supplemental Schedule J form used for expenses, Debtor states that the two sons are still sixteen and eighteen years of age, though more than two years have passed since this case was filed, and the sons' ages were stated under penalty of perjury in March 2015.

I. "14. I miscalculated our 2015 taxes and ended up owing the IRS an additional $3,497.00. I have an installment agreement with the IRS to pay this off at the rate of $200.00 per month."

The declaration does not state when this additional payment for post-petition taxes began and when it would end (which then increases disposable income by $200.00 per month). Additionally, Debtor provides no testimony of what has been done to correct this error, whether monthly tax withholding has been increased, and showing that the present budget is not built on fault tax obligation assumptions.

Declaration, Dckt. 43.

In comparing Original Schedule J to the Exhibit B expenses, the court notes the following:

	Original Schedule J Dckt. 1 at 36–38	**Exhibit B Statement of Expenses, Dckt. 44 at 5–8**	**Observations of the Court**
Home Maintenance	$200	$275	No explanation provided for how this increase, which Debtor has been paying from the prior budget is new, or what it consists of that is different than in the past.
Electricity	$400	$350	No explanation provided for how this increase, which Debtor has been paying from the prior budget is new. No documentation is provided of such significant monthly increase (14%).
Propane	$163	$100	No explanation provided for how this increase, which Debtor has been paying from the prior budget is new. No documentation is provided of such significant monthly increase (63%).

Food and Housekeeping Supplies	$900	$1,100	No explanation provided for how this increase, which Debtor has been paying from the prior budget is new. No documentation is provided of such significant monthly increase (22%). As discussed above, no explanation has been provided for a 22% increase in food consumed by sixteen-to-eighteen-year-olds who are now eighteen-to-twenty-year-olds. Further, no explanation is provided for any expenses paid by Debtor's twenty-plus-year-old son.
Transportation	$800	$900	No explanation provided for how this increase, stated as the cost of gas, which Debtor has been paying from the prior budget is new. No documentation is provided of such significant monthly increase (63%).
Vehicle Insurance	$358	$650	It has been explained that vehicle insurance has increased due to moving violations cited to Debtor and Debtor's son. But Debtor does not explain why the full cost of three vehicles is being paid by the two debtors in this case, or what income Debtor's twenty-plus-year-old son has and is paying for the expense of any vehicle he is using.
IRS 2015 Tax Payment	$0	$200	No explanation is provided as to how such under payment of taxes has been corrected or that the $200 will be paid into the plan when the unapproved post-petition payment plan is completed.

In comparing Original Schedule J to Exhibit B Current Expense Statement (taking out the monthly mortgage payment now included in Exhibit B), Debtor purports to now have $5,349.00 in monthly expenses compared to $3,970.59 in monthly expenses in March 2015—a difference of $1,378.41.

In confirming Debtor's Chapter 13 Plan (Dckt. 5) in this case, in reliance on the financial information filed in Original Schedules (I and J), Debtor's monthly plan payment was $5,400.00. Of this, $4,596.66 was paid to the creditor for the monthly mortgage payment ($3,820.00 currently amount and $776.66 for the pre-petition arrearage). Chapter 13 Plan, Dckt. 5.

The current monthly mortgage payment pursuant to the post-petition loan modification authorized by the court (Order, Dckt. 40) is now (and for the life of the Chapter 13 Plan in this case) $2,788.25. Loan Modification Agreement, Dckt. 33. This is a ($1,808.41) decrease in the housing expense, freeing up $1,808.41 per month to fund the Chapter 13 Plan. Due to the high mortgage expense being paid through the Plan, Debtor was able to only provide a 0.00% dividend for creditors holding $245,000 in general unsecured claims.

In the proposed Modified Plan (Dckt. 45), though substantially decreasing the monthly mortgage expense being paid through the Plan, Debtor has once again proposed being able to pay only a 0.00% dividend to creditors holding approximately $245,000.00 in general unsecured claims. Debtor has managed to come up with the "additional" expenses necessary to offset, and keep, the reduced amount that has to be paid on the secured claim through the Plan.

The court finds Debtor's testimony not to be credible. In light of Debtor and Debtor's counsel having the luxury of time to prepare a detailed and informative declaration clearly explaining how and why expenses have so increased, they have chosen not to do so. The conclusion drawn by the court, based on the evidence presented by Debtor is that no such increase in costs actually exists. Rather, this is a "MAI" declaration ("made as instructed" to divert monies improperly to Debtor). While including expenses for their twenty-plus-year-old son, no information about any income of the son is provided, or why the son is not at least paying for his vehicle expense.

This conduct of Debtor is not in good faith. This violates not only the Bankruptcy Code, but impugns the credibility of Debtor as a witness, and it demonstrates bad faith in the prosecution of this case. This bad faith may so taint this case, that Debtor and Debtor's counsel may have precluded Debtor from confirming a modified plan in this case, or confirming a plan in any subsequent case.

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

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

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

2. **17-20001-E-13 DB-1** | **SHELBY MOODY** **Lauren Rode** | **OBJECTION TO CONFIRMATION OF PLAN BY GIGLI FAMILY TRUST 2-9-17 [20]**

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

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

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Chapter 13 Trustee on February 9, 2017. The United States Trustee was not served with notice. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is overruled without prejudice.

Gigli Family Trust, Creditor with a secured claim, opposes confirmation of the Plan on the basis that:

A. Debtor's Plan fails to properly treat the Creditor's Secured Claim.

B. The Plan did not provide for arrearages.

INSUFFICIENT NOTICE PROVIDED

Federal Rule of Bankruptcy Procedure 9034(i) requires that any entity filing an objection to confirmation of a plan serve that objection on the United States Trustee. Federal Rule of Bankruptcy Procedure 5005(b)(1) specifies that such objection "be mailed or delivered to an office of the United States

trustee, or to another place designated by the United States trustee, in the district where the case under the Code is pending." Here, the United States Trustee was not served with Creditor's Objection.

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

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

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

DISCUSSION

The objecting Creditor asserts a claim of $280,523.30 in this case. Debtor's Schedule D estimates the amount of the Creditor's claim as $280,523.30 and indicates that it is secured by a first deed of trust on Debtor's residence. The Plan provides for treatment of this as a Class 1 claim, but (because Debtor asserts that it is subject to a claims valuation pursuant to 11 U.S.C. § 506(a)), provides that the amount in arrears is $0.00, and lists a purported monthly contract installment amount of $1,600.00.

The Creditor alleges that the Plan is not feasible 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 Debtor's residence. *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 a debtor adequately fund a 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)). Nothing in § 1322(a) compels a debtor to propose a plan that provides for a secured claim, however.

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:

A. Provide a treatment that the debtor and creditor agree to (11 U.S.C. § 1325(a)(5)(A)),

B. 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

C. Surrender the collateral for the claim to the creditor (11 U.S.C. § 1325(a)(5)(C)).

Those three possibilities are relevant only if the plan provides for the secured claim, though.

