

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

April 25, 2017, at 3:00 p.m.

1. **14-20006-E-13** **RYAN/MEGAN ROSTRON** **MOTION TO MODIFY PLAN**
MJD-2 **Matthew DeCaminada** **3-17-17 [89]**

Final Ruling: No appearance at the April 25, 2017 hearing is required.

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

Sufficient 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 March 17, 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 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. Debtor has filed evidence in support of confirmation. The Chapter 13 Trustee filed a statement of non-opposition on April 10, 2017. Dckt. 96. 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 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 March 17, 2017, is confirmed. Debtor's Counsel 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.

2. [17-20709-E-13](#) **FRANK FERREIRA** **OBJECTION TO CLAIM OF INTERNAL**
MAC-1 **Marc Caraska** **REVENUE SERVICE, CLAIM NUMBER 2**
3-9-17 [25]

Final Ruling: No appearance at the April 25, 2017 hearing is required.

Local Rule 3007-1 Objection to Claim—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor, Chapter 13 Trustee, and Office of the United States Trustee on March 9, 2017. By the court's calculation, 47 days' notice was provided. 44 days' notice is required. Fed. R. Bankr. P. 3007(a) (thirty-day notice); L.B.R. 3007-1(b)(1) (fourteen-day opposition filing requirement).

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Objection to Proof of Claim Number 2 of Internal Revenue Service is granted, Creditor having filed Second Amended Proof of Claim No. 2 to state its claim as a \$6,785.13 general unsecured claim.

Frank Ferreira, III, the Chapter 13 Debtor (“Objector”) requests that the court disallow the claim of Internal Revenue Service (“Creditor”), Proof of Claim No. 2 (“Claim”), Official Registry of Claims in this case. Objector asserts that Creditor is showing Objector’s 2016 federal income tax return as not being filed with a priority claim of \$1,785.60. Objector asserts that he has filed his 2016 federal income tax return and was to receive a refund of \$476.00.

DISCUSSION

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

Here, Objector states in his Declaration that he has filed his 2016 federal income tax return and has submitted signed, redacted copies of the 2016 federal income tax return as Exhibit B. Dckt. 27, 28. Objector alleges he was to receive a refund on the 2016 federal income tax return in the amount of \$476.00, and he requests the court enter an order modifying the Proof of Claim of Creditor at \$0.00 secured, \$0.00 priority, and \$7,737.13 general unsecured.

Creditor has amended Proof of Claim No. 2 twice. The first time was on March 17, 2017, when Creditor adjusted the total amount of unsecured priority claims to \$0.00 and the total amount of unsecured general claims to \$7,261.13.

The second amendment occurred on April 4, 2017, when Creditor adjusted the total amount of unsecured general claims to \$6,785.13. Thus, Creditor’s amendments are consistent with the Objection to Claim and are in the nature of an admission of the merits of the Objection.

The Objection is sustained, and the claim of the Internal Revenue Service is disallowed for all amounts in excess of \$6,785.13.

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

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

The Objection to Claim of Internal Revenue Service, Creditor filed in this case by Frank Ferreira, III, the Chapter 13 Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection to Proof of Claim Number 2 of Internal Revenue Service is granted, with the claim disallowed for all amounts in excess of a \$6,785.13 general unsecured claim.

3. [16-28421-E-13](#) **CASSIE BERGQUIST** **MOTION TO CONFIRM PLAN**
EAS-1 **Edward Smith** **3-9-17 [23]**

Final Ruling: No appearance at the April 25, 2017 hearing is required.

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

Sufficient 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 March 9, 2017. By the court’s calculation, 47 days’ notice was provided. 42 days’ notice is required.

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

The Motion to Confirm the Amended Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Debtor has provided evidence in support of confirmation. The Chapter 13 Trustee filed a statement of non-opposition on April 3, 2017. Dckt. 29. The Amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

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

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

IT IS ORDERED that the Motion is granted, Debtor's Amended Chapter 13 Plan filed on March 9, 2017, is confirmed. Debtor's Counsel 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.

4. [17-20021-E-13](#) **STEPHEN/LYNNE CLAVE** **MOTION TO CONFIRM PLAN**
JJC-2 **Julius Cherry** **3-4-17 [33]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 3, 2017. By the court's calculation, 53 days' notice was provided. 42 days' notice is required.

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

The Motion to Confirm the Amended Plan is granted.

Stephen Clave and Lynne Clave ("Debtor") seek confirmation of the Amended Plan because various facts have changed and issues have been raised that have been accommodated for through concurrently-filed schedule and plan amendments. Dckt. 36.

The Amended Plan proposes the following:

- A. Adjust the combined principal, interest, and escrow dividend to Class 1 creditor Ditech Financial, LLC from \$1,239.37 to \$1,350.47 for plan months two through sixty due to a change in the interest rate and monthly escrow withholding amount.
- B. Adjust the dividend for arrears owed to Class 1 creditor Ditech Financial, LLC from \$517.36 to \$493.67 for plan months two through sixty due to a change in the actual amount of arrears and reduction of interest paid on arrears.
- C. Adjust the monthly dividend to Class 2 creditor Capital One Bank, NA from \$217.24 to \$335.00 for plan months two through six, then \$700.00 each month thereafter until claim is paid in full to effect accelerated payment of a debt on which interest must be paid.
- D. Remove Class 1 creditor County of Yuba due to post-petition notification that all property taxes debts due had been paid by Class 1 creditor Ditech Financial, LLC prior to the date of petition.
- E. Adjust dividend to all Class 7 unsecured nonpriority creditors from two percent to zero percent to provide enough funds in the plan to accommodate Class 1 and Class 2 secured creditors.
- F. Increase Debtor's plan payments for months two through sixty from \$2,290.00 to \$2,330.00.
- G. Adjust Debtor's monthly clothing budget from \$80.00 to \$40.00 to provide funds to accommodate increased plan payments for months two through sixty.
- H. Adjust administrative expenses from \$120.26 to \$380.83 to allow Debtor's attorney to receive remaining fees in six months while assuring adequate protection for secured creditors.

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

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on April 3, 2017. Dckt. 51.

The Trustee states that the plan payment must increase to \$2,408.44 effective February 25, 2017, because Debtor's mortgage payment changed. Debtor provides for Ditech in Class 1, but failed to adjust the mortgage arrears amount.

With the Plan payment modified to \$2,408.44 beginning March 25, 2017, to fund the adjusted mortgage payment and arrears claim, the Trustee states that the Plan is feasible.

The Trustee requests that the court grant confirmation with a provision in the order confirming that includes that Plan payments are \$2,290.00 for the first month, and \$2,408.44 for the next fifty-nine months provided that Debtor can make the payment increased by \$118.44.

RULING

At the hearing, Debtor reported that an increase of \$118.44 in plan payments to \$2,408.44 **is / is not** feasible. The Amended Plan, as modified, complies with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is confirmed.

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

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

The Motion to Confirm the Amended Chapter 13 Plan filed by 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, as modified to make plan payments for months two through sixty be \$2,408.44, is granted, Debtor's Amended Chapter 13 Plan filed on March 4, 2017, is confirmed. Debtor's Counsel 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.

[17-21525-E-13](#)
EWV-116

CHERI GOETZ
Eric Vandermey

MOTION TO VALUE COLLATERAL OF
TRINITY FINANCIAL SERVICES, LLC
3-26-17 [\[14\]](#)

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.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, and Office of the United States Trustee on March 26, 2017. By the court's calculation, 30 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 hearing on the Motion to Value Secured Claim of Trinity Financial Services, LLC (“Creditor”) is continued to 3:00 p.m. on xxxxxxxx, 2017, to allow Creditor to obtain an appraisal and share a copy of the appraisal with Debtor if Creditor disputes the asserted value of the Property.

The Motion to Value filed by Cheri Goetz (“Debtor”) to value the secured claim of Trinity Financial Services, LLC (“Creditor”) is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 374 Aaron Circle, Vacaville, California (“Property”). Debtor seeks to value the Property at a fair market value of \$317,000.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See Fed. R. Evid. 701; see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

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

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

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

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

NO PROOF OF CLAIM FILED

No Proof of Claim has been filed by a creditor that appears to be for the claim to be valued.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on April 11, 2017. Dckt. 20. The Trustee states that Creditor has not filed a claim, and the Trustee has no basis to oppose the motion.

CREDITOR'S OPPOSITION

Creditor filed an Opposition on April 11, 2017. Dckt 23. Creditor asserts that the initial assessment value of the Property is \$340,000.00. Creditor requests additional time to retain an appraiser expert to inspect and report the property value. Creditor believes that it is not wholly unsecured and is entitled to full rights as a lienholder on the Property.

Creditor requests an initial determination at the first hearing on this matter as to the date of valuation, as there is an alleged split of authority in the Ninth Circuit regarding whether the date of confirmation or the date of filing is the proper date for value in a Chapter 13 motion to value. Creditor's position is that the date of confirmation is the date of valuation, and would brief the issue upon request.

However, Creditor has not provided any admissible evidence of value in favor of any of the positions it requests in opposition.

DISCUSSION

The Capital One 360 First deed of trust secures a claim with a balance of approximately \$328,000.00, based on Debtor's statement under penalty of perjury on Schedule D. Creditor's Second deed of trust secures a claim with a balance of approximately \$71,339.00. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized if Debtor's testimony of value is uncontested.

It is not unreasonable to allow Creditor to promptly obtain an appraisal. This also affords Debtor and Creditor to address the economic realities of the junior lien position, the amount of the senior lien, and whether the parties can craft a better economic resolution than litigation.

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 Cheri Goetz (“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 hearing on the Motion to Value the Secured Claim of Trinity Financial Services, LLC is continued to **3:00 p.m. on xxxxxxxxx, 2017.**

- a. Priority unsecured tax debts totaling \$76,612.00,
 - b. Student loans of \$321,591.00, and
 - c. General unsecured debts of \$107,002.00.
- C. Debtor unfairly discriminates against creditors. The Plan proposes to pay 0% to unsecured creditors. Debtor Leslie Fournier testified at the First Meeting of Creditors held on September 29, 2016, that she is making a \$151.50 monthly student loan payments directly. Debtor's Schedule J does not disclose that expense. Where Debtor admits that the student loan payment is hidden in the budget, creditors do not have the opportunity to object to the direct payment to an unsecured debt.
- D. Debtor's Plan may not be the Debtor's best effort. Debtor is above median income and proposes to pay 0% to general unsecured creditors.
1. The Trustee objects to the following deductions on Form 122C-2:
 - a. \$489.00 for optional telephone services. Debtor's separate budgets list \$165.00 for telephone expenses for Debtor Stephen Fournier and \$0.00 for Debtor Leslee Fournier. According to the form, this deduction is not to be used for basic home telephone service, internet, cell phone, or self-employment expenses;
 - b. \$37.00 for additional food and clothing expense. No proof of the expense is provided as required by the form;
 - c. \$125.00 for charity expenses. No charitable expenses are disclosed on the Debtor's budget or on the Business Income and Expenses; and
 - d. \$2,764.00 for Debtor Stephen Fournier's separate living expenses. Debtor has claimed standard Internal Revenue Service allowable living expense deductions for a household of two persons on lines 6, 7g, 8, 9, 11, 12, and 13a-f. The Trustee objects to Debtor taking additional deductions for the separate household expenses when already claiming expenses for a household of two persons.