When a plan does not provide for a secured claim, the remedy is not denial of confirmation. Instead, the claimholder may seek 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). That is reason to sustain the Objection.

The objecting Creditor holds a deed of trust secured by Debtor's residence. The Creditor has not filed a timely proof of claim that asserts pre-petition arrearages. The Plan does not propose to cure those arrearages. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments because it does not provide for the surrender of the collateral for this claim. *See* 11 U.S.C. §§ 1322(b)(2) & (5), 1325(a)(5)(B). The Plan cannot be confirmed because it fails to provide for the full payment of arrearages.

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

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

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

3. **17-20001-E-13** **SHELBY MOODY** **OBJECTION TO CONFIRMATION OF**
DPC-1 **Lauren Rode** **PLAN BY DAVID P. CUSICK**
2-7-17 [15]

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

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

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on February 7, 2017. The United States Trustee was not served with notice. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan overruled without prejudice.

INSUFFICIENT NOTICE PROVIDED

The United States Trustee was not served with notice of the Objection to Confirmation. While Federal Rule of Bankruptcy Procedure 2002(k) incorporates Rule 2002(b)(2) to require service upon the U.S. Trustee of notice of the *deadline* to file objections to confirmation, it does not address service of the actual objection.

Federal Rule of Bankruptcy Procedure 9034(i) requires service of objections to confirmation, however. Rule 9034 states that "any entity that files a pleading, motion, **objection**, or similar paper relating to any of the following matters shall transmit a copy thereof to the United States trustee within the time required by these rules for service of the paper." (emphasis added). Subdivision (i) lists "confirmation of a plan" as one of the matters encompassed by the rule. Therefore, an objection to confirmation of a plan must be served on the U.S. Trustee. That service was not provided for this Objection, and the Objection is overruled without prejudice.

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

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

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF SERVICE IS PROVIDED TO THE U.S. TRUSTEE

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

A. Debtor's Plan exceeds sixty months.

B. Debtor may have improperly classified the secured claim of Gigli Family Trust in Class 1 of the Plan.

C. Debtor may have improperly classified the secured claim of Capital One Auto Finance in Class 1 of the Plan.

D. The Plan does not provide all of Debtor's projected disposable income.

E. The Trustee is unable to determine how or how much to pay in attorney fees.

F. Not all of Debtor's assets are reported.

G. Debtor has not completely filled out the Statement of Financial Affairs.

The Trustee's objections are well-taken.

Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to the Trustee, the Plan will complete in seventy-seven months due to misclassificiation of claims in Class 1. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

The Gigli Family Trust ("Creditor A") asserts a claim of $280,523.30 in this case. Debtor's Schedule D estimates the amount of the Creditor A's claim as $280,523.30 and indicates that it is secured by a first deed of trust on Debtor's residence. The Plan provides for treatment of this as a Class 1 claim, but (because Debtor asserts that it is subject to a claims valuation

pursuant to 11 U.S.C. § 506(a)), provides that the amount in arrears is $0.00, and lists a purported monthly contract installment amount of $1,600.00.

Capital One Auto Finance ("Creditor B") asserts a claim of $6,704.36 in this case. Debtor's Schedule D estimates the amount of the Creditor B's claim as $6,619.00 and indicates that it is secured by Debtor's 2007 Jeep Commander-V8 Utility 4D Sport. The Plan provides for treatment of this as a Class 1 claim, but (because Debtor asserts that it is subject to a claims valuation pursuant to 11 U.S.C. § 506(a)), the contract term is sixty months with the final payment of $268.48 due on March 4, 2019.

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 a debtor adequately fund a 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)). Nothing in § 1322(a) compels a debtor to propose a plan that provides for a secured claim, however.

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:

A. Provide a treatment that the debtor and creditor agree to (11 U.S.C. § 1325(a)(5)(A)),

B. 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

C. Surrender the collateral for the claim to the creditor (11 U.S.C. § 1325(a)(5)(C)).

Those three possibilities are relevant only if the plan provides for the secured claim, though.

When a plan does not provide for a secured claim, the remedy is not denial of confirmation. Instead, the claimholder may seek 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 Creditor A's and B's

secured claims raises doubts about the Plan's feasibility. *See* 11 U.S.C. § 1325(a)(6). That is reason to sustain the Objection.

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

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

The Plan proposes to pay a 100% dividend to unsecured claims, for sixty months for $1,898.90 per month, though Debtor's projected disposable income under 11 U.S.C. § 1325(b)(2) totals $8,129.00.

Debtor has an additional $1,075.10 in additional disposable income not contributed into the Plan according to the $2,974.22 disposable income listed on Schedule J. Debtor erroneously provided for a mortgage expense of $1,600.00 as Debtor's principal residence on Schedule J when the property is not actually Debtor's principal residence, which means Debtor has an additional $1,600.00 per month in disposable income.

Debtor has also erroneously provided for payment of the 2007 Jeep Commander-V8 Utility 4D Sport in both the Plan and on Schedule J, which means Debtor has an additional $268.00 per month in disposable income. Thus, the court may not approve the Plan.

The Trustee asserts that Debtor's Plan proposes to pay $4,500.00 in attorney fees. Debtor has no business income reported under Schedule I. Only $4,000.00 is allowed in a non-business case under Local Rule 2016-1(c)(1). The Trustee also argues Debtor failed to select a box in § 2.06 of the Plan, designating whether fees will be paid as "no look fees" or if Debtor will be filing a motion for attorneys' fees.

The Trustee points out that § 2.07 of the Plan fails to provide a monthly dividend to be paid toward administrative expenses such as the attorneys' fees balance.

On Schedule B and Statement of Financial Affairs, Debtor reports having no interest or income in Retirement or Pension Accounts. Debtor's 2015 Tax Return, which included Form 8880-Credit for Qualified Retirement Savings Contributions-2015 reports $4,455 toward an Elective Deferral to 401K or other qualified employer plan, voluntary employee contributions, and 501(c)(18)(D) plan contributions for 2015.

Finally, the Trustee asserts that Debtor has not completely filled out the Statement of Financial Affairs. Debtor's reported wages for 2016 were $12,000.00. There are no reported wages for 2015. Debtor also fails to report receiving rental income for the past two years, but reports rent as a source of income on Schedule I.

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

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

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

4. 12-21207-E-13 JIM LEDESMA — MOTION TO MODIFY PLAN
PGM-5 Peter Macaluso — 1-30-17 [225]

Final Ruling: No appearance at the March 7, 2017 hearing is required.

Local Rule 9014-1(f)(1) Motion—Chapter 13 Trustee Opposition and Debtor Response Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 30, 2017. By the court's calculation, 36 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is granted.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtor has filed evidence in support of confirmation. The Chapter 13 Trustee filed a Limited Objection on February 21, 2017. Dckt. 234. The Trustee notes that the Modified Plan authorizes ongoing Class 1 payments at $69,776.58, but $71,014.01 has actually been disbursed. The Trustee does not object to a correction in the order confirming.