Adjusting the form for these expenses results in monthly disposable income of \$3,393.98. Based on the applicable commitment period of sixty months, unsecured creditors would be entitled to receive \$203,638.80. The Plan proposes to pay \$76,612.00 to priority unsecured creditors and a 0% dividend to general unsecured creditors.

2. Debtor's separate budgets both list a food expense of \$600.00 on Schedule J. The Internal Revenue Service Allowable Living Expenses National Standard for food for one person is \$307.00 per month. The Trustee requests proof that Debtor actually has these expenses above the national standard allowance.

NOVEMBER 1, 2016 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on December 6, 2016. Dckt. 53. The court set November 8, 2016, as the deadline to file and serve any supplemental objections. Replies were to be filed and served by November 22, 2016.

TRUSTEE'S SUPPLEMENT TO OBJECTION

The Trustee filed a Supplement on November 8, 2016. Dckt. 59. The Trustee summarizes that he objected on four grounds:

- A. Delinquency,
- B. Eligibility based on unsecured debt,
- C. Student loan treatment, and
- D. Not best effort.

The Trustee states that Debtor is now current. So, the delinquency objection has been resolved. As to the unsecured debt, the Trustee notes that Debtor has filed Amended Schedules that reflect the debt as contingent for a lesser amount. *See* Dckt. 42. The Trustee has filed a Motion to Dismiss based upon delinquency and eligibility, and Debtor has opposed revealing that Debtor has been in an income-based repayment plan since 2007.

At this time, the Trustee is not certain if the student loan debt should be considered contingent for purposes of eligibility. The monies are owed now, and a contingency may occur so that the debt will be reduced—completion of the income-based repayment plan. That possible contingency appears to be pending at the time of the bankruptcy filing.

The Trustee raises an issue of unfair discrimination against unsecured creditors. Debtor's Plan does not classify the student loan payments separately, and no clear expense item appears on Schedule J for it, but Debtor has stated that she is paying it at \$151.50 per month. In a sixty-month plan, that will result in a \$2.59 payback (based on \$9,090.00 paid on \$351,591.00). General unsecured claims are to receive 0% under the Plan, when they would need to receive \$1,994.36 to be paid the same percentage as the student loan, which would require an increased plan payment by \$37.00 per month.

The Trustee illustrates that Debtor has not presented a Schedule J-2 that shows the student loan expense, a copy of the current income-based repayment plan, or sufficient documentation that the court can

determine if the income-based repayment plan will remain in plan and available for the remainder of the Plan.

DEBTOR'S RESPONSE TO TRUSTEE'S OBJECTION

Debtor filed an Opposition to the Trustee's Objection on November 22, 2016. Dckt. 75. Debtor confirms that the delinquency objection has been resolved. Debtor states that Schedule F has been amended to reflect the student loan debt as contingent, which Debtor expects to be the case throughout the term of the loan because Debtor has never not qualified for the plan (measured by annual verifications).

To address the Trustee's allegation of unfair discrimination against unsecured claims, Debtor proposes to raise plan payments by \$39.00.

Debtor states that she attached a Schedule J-2 (Exhibit A, Dckt. 77) showing that the student loan is paid as a business expense. Debtor does not have the original income-based repayment plan approval, but she has attached a Payments and Billing Statement from Cornerstone—the loan servicer—(Exhibit B, Dckt. 77), Payee Details for Department of Education Cornerstone Loan Services showing recent payments (Exhibit C, Dckt. 77), and a printout from Federal Student Aid showing the history of her student loans (Exhibit D, Dckt. 77).

Debtor justifies the \$489.00 per month telephone expense that the Trustee objected to by stating that it is necessary for long distance expenses, Debtor Stephen Fournier's work cell phone, and job-related internet access. The Trustee also objected that an additional \$37.00 food and clothing expense was not supported by independent documentation, and Debtor states that it covers professional clothing and dry cleaning expenses for work.

Debtor states that the charity expenses are included in Debtor's discretionary expenses. Debtor Leslee Fournier donates \$500.00 per year, or \$42.00 per month, and Debtor Stephen Fournier donates \$85.00 per month.

While the Trustee objects to Debtor Stephen Fournier's separate living expenses, Debtor explains that they have been separated for more than three years and did not have an ability to alter the means test through the software they used. Debtor manually recalculated the means test and received a result showing that unsecured claims should be paid \$38.98 per month. As mentioned before, Debtor has agreed to increase plan payments by \$39.00 per month.

Debtor explains that the \$600.00 per month expense for food and household supplies is caused because Debtor Stephen Fournier maintains a physically demanding job and must eat well, and Debtor Leslee Fournier travels several days each week, which necessitates eating out. Debtor has provided various food and grocery shopping receipts to verify these expenses to the Trustee.

Debtor requests that the Objection to Confirmation be overruled.

DECEMBER 6, 2016 HEARING

At the hearing, the court noted that the parties had set an evidentiary hearing on a motion to value, as well as continuing to negotiate to resolve their dispute on an economic basis using realistic values for the collateral. Debtor, JPMorgan Chase Bank (“Creditor”), and the Trustee agreed to continue the hearing, and the court continued it to 1:30 p.m. on April 19, 2017, to be conducted in conjunction with an evidentiary hearing on a motion to value a secured claim. Dckt. 85.

ORDER RESETTING HEARING

On March 20, 2017, the court entered an order resetting the hearing on this Objection to 3:00 p.m. on April 25, 2017. Dckt. 107.

TRUSTEE’S STATUS REPORT

The Trustee filed a Status Report on March 21, 2017. Dckt. 108. The Trustee reports that some of his objections have been resolved, but some others have not been resolved. The Trustee notes that the Plan will complete in seventy-two months, instead of within sixty, because Debtor and Creditor stipulated that creditor would have a secured claim for \$11,500.00 with 5% interest and monthly principal and interest payments of \$217.02. *See* Dckt. 104. Without the stipulation, the Plan had called for Creditor’s lien to be stripped in Class 2C.

The Trustee states that Debtor is no longer delinquent and is current with plan payments.

Debtor stated that plan payments would be increased by \$39.00 to resolve the Trustee’s objection to paying student loans outside of the Plan, but the Trustee notes that plan payments have not increased yet.

Regarding disposable income, the Trustee notes that Debtor filed an Amended Statement of Current Monthly Income and Calculation of Disposable Monthly Income and reduced the household size to one, but the Trustee states that Debtor has claimed increased deductions without any explanation. Debtor increased healthcare expenses on Line 22 from \$82.00 to \$136.00. On Line 43, Debtor increased Mr. Fournier’s separate living expenses from \$2,764.00 to \$2,984.00. Even considering the increases, there would be disposable monthly income of \$258.98 to be applied toward the Plan (which pays 0.00% to general unsecured claims) for a total dividend of \$15,538.80.

DISCUSSION

The Trustee’s objections are well-taken. Now that the court has approved a stipulation between Debtor and JPMorgan Chase Bank, 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-two months. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

The Trustee opposes confirmation due to the Debtor’s unfair discrimination to unsecured creditors. Debtor Leslee Fournier testified at the First Meeting of Creditors that she is directly paying a monthly student loan payments of \$151.00; however, Debtor failed to disclose this expense on Schedule J.

By not disclosing this payment, Debtor has unfairly discriminated against other unsecured creditors by foreclosing them from objecting to the direct payment of an unsecured debt. While Debtor has promised to increase plan payments by \$39.00 to resolve this particular objection, no increase has been made. Therefore, this ground is cause to deny confirmation. 11 U.S.C. § 1322(a)(3), (b)(1).

Additionally, Debtor has increased expenses for healthcare and separate living expenses without any explanation why they are necessary. Without a clear picture of Debtor's necessary and reasonable expenses, the court cannot determine if 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 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

The Proof of Claim was filed untimely according to the Federal Rules of Bankruptcy Procedure 3002(c). The bar date for non-governmental units to file claims was May 25, 2016. The Proof of Claim was filed on October 4, 2016.

Based on the evidence before the court, the creditor's claim is untimely and is disallowed in its entirety. The Objection to the Proof of Claim is sustained.

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

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

The Objection to Claim of LoanNow, LLC, Creditor filed in this case by David Cusick, the Chapter 13 Trustee, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection to Proof of Claim Number 17 of LoanNow, LLC is sustained, and the claim is disallowed in its entirety.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 31, 2017. By the court’s calculation, 49 days’ notice was provided. 42 days’ notice is required.

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

The Motion to Confirm the Amended Plan is denied.

Billy Tenberg (“Debtor”) seeks confirmation of the Amended Plan that was filed to include previously unaccounted-for debts. Dckt. 43. The Amended Plan reduces monthly payments for attorneys’ fees, adds creditors to their respective classes, and reduces the dividend to unsecured claims by six percent. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

TRUSTEE’S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on February 22, 2017. Dckt. 49.

The Trustee asserts that Debtor has not disclosed the changes in the Amended Plan in the Motion. The Motion therefore does not state with particularity the grounds upon which relief is sought. The Trustee notes that the new plan differs for the following reasons:

- A. Monthly payment for attorney fees has been reduced by \$100.00;

- B. Bank of America has been added to Class 1 for a Second Deed of Trust to be paid \$135.00 per month, and arrears are to be paid forty-seven percent interest;
- C. Wells Fargo has been added to Class 2(a) for \$4,030.60 secured by jewelry to be paid \$50.00 per month, at four percent interest;
- D. Wells Fargo has been added to Class 4 for a First Deed of Trust to be paid \$1,800.00 per month directly by Debtor; and
- E. The dividend to unsecured claims has been reduced to no less than eight percent, down from no less than fourteen percent.

The Plan payments remain \$600.00 per month for sixty months. No amended Schedule I or J or Statement of Financial Affairs has been filed. Schedule C was amended and now includes a \$130.00 claim in Jewelry that had not been listed on Schedule B.

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 an eight-percent dividend to unsecured claims, which total \$81,069.88. Debtor's projected disposable income under 11 U.S.C. § 1325(b)(2) is unclear with no documentary evidence to support his declaration statement that he averages \$5,000.00 per month on an annual basis.

The Trustee asserts that Debtor has presented 1099-C forms, from 2014 and 2015, along with a document supposedly relating to an accounting of Debtor's income. Debtor does not explain in Debtor's Declaration the origins of the document representing an accounting of Debtor's gross income.

The Trustee notes that if this document is correct, however, then Debtor has income exceeding what was claimed on the Statement of Financial Affairs. Also, Schedule I lists a gross income of \$5,000.00 from wages and \$1,100.00 from Social Security, which does not add up to \$5,000.00 per month of gross income.

REQUEST FOR CONTINUANCE

Debtor requested that this matter be continued on March 14, 2017. Dckt. 55. Debtor requested a continuance to provide time to compile the financial records requested by the Trustee. The court granted Debtor's request on March 14, 2017, and continued the hearing to 3:00 p.m. on April 25, 2017. Dckt. 57.