Debtor filed a Response, concurring that the correction as stated by the Chapter 13 Trustee must be made, and stated an amendment to the Plan to be stated in the Order confirming the Plan. Dckt. 240. Debtor's amendment to the Modified Plan states that the ongoing Class 1 payments are for $71,014.01. The Modified Plan, as modified, complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Modified Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Modified Chapter 13 Plan filed on January 30, 2017, and as modified to reflect that Class 1 payments are for $71,014.01, 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.

5. 15-28908-E-13 WILLIAM/SARAH MCGARVEY MOTION TO MODIFY PLAN
MJD-3 Matthew DeCaminada 1-31-17 [55]

Final Ruling: No appearance at the March 7, 2017 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 31, 2017. By the court's calculation, 35 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is granted.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtor has filed evidence in support of confirmation. The Chapter 13 Trustee filed a statement of non-opposition on February 21, 2017. Dckt. 68. The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Modified Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Modified Chapter 13 Plan filed on January 31, 2017, is confirmed. Counsel for the Debtor shall prepare

an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

6. 17-20709-E-13 MAC-1 | **FRANK FERREIRA** **Marc Caraska** | **MOTION TO EXTEND AUTOMATIC STAY** **2-17-17 [14]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on February 17, 2017. By the court's calculation, 18 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. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Extend the Automatic Stay is denied.

Frank Ferreira, III ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond thirty days in this case. This is the Debtor's second bankruptcy petition pending in the past year. The Debtor's prior bankruptcy case (No. 16-27559) was dismissed on January 25, 2017, after Debtor failed to make any plan payments, failed to appear at the Meeting of Creditors, failed to provide tax returns, and failed to provide employment pay advices. *See* Order, Bankr. E.D. Cal. No. 16-27559, Dckt. 41, January 25, 2017. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor thirty days after filing of the petition.

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed because Debtor's counsel filed the prior case too soon due to a clerical error.

While in his testimony Debtor states that there was a "clerical error" in counsel's office, no explanation of such conclusion by Debtor is provided.

Response by Chapter 13 Trustee

The Chapter 13 Trustee has responded to this Motion, advising the court that with the filing of this new case, Debtor: (1) has failed to make any plan payments; (2) Debtor and Debtor's attorney failed to appear at the first meeting of creditors; (3) Debtor has failed to provide copies of tax returns; and (4) Debtor has failed to provide copies of pay advices. Dckts. 18, 19.

Decision

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). The subsequently filed case is presumed to be filed in bad faith if one or more of Debtor's cases was pending within the year preceding filing of the instant case. *Id.* § 362(c)(3)(C)(i)(I). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* § 362(c)(3)(C).

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); *see also* Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209–10 (2008). Courts consider many factors—including those used to determine good faith under §§ 1307(c) and 1325(a)—but the two basic issues to determine good faith under § 362(c)(3) are:

A. Why was the previous plan filed?

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

In re Elliot-Cook, 357 B.R. at 814–15.

Debtor has 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 prior case was filed on November 15, 2016, and was dismissed on January 25, 2017. Case No. 16-27559, Dckts. 1, 41.

Accepting the assertion that "mistakes happen," the court considers Debtor's conduct in this case.

Debtor, based on his conduct in this case, is not prosecuting this bankruptcy case in good faith. Though perceiving a need to be in bankruptcy and enjoy the protections thereof, he is not fulfilling his minimum obligations as a Debtor. He is not making his plan payment. He is not appearing at his First Meeting of Creditors. He is not providing his pay advices. He is not providing copies of his tax returns.

It is not clear why the prior filing was in error or why Debtor cannot fulfill his obligations in this case. Debtor is employed by the State of California and derives his income therefrom. Dckt. 1 at 29–30. Debtor is not running a business or having any other "complex" ongoing transactions that would have rendered the prior filing a "clerical error." A review of Schedule B discloses Debtor having modest assets,

again, nothing to indicate a complex business or financial transaction that requires precise timing for filing the bankruptcy case.

Debtor has failed to rebut the presumption of bad faith with the filing of this second bankruptcy case this year. Debtor has failed to provide the court with grounds for extending the automatic stay. With this Motion being denied, the automatic stay, as to the Debtor, expires by operation of law pursuant to 11 U.S.C. § 362(c)(3)(A) thirty days after the commencement of this bankruptcy case. FN.1.

FN.1. As this court has noted in other cases, Congress expressly provides in 11 U.S.C. § 362(c)(3)(A) that the automatic stay **terminates as to the Debtor**, and nothing more. In 11 U.S.C. § 362(c)(4), Congress expressly provides that the automatic stay **never goes into effect in the bankruptcy case** when the conditions of that section are met. Congress clearly knows the difference between a debtor, the bankruptcy estate (for which there are separate express provisions under 11 U.S.C. § 362(a) to protect property of the bankruptcy estate) and the bankruptcy case. While terminated as to the Debtor, the plain language of 11 U.S.C. § 362(c)(3) is limited to the automatic stay as to only the Debtor.

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 to Extend the Automatic Stay as to the Debtor pursuant to 11 U.S.C. § 362(c)(3)(B)is denied.

7. 13-22820-E-13 KATHLEEN SINDELAR MOTION TO MODIFY PLAN
EJS-6 Eric Schwab 1-18-17 [94]

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

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 18, 2017. By the court's calculation, 48 days' notice was provided. 35 days' notice is required.

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

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

Kathleen Sindelar ("Debtor") seeks confirmation of the Modified Plan to account for claims by Chase and First Tech Federal Credit Union after the court overruled her objections to those claims. Dckt. 94. The Modified Plan proposes paying $18,000.00 through January 2017 with a 9% dividend to unsecured claims. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

The Proof of Service for this Motion states that it was served by First Class mail on the following relevant parties:

Bank Of America
PO Box 982235
El Paso TX 79998

First Tech Federal Credit Union
PO Box 2100
Beaverton OR 97075-2100

(p) BANK OF AMERICA
PO BOX 982238
EL PASO TX 79998-2238

Capital One
PO Box 85520
Richmond VA 23285

(p) CAPITAL ONE
PO BOX 30285
SALT LAKE CITY UT 84130-0285

Chase
PO Box 15298
Wilmington DE 19850-5298

Chase
PO Box 24696
Columbus OH 43224-0696

Wells Fargo Bank NA
PO Box 10438
Des Moines, IA 50306-0438

Wells Fargo Bank Nv Na
PO Box 31557
Billings MT 59107-1557

Dckt. 98.