SUPPLEMENTAL FILING

Debtor filed a supplemental document entitled Business Income and Expenses on April 17, 2017. Dckt. 63. The document estimates \$13,243.00 in future gross monthly income and \$8,243.00 in future monthly expenses, netting \$5,000.00 per month in income.

The listed monthly expenses are:

A.	\$340.00	Worker's Compensation
B.	\$625.00	Other Taxes
C.	\$110.00	Utilities
D.	\$740.00	Repairs and Maintenance
E.	\$500.00	Vehicle Expenses
F.	\$1,040.00	Travel and Entertainment
G.	\$100.00	Equipment Rental and Leases
H.	\$200.00	Legal/Accounting/Other Professional Fees
I.	\$460.00	Insurance
J.	\$220.00	Employee Benefits (e.g., pension, medical, etc.)
K.	\$100.00	Laundry
L.	\$1,600.00	Fuel
M.	\$158.00	Licensing
N.	\$50.00	Scale Fees
O.	\$2,000.00	Labor

DISCUSSION

Debtor appears to have filed the supplemental Business Income and Expenses document in direct response to the Trustee's statement that "[i]n the event that the Debtor seeks confirmation of a plan, the Debtor should file a detailed business budget, and the Trustee will object unless the Debtor also provides to the Trustee a year of bank statements to support it" Dckt. 49. No evidence has been provided regarding whether Debtor has provided bank statements to the Trustee.

The income and expenses document may seem detailed to Debtor, but the court has no information about what many of the categories are and how the amounts are reasonable and justified. Debtor has not filed a supplemental declaration with the document, which would be proper both to introduce the document into evidence and to provide the court and the Trustee with context for the various categories.

As the document has been presented, the court has no clearer of a picture of Debtor's financial situation now than it did at the prior hearing. Without a clear sense of Debtor's financial situation, the court cannot confirm the Plan.

With Debtor's various changes, filings, and omissions going unexplained, the court denies the Motion to Confirm the Amended Plan.

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

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

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

IT IS ORDERED that the Motion to Confirm the Amended Plan is denied.

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.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor’s Attorney on March 29, 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 may not be able to afford plan payments for property sales and real property insurance.
- B. Debtor failed to provide a tax transcript or a copy of her Federal Income Tax Return.
- C. Debtor failed to provide for Franchise Tax Board’s priority claim on Schedule E.

The Trustee’s objections are well-taken.

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Section 1.02 of the Plan calls for “Lump-Sum from sale of commercial properties in the approximate amount of \$130,000 or an amount sufficient to complete the plan.” Debtor was not aware of

the sale prices for 251 S. and 253 S. Elmwood, and 232 S. Mirage in Lindsay, California. The Plan fails to list when the lump sums will be paid into the Plan and if the properties listed will pay in sufficient funds to complete the Plan.

Debtor also admitted that the property of 906 Almond Street, Yuba City, California is currently not covered by insurance. The Trustee is not clear if any of the properties that Debtor has an interest in are covered by real property insurance because Schedule J does not list an expense for real property insurance. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

The Trustee argues that Debtor did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. *See* 11 U.S.C. § 521(e)(2)(A); 11 U.S.C. § 1325(a)(9); Fed. R. Bankr. P. 4002(b)(3).

The Trustee asserts that the Franchise Tax Board has a claim for \$2,132.53 in priority unsecured debt. Proof of Claim 1, filed on March 10, 2017. The Plan does not provide for all priority debt as required by 11 U.S.C. § 1322(a)(2).

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. [17-20943-E-13](#) **MARTHA RAMIREZ**
FWP-1 **Peter Macaluso**

**OBJECTION TO CONFIRMATION OF
PLAN BY SUTTER COUNTY
TREASURER & TAX COLLECTOR
3-30-17 [22]**

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.

Sufficient 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 March 30, 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.

Sutter County Treasurer & Tax Collector, Creditor with a secured claim, opposes confirmation of the Plan on the basis that:

- A. The proposed monthly payments will not cure arrearages on Creditor’s claim;
- B. The proposed lump sum payment from selling properties is too speculative, meaning that Debtor may not be able to afford plan payments; and
- C. Neither the Plan nor the bankruptcy case were filed in good faith.

Creditor’s objections are well-taken. The objecting creditor holds a first-priority tax lien secured by Debtor’s residence. Creditor has filed a proof of claim in which it asserts \$64,366.35 in pre-petition

arrearages. The Plan does not propose to cure those arrearages through ongoing monthly payments alone. Instead, the Plan proposes monthly payments of \$860.00 (as a Class 2 Claim) plus a lump sum on or before the sixtieth month. Dckt. 10. The court agrees with Creditor that the Plan is too speculative as to funding the Plan when Debtor does not provide specific mechanisms in case she is not able to sell property to generate a lump sum. Section 1.02 of the Plan calls for “LUMP-SUM FROM SALE OF COMMERCIAL PROPERTIES IN THE APX AMOUNT OF \$130,00 OR AN AMOUNT SUFFICIENT TO COMPLETE THE PLAN.” *Id.*

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). What has been proposed to the court, though, is far too speculative for the court or any party in interest to determine the feasibility and viability of a plan based upon a potential sale of property within the next five years.

Without a sufficient lump sum from selling property, Debtor will not be able to make adequate plan payments under 11 U.S.C. § 1325(a)(6). Debtor proposes to pay Creditor’s claim \$860.00 per month, which equals \$51,600.00 over the course of the plan term. That amount is short of Creditor’s full priority claim by \$12,766.35.

Finally, Creditor argues that this Plan and bankruptcy case have not been filed in good faith. Creditor notes that this is Debtor’s fourth bankruptcy case in eight years with mere months existing between some of the filings. Creditor argues that Debtor has been unable to confirm a plan through the cases and uses the cases and proposed plans to delay creditors from exercising their rights. The court’s review of Debtor’s bankruptcy cases reveals the following:

- A. Case No. 09-33215
 - 1. Chapter 13
 - 2. Filed on June 26, 2009
 - 3. Appeared in *pro se*
 - 4. No confirmed plan
 - 5. Dismissed on August 27, 2009

- B. Case No. 09-48498
 - 1. Chapter 11
 - 2. Filed on December 30, 2009
 - 3. Appeared in *pro se*

4. No confirmed plan
 5. Dismissed on May 12, 2011
- C. Case No. 11-36557
1. Filed as Chapter 13 on July 5, 2011
 2. Converted to Chapter 7 on March 19, 2012
 3. Represented by Anthony Hughes and Peter Macaluso
 4. No confirmed plan while in Chapter 13
 5. Discharged on March 16, 2017
- D. Case No. 17-20943 (present case)
1. Chapter 13
 2. Filed on February 15, 2017
 3. Represented by Peter Macaluso
 4. No confirmed plan

Through four bankruptcy cases that have existed almost as one ongoing case, Debtor has experimented with various chapters of the Bankruptcy Code and has not yet proposed a plan that the court confirmed. Only by the court converting one of Debtor's cases to Chapter 7 was Debtor able to complete a case to discharge. The filing of the present case and plan does not appear to be in good faith pursuant to 11 U.S.C. § 1325(a)(3) & (7) given Debtor's history of proposing unconfirmable plans.

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,

- E. Debtor's Chapter 13 documents are incomplete.
- F. Debtor's Plan proposes to pay interest on arrears when not entitled.
- G. Debtor did not file a spousal waiver.
- H. Debtor's Plan fails to provide for Wells Fargo Bank's secured claim.

The Trustee's objections are well-taken.

The Trustee asserts that Debtor is \$150.00 delinquent in plan payments, which represents one month of the \$150.00 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 did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. To attempt to confirm a plan while failing to appear and be questioned by the Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

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

11 U.S.C. § 1325(a)(1) provides for confirmation of a plan if it complies with Chapter 13 provisions and other applicable Code provisions. Here, Debtor has proposed a plan that is woefully lacking in compliance with the Bankruptcy Code for the following reasons:

- A. Schedule J lists Debtor's net income as negative \$2,395.00.
- B. Section 2.15 is blank, and Debtor failed to list a dividend to unsecured creditors.
- C. Debtor lists LoanCare Servicer in Class 1 of the Plan and Class 1 is incomplete as it fails to list the arrearage dividend.
- D. Schedules E and F lists Smile Generation as a priority creditor. No other creditors were listed on those schedules. It is not clear if Debtor completed the schedules properly.
- E. The Statement of Financial Affairs is incomplete. Debtor provides no information in the entire document.

The Trustee asserts that the Plan does not comply with 11 U.S.C. § 1325(a)(1) because it proposes to pay interest on arrears to LoanCare Servicer in Class 1. However, this creditor may not be entitled to interest under 11 U.S.C. § 1322(e) unless the note provides for interest on late payments or applicable non-bankruptcy law requires it.

The Trustee objects to Debtor's use of the California exemptions without the filing of the spousal waiver required by California Code of Civil Procedure § 703.140. California Code of Civil Procedure § 703.140(a)(2), provides:

If the petition is filed individually, and not jointly, for a spouse, the exemptions provided by this chapter other than the provisions of subdivision (b) are applicable, except that, if **both** of the spouses effectively waive in writing the right to claim, during the period the case commenced by filing the petition is pending, the exemptions provided by the applicable exemption provisions of this chapter, other than subdivision (b), in any case commenced by filing a petition for either of them under Title 11 of the United States Code, then they may elect to instead utilize the applicable exemptions set forth in subdivision (b).

(emphasis added). The court's review of the docket reveals that the spousal waiver has not been filed.

The Trustee notes that Wells Fargo Bank, N.A. asserts a claim of \$6,535.34 in this case. Debtor's Schedule D does not list this claim. The Plan does not provide for treatment of that 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 Wells Fargo Bank, N.A.'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 Wells Fargo Bank, N.A.'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 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.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on March 9, 2017. By the court’s calculation, 47 days’ notice was provided. 42 days’ notice is required.

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

The Motion to Confirm the Amended Plan is denied.

Richard Cruz (“Debtor”) seeks confirmation of the Amended Plan because he has supplied documentation that was missing in the first plan. Dckt. 111. The Amended Plan corrected the Plan to exclude for the income and expenses of his separated non-filing spouse, include 2015 tax returns filed, account for the granted Motions to Value Secured Claim on Second and Third mortgages, provide for certain secured debts with creditors, and indicate the corporation Debtor co-owns pays for certain secured debt.. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

TRUSTEE’S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on April 3, 2017. Dckt. 115.