Service by Certified Mail Required

Federal Rule of Bankruptcy Procedure 9014(b) requires that motions and their contested matter-initiating documents (such as objections and applications) must be served in the same manner as a summons in an adversary proceeding. Federal Rule of Bankruptcy Procedure 7004(h) [emphasis added] requires:

> "h) **Service** of process **on an insured depository institution**. Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding **shall be made by certified mail addressed to an officer** of the institution unless–
>
> (1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;
>
> (2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or
>
> (3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

The FDIC online database provides the following information as to headquarters addresses:

Bank of America, NA
100 North Tryon Street
Charlotte, NC 28202

Capital One, NA
1680 Capital One Drive
Mclean, VA 22102

Chase Bank USA, NA
201 North Walnut Street
Wilmington, DE 19801

JPMorgan Chase Bank, NA
1111 Polaris Parkway
Columbus, OH 43240

Wells Fargo Bank NV, NA (Inactive as of February 20, 2004)
3800 Howard Hughes Parkway
Las Vegas, NV 89109

Wells Fargo Bank, NA
101 N. Phillips Avenue
Sioux Falls, SD 57104

https://research.fdic.gov/bankfind.

Service was not made to those addresses, was not made by certified mail, and was not addressed to an officer responsible for such matters. Service has not been adequately made.

Additionally, for seven years this court has made it clear that parties, be they debtors or creditors, must comply with the requirements under the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, Federal Rules of Evidence, the Bankruptcy Code, and other applicable laws. As part of this, the court has provided parties and counsel with the following quote:

> Service upon a post office box is deficient. *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 92–93 (B.A.P. 9th Cir. 2004) (holding that service upon a post office box does not comply with the requirement to serve a pleading to the attention of an officer or other agent authorized as provided in Federal Rule of Bankruptcy Procedure 7004(b)(3)); *see also Addison v. Gibson Equip. Co., (In re Pittman Mech. Contractors, Inc.)*, 180 B.R. 453, 457 (Bankr. E.D. Va. 1995) ("Strict compliance with this notice provision in turn serves to protect due process rights as well as assure that bankruptcy matters proceed expeditiously.").

In addition to having failed to comply with the service requirements of Federal Rule of Bankruptcy Procedure 9014(b) and Federal Rule of Bankruptcy Procedure 7004(h), the pleadings have been dumped into a Post Office Box. That is insufficient service.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on February 17, 2017. Dckt. 102. The Trustee states that he is not opposed to the plan term being sixty months as stated in Section 1.03 of the Plan, but he is not certain that Debtor intended to extend the plan term. In the Additional Provisions, Debtor states that the term will be April 1, 2013, through January 2017. January 2017 was the forty-sixth month of the

Plan. Debtor was under-median income for the confirmed plan that called for thirty-six payments of $500.00 with an 11% dividend to unsecured claims. Debtor made those payments, and the Trustee has disbursed a 9.74% dividend.

The proposed First Modified Plan makes no provision for any further monthly plan payments to be made by Debtor for the remaining sixteen months of the Plan. *See* Additional Provisions to the Plan.

The Trustee is not sure whether all documents have been filed and served. The Proof of Service (Dckt. 98) lists "Exhibits" as being served, but the Trustee cannot locate any such exhibits.

Third, the Trustee notes that Debtor added "Chase: First Mortgage: Vireo Way" to Class 3, but that property is not listed on Schedule A, and the creditor is not listed on Schedule D. The Trustee states that Debtor did list a property transfer via quitclaim deed to Frank Sindelar for 6421 Vireo Way Granite Bay on the Statement of Financial Affairs (Dckt. 1, p. 27), but Debtor did not list a transaction date.

The Trustee has raised several inconsistencies in Debtor's presentation of the Modified Plan, which on its face is not feasible because of the conflicting plan terms and apparent transfer of real property. *See* 11 U.S.C. § 1325(a)(6).

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

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

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

8. **16-28421-E-13 DPC-1** **CASSIE BERGQUIST** **Edward Smith** **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **2-8-17 [13]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on February 8, 2017. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

A. Debtor is delinquent.

B. Debtor is not able to make the payments required.

The Trustee's objections are well-taken. The Trustee asserts that Debtor is $200.00 delinquent in plan payments, which represents one month of the $200.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor's plan payment is $200.00 per month, and her net disposable income on Schedule J is $231.84. In Class 4 of the plan, Debtor provides that she will make ongoing post-petition payments of $423.91 to Operating Engineers FCU, who is secured by a 2012 Land Rover LR2. That expense is not

reported and deducted on Schedule J, but if it were, there would be a net disposable income of ($192.07). Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

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

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

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

9. **17-20021-E-13** **STEPHEN/LYNNE CLAVE** **OBJECTION TO CONFIRMATION OF**
DPC-1 **Julius Cherry** **PLAN BY DAVID P. CUSICK**
2-7-17 [25]

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on February 7, 2017. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

A. The Plan pays 2% interest on an arrearage to Ditech Financial that may not be entitled to such interest payment under 11 U.S.C. § 1322(e), unless the underlying note provides for interest on late payments or applicable non-bankruptcy law requires such payment;

B. The Plan does not provide for "Bank of America's" second deed of trust on real property commonly known as 715 Harding Place, Wheatland, California, and Stephen Clave and Lynne Clave ("Debtor") have filed a Motion to Value regarding that deed, upon which the Plan relies;

C. The Plan does not provide for Yuba County's property tax lien listed on Schedule D; and

D. Section 2.06 of the Plan does not indicate whether attorneys' fees will be paid according to Local Bankruptcy Rule 2016-1(c) or by further motion, but the Plan indicates that $1,715.00 has been paid already.

The Trustee's objections are well-taken.

A review of Debtor's Plan shows that it relies on the court valuing the secured claim of Bank of America, N.A.. Debtor has filed a Motion to Value the Secured Claim of Bank of America, N.A., that is set for hearing on March 7, 2017. Without the court valuing the claim, the Plan is not feasible. 11 U.S.C. § 1325(a)(6). At the hearing, the court granted the Motion to Value, though. Therefore, that portion of the Trustee's objection has been resolved.

Schedule D lists Yuba County as having a claim of $1,350.00 in this case, but the Plan does not provide for that 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 a debtor adequately fund a 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)). Nothing in § 1322(a) compels a debtor to propose a plan that provides for a secured claim, however.

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:

A. Provide a treatment that the debtor and creditor agree to (11 U.S.C. § 1325(a)(5)(A)),

B. 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

C. Surrender the collateral for the claim to the creditor (11 U.S.C. § 1325(a)(5)(C)).

Those three possibilities are relevant only if the plan provides for the secured claim, though.

When a plan does not provide for a secured claim, the remedy is not denial of confirmation. Instead, the claimholder may seek 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 Yuba County's secured claim raises doubts about the Plan's feasibility. *See* 11 U.S.C. § 1325(a)(6). That is reason to sustain the Objection.