The Trustee asserts that 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 eighty-two months due to priority claims filed by the Internal Revenue Service claiming \$53,093.89, and the Franchise Tax Board claiming \$8,314.07. The plan payment must be increased to at least \$395.00 to complete within the allotted time. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor's Second Amended Plan removes treatment of the secured claim of HSBC Bank USA, N.A., and Nationstar Mortgage LLC ("Creditor"). The Trustee does not know what Debtor intends to do with the property. Creditor's claim reports mortgage arrearages totaling \$21,769.34 that would be paid by the Trustee in Class 1 or Class 3 as property to be surrendered, although the Plan does not so provide. If the collateral is surrendered, Debtor will not have the \$1,410.00 expense, and the Plan will not pay unsecured claims Debtor's projected disposable income. Debtor also listed a property on Schedule A and B as the primary residence of his spouse, but that conflicts with Schedule G, which lists his spouse at a different address. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

The Trustee is uncertain if attorney fees reported in the Second Amended Plan are accurate. Debtor's previous plan changed the fees from \$0.00 to \$1,500.00 and the balance due from \$4,000.00 to \$2,500.00. Debtor's Rights and Responsibilities and Disclosure of Compensation still report \$0.00 prior to filing and the fee balance as \$4,000.00. The Trustee raised this issue in the previous Opposition to Motion to Confirm First Amended Plan.

The Amended Plan does not comply with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is not confirmed.

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

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

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

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

13. [16-24246-E-13](#) RICHARD CRUZ
PPR-2 Eric Vandermey

**OBJECTION TO CONFIRMATION OF
PLAN BY HSBC BANK USA, N.A.
4-6-17 [118]**

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.

Sufficient 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 April 6, 2017. By the court's calculation, 19 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.

HSBC Bank USA, National Association as Trustee for Structured Adjustable Rate Mortgage Loan Trust, Mortgage Pass-Through Certificates, Series 2007-7, Creditor with a secured claim, opposes confirmation of the Plan on the basis that:

- A. The Plan does not require maintenance of ongoing post-petition monthly payments.
- B. The Plan does not cure arrearages on Creditor's claim.
- C. The Plan does not provide for Creditor's secured claim.
- D. Debtor has acted in bad faith by ignoring Creditor's claim.

Creditor's objections are well-taken. The objecting creditor holds a deed of trust secured by Debtor's residence. Creditor has filed a timely proof of claim in which it asserts \$21,769.34 in 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 objecting Creditor asserts a secured claim of \$509,419.93 in this case. Debtor's Schedule D lists the servicer, Nationstar Mortgage, instead of Creditor, and it estimates the amount of the claim secured by a deed of trust is \$487,500.00. The Plan does not provide for the claim.

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.

Creditor also argues that Debtor has acted in bad faith under 11 U.S.C. § 1325(a)(3) by proposing a plan that does not provide for Creditor's claim. Of the two prior plans filed in this case, one appears to provide for Creditor by including payments of \$1,800.00 to Nationstar Mortgage. *See* First Amended Plan, filed November 18, 2016, Dckt. 86. As the court discussed above, Debtor is not required to provide for a secured claim, and the omission of Creditor's claim here is not, by itself, proof of bad faith.

Improper Request for Barring Debtor from Refiling for Bankruptcy

Creditor makes an additional request in the prayer that this bankruptcy case be dismissed and that Debtor be barred from filing another bankruptcy case for a period of 180 days pursuant to 11 U.S.C. § 109(g). Creditor has not provided the court with any grounds or supporting law and argument to support its request for dismissing Debtor's case and barring Debtor from refiling. No Memorandum of Points and Authorities has been filed to support a legal basis for such a request, and no evidence has been filed to support such a request in this case.

The court does not consider a moving party's requests lightly. Federal Rule of Bankruptcy Procedure 9011(b) states the following:

By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleadings, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

When a party violates his representations to the court, Federal Rule of Bankruptcy Procedure 9011(c)(1)(B) provides for the court to issue sanctions on its own initiative. Such an unsupported request

to bar Debtor from refiling a bankruptcy case causes the court to question Creditor's and Creditor's counsel's representations under the Federal Rules of Bankruptcy Procedure.

If Creditor or Creditor's counsel persist in requesting such relief, or other relief, for which no proper grounds exist or in a manner that is not procedurally proper, then the court will likely issue an Order to Show Cause for Creditor's counsel to explain how such a request is consistent the certifications made under Federal Rule of Bankruptcy Procedure 9011, with no telephonic appearances permitted. The possible corrective sanctions could include suspending telephonic appearance permission for a period of one year, the court concluding that it is necessary for such counsel to appear in person in court to properly comply with the law and rules.

RULING

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.

14. [17-21057-E-13](#) PAUL BOUTIETTE
CJO-1 Peter Macaluso

**OBJECTION TO CONFIRMATION OF
PLAN BY U.S. BANK, N.A.
3-30-17 [24]**

Final Ruling: No appearance at the April 25, 2017 hearing is required.

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

Sufficient 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 March 30, 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.

**The hearing on the Objection to Confirmation of Plan is continued to 3:00 p.m.
on May 9, 2017.**

U.S. Bank National Association, Creditor with a secured claim, opposes confirmation of the Plan on the basis that it relies on a motion to value Creditor's secured claim.

A review of Debtor's Plan shows that it relies on the court valuing Creditor's secured claim. Debtor filed a Motion to Value Creditor's Secured Claim, and a review of the docket shows that on April 12, 2017, the court continued the hearing on that motion to 3:00 p.m. on May 9, 2017. This Objection relates directly to the court's ruling on that Motion, and therefore, continuing the hearing on this matter is appropriate.

Non-Compliance with Federal Rules of Evidence

Creditor has not provided any declaration from a witness who is knowledgeable and competent to testify as to supporting facts for Creditor's Objection pursuant to Federal Rules of Evidence 601 & 602. Also, Creditor has not followed any procedure for admitting evidence to the record. The filed exhibits have not been authenticated, and they are not admissible when filed by themselves. *See* Dckt 26; *see also* Federal Rules of Evidence 901 & 902.