Finally, the Plan is not feasible because it has not been completed fully. *See* 11 U.S.C. § 1325(a)(6). The Plan does not state whether attorneys' fees will be paid according to Local Bankruptcy Rule 2016-1(c) or by later motion. While that is a *minor* problem that can be addressed at the hearing, it indicates that at this stage the Plan is not feasible.

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

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

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

10. 17-20021-E-13 JJC-1 **STEPHEN/LYNNE CLAVE** **Julius Cherry** **MOTION TO VALUE COLLATERAL OF BANK OF AMERICA, N.A.** **2-1-17 [18]**

Final Ruling: No appearance at the March 7, 2017 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditor, and Office of the United States Trustee on February 1, 2017. 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Value Secured Claim of Bank of America, N.A. ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $0.00.

The Motion to Value filed by Stephen Clave and Lynne Clave ("Debtor") to value the secured claim of Bank of America, N.A. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 715 Harding Place, Wheatland, California ("Property"). Debtor seeks to value the Property at a fair market value of $239,576.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

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

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

> (a)(1) An **allowed claim of a creditor** secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, **is a**

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

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

NO PROOF OF CLAIM FILED

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

TRUSTEE'S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a Non-Opposition on February 21, 2017. Dckt. 29. The Trustee asserts the Debtor moves for the Court to value the Property's Second Deed of Trust at $0.00 secured because the First Deed of Trust (held by Ditech Financial, LLC) is $305,694.90, and the Motion indicated the Property's fair market value is $239,576.00. However, Debtor's Exhibit lists the "Zestimate" price for the property at $266,196.00. The Trustee also notes, that to date, the Creditor has not filed a claim.

DISCUSSION

The Ditech Financial, LLC first deed of trust secures a claim with a balance of approximately $305,694.90. Creditor's second deed of trust secures a claim with a balance of approximately $28,152.61. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's secured claim is determined to be in the amount of $0.00, the value of the collateral, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value Secured Claim filed by Stephen Clave and Lynne Clave ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of Bank of America, N.A. secured by a second in priority deed of trust recorded against the real property commonly known as 715 Harding Place, Wheatland, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $239,576.00 and is encumbered by a senior lien securing a claim in the amount of $305,694.90, which exceeds the value of the Property that is subject to Creditor's lien.

11. 13-20939-E-13 GTB-2 | **TIMOTHY/TAMARA MENEBROKER** **George Burke** | **MOTION TO MODIFY PLAN** **1-9-17 [99]**

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

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on January 12, 2017. By the court's calculation, 54 days' notice was provided. 35 days' notice is required.

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

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

Tamara Menebroker ("Debtor") seeks confirmation of the Modified Plan to account for insurance benefits received after her spouse's death. Dckt. 99. The Modified Plan proposes plan payments of $1,165.74 with a 10% dividend to unsecured claims. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

The Proof of Service for this Motion states that it was served with "first class postage" on the following parties:

Attn: Officer
Ally Financial
PO Box 130424
Roseville, MN 55113-0004

Attn: Officer, Managing or General Agent
Cashcall, Inc.
C/O Weinstein & Riley, PS
2001 Western Ave., Ste. 400
Seattle, WA 98121

Attn: Officer
Capital One Bank USA, N.A.
PO Box 71083
Charlotte, NC 28272-1083

Attn: Officer, Managing or General Agent
Check Into Cash, Inc.
Attn: Collections
PO Box 550
Cleveland TN 37364-0550

Attn: Civil Process Clerk
Franchise Tax Board
Bankruptcy Section MS A340
PO Box 2952
Sacramento, CA 95812-2952

Attn: Officer
First Premier Bank
601 S Minnesota Ave
Sioux Falls SD 57104-4868

Attn: Officer
Harley-Davidson Credit Corp
9441 LBJ Freeway, Suite 350
Dallas, TX 75243

Attn: Officer, Managing or General Agent

Attn: Officer, Managing or General Agent
California Check Cashing
c/o Jefferson Capital Syst LLC
PO Box 7999
Saint Cloud MN 56302-7999

Attn: Officer, Managing or General Agent
LVNV Funding LLC
c/o Resurgent Capital Svcs
PO Box 10587
Greenville, SC 29603

Office of the U.S. Trustee
501 I Street, Room 7-500
Sacramento, CA 95814-7304

Attn: Officer
Portfolio Recovery Assoc LLC
PO Box 41067
Norfolk VA 23541

Attn: Officer
Premier Bankcard Charter
PO Box 2208
Vacaville, CA 95696-8208

United States Attorney
For IRS
501 I Street Suite 10-100
Sacramento CA 95814-7306

Attn: Officer
Wells Fargo Bank
PO Box 5058 MAC P6053-021
Portland, OR 97208

Attn: Officer, Managing or General Agent
Quantum3 Group LLC
PO Box 788
Kirkland WA 98083-0788

Attn: Civil Process Clerk

Ideal Gelt
790 W Sam Houston N 202
Houston TX 77024

United States Dept of Justice
Civil Trials Western Region
Box 683, Ben Franklin Station
Washington, D.C. 20044

Attn: Civil Process Clerk
Internal Revenue Services
PO Box 7346
Philadelphia PA 19101-7346

Dckt. 106.

Service by Certified Mail Required

Federal Rule of Bankruptcy Procedure 9014(b) requires that motions and their contested matter-initiating documents (such as objections and applications) must be served in the same manner as a summons in an adversary proceeding. Federal Rule of Bankruptcy Procedure 7004(h) [emphasis added] requires:

> "h) **Service** of process **on an insured depository institution**. Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding **shall be made by certified mail addressed to an officer** of the institution unless–
>
> (1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;
>
> (2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or
>
> (3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

The FDIC online database provides the following information as to the addresses of Capital One Bank USA, N.A., and Wells Fargo Bank, federally insured financial institutions:

> Wells Fargo Bank, N.A.
> 101 N. Phillips Avenue
> Sioux Falls, SD 57104
>
> Capital One Bank USA, N.A.
> 4851 Cox Road
> Glen Allen, VA 23060

https://research.fdic.gov/bankfind.

Service was not made to those addresses and was not made by certified mail. Service has not been adequately made on Capital One Bank USA, N.A., and Wells Fargo Bank.

Additionally, for seven years this court has made it clear that parties, be they debtors or creditors, must comply with the requirements under the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, Federal Rules of Evidence, the Bankruptcy Code, and other applicable laws. As part of this, the court has provided parties and counsel with the following quote:

> Service upon a post office box is deficient. *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 92–93 (B.A.P. 9th Cir. 2004) (holding that service upon a post office box does not comply with the requirement to serve a pleading to the attention of an officer or other agent authorized as provided in Federal Rule of Bankruptcy Procedure 7004(b)(3)); *see also Addison v. Gibson Equip. Co., (In re Pittman Mech. Contractors, Inc.)*, 180 B.R. 453, 457 (Bankr. E.D. Va. 1995) ("Strict compliance with this notice provision in turn serves to protect due process rights as well as assure that bankruptcy matters proceed expeditiously.").

In addition to having failed to comply with the service requirements of Federal Rule of Bankruptcy Procedure 9014(b) and Federal Rule of Bankruptcy Procedure 7004(h), the pleadings have been dumped into a Post Office Box. That is insufficient service.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on February 21, 2017. Dckt. 110. The Trustee notes that confirmation of the Modified Plan relies upon the Motion to Substitute Debtor for her deceased husband, which is also set for hearing on March 7, 2017.

The Trustee asserts that Debtor is $2,973.28 delinquent in plan payments, which represents multiple months of the $1,165.74 plan payment. According to the Trustee, the Plan calls for payments of $57,322.28 so far, but Debtor has paid only $54,349.00. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

The Trustee notes as well that the Modified Plan conflicts with the confirmed plan regarding attorneys' fees. Under the confirmed plan, $1,450.00 of fees were paid prior to filing the case, and $2,550.00 would be paid through the plan, which the Trustee has paid. The Modified Plan proposes $0.00 in attorneys' fees, with Debtor's counsel waiving substantial and unanticipated fees and costs but reserving an option to request costs and fees by motion later on in the case.

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

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

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

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

IT IS ORDERED that Motion to Confirm the Modified Plan is denied without prejudice, and the proposed Chapter 13 Plan is not confirmed.

12. 13-20939-E-13 GTB-3 | **TIMOTHY/TAMARA MENEBROKER** | **George Burke** | **MOTION TO CONTINUE ADMINISTRATION OF THE CASE AND/OR MOTION TO WAIVE POST-PETITION EDUCATION AND CERTIFICATION REQUIREMENTS, MOTION FOR ORDER SUBSTITUTING DEBTOR AS REPRESENTATIVE FOR DECEASED HUSBAND** **1-9-17 [104]**

Final Ruling: No appearance at the March 7, 2017 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on January 12, 2017. By the court's calculation, 54 days' notice was provided. 28 days' notice is required.

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

Joint Debtor, Tamara Menebroker, seeks an order approving the motion to substitute the Joint Debtor for the deceased Debtor, Timothy Menebroker. This motion is being filed pursuant to Federal Rule of Bankruptcy Procedure 1016 and 7025.

Debtor filed for relief under Chapter 13 on January 24, 2013. On April 15, 2013, the Debtor's Chapter 13 Plan was confirmed. Dckt. 24. On November 12, 2015, Debtor Timothy Menebroker 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 substituted 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. A Suggestion of Death was filed on March 16, 2016. Dckt. 43. Joint Debtor is the spouse 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 on February 17, 2017. Dckt. 107. The Trustee notes that Debtor did not file a supporting declaration with the Motion, but she did file one with a Motion to Confirm Modified Plan (Dckt. 102). The Trustee states that the declaration describes the proceeds from insurance policies and how the funds were spent. Additionally, the Trustee reports that Debtor has supplied him with bank statements for the period November 2015 through June 2016.

The information provided on the docket has resolved the Trustee's opposition to Debtor's prior Motion for Omnibus Relief (PGM-1), and the Trustee does not oppose the Motion.

DISCUSSION

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

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

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

> Subdivision (a) of Rule 25 of the Federal Rules of Civil Procedure deals with the situation of death of one of the parties. If a party dies and the claim is not extinguished, then the court may order substitution. **A motion for substitution may be made by a party to the action or by the successors or representatives of the**

> **deceased party.** There is no time limitation for making the motion for substitution originally. Such time limitation is keyed into the period following the time when the fact of death is suggested on the record. In other words, procedurally, **a statement of the fact of death is to be served on the parties in accordance with Bankruptcy Rule 7004 and upon nonparties as provided in Bankruptcy Rule 7005** and suggested on the record. The suggestion of death may be filed only by a party or the representative of such a party. The suggestion of death should substantially conform to Form 30, contained in the Appendix of Forms to the Federal Rules of Civil Procedure.
>
> The motion for substitution must be made not later than 90 days following the service of the suggestion of death. Until the suggestion is served and filed, the 90 day period does not begin to run. In the absence of making the motion for substitution within that 90 day period, paragraph (1) of subdivision (a) requires the action to be dismissed as to the deceased party. However, the 90 day period is subject to enlargement by the court pursuant to the provisions of Bankruptcy Rule 9006(b). Bankruptcy Rule 9006(b) does not incorporate by reference Civil Rule 6(b) but rather speaks in terms of the bankruptcy rules and the bankruptcy case context. Since Rule 7025 is not one of the rules which is excepted from the provisions of Rule 9006(b), the court has discretion to enlarge the time which is set forth in Rule 25(a)(1) and which is incorporated in adversary proceedings by Bankruptcy Rule 7025. Under the terms of Rule 9006(b), a motion made after the 90 day period must be denied unless the movant can show that the failure to move within that time was the result of excusable neglect. The suggestion of the fact of death, while it begins the 90 day period running, is not a prerequisite to the filing of a motion for substitution. The motion for substitution can be made by a party or by a successor at any time before the statement of fact of death is suggested on the record. **However, the court may not act upon the motion until a suggestion of death is actually served and filed.**
>
> The **motion for substitution together with notice of the hearing is to be served on the parties in accordance with Bankruptcy Rule 7005 and upon persons not parties in accordance with Bankruptcy Rule 7004 . . . .**

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

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

Here, Tamara Menebroker 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 original Motion was filed within the ninety-day period specified in Federal Rule of Bankruptcy Procedure 1016, following the filing of the Suggestion of Death. Dckt. 44. 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, Tamara Menebroker, as the spouse of the deceased party and as the successor's heir and lawful representative, may continue to administer the case on behalf of the deceased debtor, Timothy Menebroker. 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 Tamara Menebroker is substituted as the successor-in-interest to Timothy Menebroker and is allowed to continue the administration of this Chapter 13 case pursuant to Federal Rule of Bankruptcy Procedure 1016.
>
> **IT IS FURTHER ORDERED** that the post-petition debtor education requirement is waived for the deceased Debtor, Timothy Menebroker.
>
> **IT IS FURTHER ORDERED** that the requested waiver of the 11 U.S.C. § 1328 Certification required by deceased Debtor Timothy Menebroker is denied.

13. **17-20344-E-13** **MELISSA HOLT** **MOTION TO VALUE COLLATERAL OF**
MMM-1 **Mohammad Mokarram** **DRIVETIME CREDIT COMPANY**
2-7-17 [14]

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

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 Chapter13 Trustee, Creditor, and Office of the U.S. Trustee on February 7, 2017. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion to Value Secured Claim of Drivetime Credit Co. ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $4,300.00.

The Motion filed by Melissa Holt ("Debtor") to value the secured claim of Drivetime Credit Co. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2004 Chevy Tahoe ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $4,300.00 as of the petition filing date. FN.1. 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).

FN.1. The Motion indicates the value of the vehicle is $4,300.00 (Dckt. 14, page 1, line 24) and $9,410.00 page 2, line 4). As the Trustee notes, this appears to be a mere scrivener's error.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on February 21, 2017. Dckt. 20. The Trustee notes that Debtor's valuation of the Vehicle has two different values in the motion: $4,300.00 and $9,410.00. Debtor has provided for Creditor on Schedule D and in Class 2B of the proposed Plan, both indicating a value of $4,300.00. The Trustee believes the valuation of $9,410.00 is a scrivener's error and has no basis for opposition to Debtor's valuation of $4,300.00.

The lien on the Vehicle's title secures a purchase-money loan incurred on November 1, 2013, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $9,637.00. 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 $4,300.00, the value of the collateral. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value Secured Claim filed by Melissa Holt ("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 Drivetime Credit Co. ("Creditor") secured by an asset described as 2004 Chevy Tahoe ("Vehicle") is determined to be a secured claim in the amount of $4,300.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is $4,300.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

14. 12-30569-E-13 NANCY GARCIA MOTION TO MODIFY PLAN
MJD-1 Matthew DeCaminada 1-27-17 [54]

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on January 27, 2017. By the court's calculation, 39 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is denied.

Nancy Garcia ("Debtor") seeks confirmation of the Modified Plan because she wants to surrender her interest in a WorldMark timeshare and remove the timeshare costs from her budget. Debtor also wants a modified plan to increase the principal balance on her vehicle based upon the claim filed by a creditor. Dckt. 57.

The Modified Plan provides that Debtor will surrender her interest in the World Mark timeshare previously listed in § 2.11, now moved to § 2.10. Debtor has removed the timeshare costs from her budget and adjusted the total general unsecured creditor amount in § 2.15 based upon the Court's Claims Register and increased the percentage paid to creditors in § 2.15 with approved claims.

Debtor has paid a total of $22,000.00 through December 2016 to the Chapter 13 Trustee and proposes to remit plan payments of $425.00 starting January 25, 2017, for six months to complete the Plan within the maximum term allowed by law. The total paid into the Plan would be $24,550.00.

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

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a Limited Opposition on February 21, 2017. Dckt. 60. The Trustee asserts the total amount paid stated in Debtor's proposed plan payments differs from the Trustee's records. The Trustee's records reflect a total amount paid of $22,400.00, $25.00 less than what is due under the Plan to date. Debtor paid $21,600.00 through December 2016 and made two payments of $400.00 in January. The Trustee does not oppose confirmation provided it is without prejudice to the Trustee seeking the $25.00 delinquency from Debtor. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

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

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

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

15. 14-30673-E-13 FERNANDO/SUSANA ORTIZ MOTION TO MODIFY PLAN
PLG-4 Steven Alpert 1-17-17 [97]

Final Ruling: No appearance at the March 7, 2017 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 17, 2017. By the court's calculation, 49 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is granted.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtor has filed evidence in support of confirmation. The Chapter 13 Trustee filed a statement of non-opposition on February 21, 2017. Dckt. 111. The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Modified Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Modified Chapter 13 Plan filed on January 17, 2017, is confirmed. Counsel for the Debtor shall prepare

an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

16. 16-28495-E-13 APN-1 | **ANN ADAMS** **Ronald Holland** | **OBJECTION TO CONFIRMATION OF PLAN BY GREENBACK ESTATES UNIT NOS 1 AND 2 HOMEOWNERS ASSOCIATION** **2-9-17 [23]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on February 9, 2017. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

Greenback Estates Unit Nos. 1 and 2 Homeowners Association, Creditor with a secured claim, opposes confirmation of the Plan. Creditor states that Ann Adams ("Debtor") is obligated under the terms of Covenants, Conditions and Restrictions ("CC&R's") to pay monthly dues to Creditor in order to cover Debtor's pro-rata share for maintaining, securing, and insuring the common areas of Property. Creditor filed those provisions separately. Moreover, on December 30, 2011, Creditor recorded a Notice of Lien Assessment.

Creditor asserts that Debtor is attempting to strip Creditor's lien and avoid paying without a credible and justifiable basis. Creditor believes the value of the Property at the time Debtor filed the petition was $140,000.00, based on a recent sale of a nearby unit of the same size.

Creditor also objects to Debtor attempting to treat it as an unsecured claim. Pursuant to Debtor's motion, the balance of the First Deed of Trust is $110,000.00 ($108,750.00 on Debtor's Schedule D). If the fair market value is to be $140,000.00, then there is enough equity in the property for Creditor to be secured.

Creditor also asserts that Debtor is attempting to strip Creditor's lien and avoid paying without a credible and justifiable basis, as there is a non-filing Co-Debtor. Creditor contends that the non-filing Co-Debtor is not the spouse of Debtor, and therefore, the Property is not community property that might otherwise be avoidable.

Creditor is also the holder of a lien in which both the Debtor and the non-filing Co-Debtor maintain a legal and equitable interest in the Property. Under 11 U.S.C. § 506, Creditor claims that Debtor is not permitted to avoid a lien when there exists a third party co-owner or co-obligor.

Additionally, Creditor is entitled to payment of its reasonable attorneys' fees and costs pursuant to CC&R's.

Lastly, Creditor believes it will be prejudiced by its position thereunder and will continue to suffer substantial and mounting losses.

At the February 28, 2017 hearing on the related Motion to Value (ULC-1), Debtor withdrew the valuation motion.

Sustaining of Objection to Confirmation

Creditor has filed a proof of claim asserting a secured claim in the amount of $11,191.19. Proof of Claim No. 1. The proposed Chapter 13 Plan does not provide for this secured claim—either as Class 1 to cure or Class 2 to modify and pay. It is listed in Class 2 to be paid $0.00, premised on a determination that the value of the secured claim is $0.00 pursuant to 11 U.S.C. § 506(a). That motion has been dismissed without prejudice. There being no such valuation, the court denies confirmation of the Plan.

The Objection to Confirmation is sustained.

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

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

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

17.	**16-28495-E-13**	**ANN ADAMS**	**OBJECTION TO CONFIRMATION OF**
	DPC-1	**Ronald Holland**	**PLAN BY DAVID P. CUSICK**
			2-7-17 [19]

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on February 7, 2017. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that the Plan relies on a pending Motion to Value.

That Motion to Value was dismissed without prejudice by Ann Adams ("Debtor"). Without the court valuing the claim, the Plan is not feasible. 11 U.S.C. § 1325(a)(6). Therefore, the Objection is sustained.

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

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

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

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

18. 13-22012-E-13 PGM-3 **KENNETH/KRISTINE THOMPSON** **Peter Macaluso** **CONTINUED MOTION TO MODIFY PLAN** **1-17-17 [149]**

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 17, 2017. By the court's calculation, 42 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is denied.

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

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on February 13, 2017. Dckt. 158.

The Trustee objects to the treatment of creditor Employment Development Department's ("Creditor") two claims of $621.81 and $431.74 in this case. Debtor's Schedule D does not list the amount of the Creditor's claim or indicate that it is secured by a deed of trust on the Debtor's residence. The Plan provides for treatment of this as a Class 4 claim to be paid by Debtor's son, but (because the Debtor asserts that it is subject to a claims valuation pursuant to 11 U.S.C. § 506(a)), proposes to pay a $0.00 monthly dividend on account of the claim.

The Trustee alleges that the Plan is not feasible 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. *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 a debtor adequately fund a 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)). Nothing in § 1322(a) compels a debtor to propose a plan that provides for a secured claim, however.

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:

A. Provide a treatment that the debtor and creditor agree to (11 U.S.C. § 1325(a)(5)(A)),

B. 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

C. Surrender the collateral for the claim to the creditor (11 U.S.C. § 1325(a)(5)(C)).

Those 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 claimholder may seek 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 Creditor's secured claim raises doubts about the Plan's feasibility. *See* 11 U.S.C. § 1325(a)(6).

The Trustee also objects to confirmation of the plan due to substantial good faith issues. The Trustee alleges that the two declarations are conflicting as to the ownership of the business. Debtor states in their declaration that the business was turned over to Debtor's son in January 2016. Dckt. 151. However, Debtor states that there was never a transfer of ownership to the son. Debtor's son's declaration stated that ownership of the business was transferred to him by Debtor on January 1, 2016, and Debtor was not insured or liable in any regards to the business. Dckt. 153.

FEBRUARY 28, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on March 7, 2017, because the deficiencies appeared to be curable, and taking due consideration of the Debtor's request for an extension in light of circumstances. Dckt. 163.

DISCUSSION

No further pleadings have been filed, and Debtor has not presented any evidence that the deficiencies have been cured.

Debtor filed a reply indicating that these deficiencies would be cured prior to the hearing. The court does not see evidence of these problems being addressed. The Modified Plan does not comply with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is not confirmed.

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

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

19. **14-22187-E-13** **NEDA HALL** **CONTINUED MOTION TO INCUR DEBT**
MJD-1 **Matthew DeCaminada** **2-14-17 [22]**

RULING POSTED AS A TENTATIVE SOLELY TO ALLOW PARTIES IN INTEREST TO ADDRESS LANGUAGE OF ORDER, IF NECESSARY

NO APPEARANCE REQUIRED IF PARTIES CONCUR IN THE COURT'S DECISION AND ORDER TEXT

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on February 14, 2017. 14 days' notice is required.

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

The Motion to Incur Debt is granted.

The Motion seeks permission to purchase real property for use as a primary residence commonly known as 7231 Cinnamon Circle, Citrus Heights, California, which the total purchase price is $182,500.00, with monthly payments of $1,811.74 with a down payment of $6,400 that will be taken out of equity in the property as a gift from the debtor's parents (sellers).

A motion to incur debt is governed by Federal Rule of Bankruptcy Procedure 4001(c). *In re Gonzales*, No. 08-00719, 2009 WL 1939850, at *1 (Bankr. N.D. Iowa July 6, 2009). Rule 4001(c) requires

that the motion list or summarize all material provisions of the proposed credit agreement, "including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions." Fed. R. Bankr. P. 4001(c)(1)(B). Moreover, a copy of the agreement must be provided to the court. *Id.* at 4001(c)(1)(A). The court must know the details of the collateral as well as the financing agreement to adequately review post-confirmation financing agreements. *In re Clemons*, 358 B.R. 714, 716 (Bankr. W.D. Ky. 2007).

TRUSTEE'S RESPONSE

Trustee opposes the motion on the basis that:

A. Debtor is currently renting at $980 per month and has not explained why she must purchase rather than to continue renting from her parents or how she can afford to purchase the property.

B. Debtor indicates that she will be able to make payments based upon additional income, however the debtor has not reported any changes to her income and/or expenses to the court or the Chapter 13 Trustee.

C. Debtor indicates that the payment per month will be $1,477. However, later in the motion Debtor indicates that the payment amount will be $1,811.74.

D. Debtor's plan proposes to pay $276 per month with unsecured guaranteed a 0% dividend. Trustee is concerned that this motion may not be in the best interest of the estate as a whole. Debtor may have more disposable income than she has reported and is proposing none to unsecured claims.

FEBRUARY 28, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on March 7, 2017. Dckt. 37.

ADDITIONAL PLEADINGS FILED

On March 3, 2017, the Chapter 13 Trustee filed a Response stating that upon review of the additional pleadings filed by Debtor, the Trustee does not oppose the Motion. Dckt. 38. The Trustee's conclusion is that Debtor having the benefit of a mortgage interest deduction will allow Debtor to fund the additional modest amount due for the mortgage payment over the current rent payment.

These additional pleadings by the Debtor are filed as Docket Entries 31–34. They support the Chapter 13 Trustee's conclusions that the Debtor can move from being a renter to home owner while still performing her duties under the Chapter 13 Plan in this case.

The Motion is granted, and Debtor is authorized to obtain the post-petition credit to purchase the real property commonly known as 7231 Cinnamon Circle, Citrus Heights, California, and to purchase said property.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Incur Debt filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Debtor is authorized to incur debt and purchase the real property commonly known as 7231 Cinnamon Circle, Citrus Heights, California, on the terms and conditions stated in the Purchase Agreements, Pre-Approval Letter, and Proposed HUD-1 documents files as Exhibits A–D, Dckt. 26.

20. 12-20297-E-13 JOSEPH ROBERTS MOTION TO INCUR DEBT O.S.T.
CYB-2 Candace Brooks 3-1-17 [40]

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

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

Local Rule 9014-1(f)(3) Motion—Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 1, 2017. By the court's calculation, 6 days' notice was provided.

The Motion to Incur Debt was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing ----------.

The Motion to Incur Debt is granted.

The Motion seeks permission to purchase a 2013 Ford F-150 XLT, which the total purchase price is $15,850.00, with monthly payments of $350.00 at 10.59% interest.

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

The court finds that the proposed credit, based on the unique facts and circumstances of this case, is reasonable. There being no opposition from any party in interest and the terms being reasonable, the Motion is granted. FN.1.

FN.1. Notwithstanding the interest rate of 10.5% being higher than the maximum amount generally allowed by the court, Debtor has now completed the sixty months of the Plan and is awaiting the Chapter 13 Trustee to complete his financial reporting of this case. The interest rate is not so significantly higher that the court will deny the Motion in light of these extraordinary circumstances.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Incur Debt filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Joseph Roberts ("Debtor") is authorized to incur debt to purchase a vehicle, with the purchase price not to exceed $23,000.00 and the interest rate not to exceed 10.59% per annum.