Without any evidence to support Creditor's position, the Objection could be overruled. Continuance of this Objection to coincide with the Motion to Value Secured Claim may save Creditor's argument, however, by allowing it time to file supplemental evidence (e.g., a supporting declaration).

CONTINUANCE OF OBJECTION

The hearing is continued to 3:00 p.m. on May 9, 2017.

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

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

The 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 hearing on the Objection to Confirmation of the Plan is continued to 3:00 p.m. on May 9, 2017.

15. [17-21057](#)-E-13 PAUL BOUTIETTE
DPC-1 Peter Macaluso

**OBJECTION TO CONFIRMATION OF
PLAN BY DAVID P. CUSICK
3-29-17 [20]**

Final Ruling: No appearance at the April 25, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on March 29, 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.

**The hearing on the Objection to Confirmation of Plan is continued to 3:00 p.m.
on May 9, 2017.**

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that Debtor's Plan relies on the Motion to Value Secured Claim of US Bank.

A review of Debtor's Plan shows that it relies on the court valuing US Bank's secured claim. Debtor filed a Motion to Value Secured Claim, and a review of the docket shows that on April 12, 2017, the court continued the hearing on that motion to 3:00 p.m. on May 9, 2017. This Objection relates directly to the court's ruling on that Motion, and therefore, continuing the hearing on this matter is appropriate.

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

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

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

IT IS ORDERED that the hearing on the Objection to Confirmation of the Plan is continued to 3:00 p.m. on May 9, 2017.

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

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

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

The Motion to Sell Property 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 Sell Property is granted.

The Bankruptcy Code permits Sherry Kiddy, the Chapter 13 Debtor, (“Movant”) to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movant proposes to sell the real property commonly known as 14418 Pincrest Drive, Brownsville, California (“Property”).

The proposed purchaser of the Property is Jason Wilkins, and the terms of the sale are:

- A. Purchase price of \$65,000.00;
- B. All-cash purchase;
- C. Initial deposit of \$2,000.00;
- D. Broker’s fee of \$2,275.00;
- E. Property includes the following items in as-is condition:
 - 1. Two generators—
 - a. One red (generic brand, model 4000EXL),

- b. One green (currently inoperative),
 - 2. Three gas cans,
 - 3. One yellow extension cord of approximately one hundred feet,
 - 4. One garden hose,
 - 5. Approximately one half of a can of Thompson Water Seal,
 - 6. One roll of fencing,
 - 7. Two water-holding tanks—
 - a. One green 1,000 gallon tank,
 - b. One white 250 gallon tank,
 - 8. Twenty-foot Prowler travel trailer—
 - a. California license 2FB4941,
 - b. Includes small flatscreen TV,
 - 9. Picnic table,
 - 10. Three molded plastic camp chairs, and
 - 11. Garbage can with lid;
- F. Movant to provide the Trustee with a copy of the escrow closing statement within fourteen days of the close of escrow; and
- G. Any and all inspections to be paid by Buyer and to be completed during a seventeen-day inspection period.

TRUSTEE’S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a statement of non-opposition on March 29, 2017.

DISCUSSION

At the time of the hearing, the court announced the proposed sale and requested that all other persons interested in submitting overbids present them in open court. At the hearing, the following overbids were presented in open court: **XXXXXXXXXXXXXXXXXX**.

Movant has included \$2,275.00 for a broker's fee to be paid to Sam Hansen of Sunwest Real Estate. The court's review of the docket reveals that Movant never sought for the court to employ a real estate broker in this case, and there is no prior case in which a broker may have been employed either. Compensation of the broker under 11 U.S.C. § 328 is not proper when the court has not authorized the employment of the professional person under 11 U.S.C. § 327. Mr. Hansen has essentially been working on Movant's behalf for free. The \$2,275.00 broker's fee is not approved, and the Trustee is not authorized to pay it.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because it provides a net lump sum that is far in excess of the remaining \$6,841.92 balance owed under the confirmed Plan.

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

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

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

IT IS ORDERED that Sherry Kiddy, Chapter 13 Debtor, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Jason Wilkins or nominee ("Buyer"), the Property commonly known as 14418 Pincrest Drive, Brownsville, California ("Property"), on the following terms:

- A. The Property shall be sold to Buyer for \$65,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 25, and as further provided in this Order.
- B. The sale proceeds shall first be applied to closing costs, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.
- C. The Chapter 13 Debtor is authorized to execute any and all documents reasonably necessary to effectuate the sale.
- D. The Trustee is not authorized to pay a real estate broker's commission to Sam Hansen of Sunwest Real Estate.
- E. No proceeds of the sale, including any commissions, fees, or other amounts, shall be paid directly or indirectly to the Chapter 13 Debtor. Within fourteen days of the close of escrow, the Chapter 13 Debtor shall provide the Chapter 13 Trustee with a

notes that Debtor Dan Miller is now unemployed, and the Plan relies on Debtor receiving a loan modification because it does not propose to pay \$21,480.86 of mortgage arrears listed in Class 1.

Additionally, the Plan does not project any future income. Debtor has claimed a “Voluntary Deduction” that averages \$904.63 per month, but Debtor has not explained what the deduction is or why it is unreported on Schedule I. Debtor report receiving \$1,100 in family assistance, but the assisting family members have not filed declarations explaining whether the assistance is feasible and likely to continue. Also, Debtor has not deducted automobile insurance on Schedule J, even though three vehicles are listed on Schedule B. Without an accurate picture of Debtor’s financial reality, the court cannot determine whether the Plan is confirmable.

The Trustee argues that the Plan is not feasible according to 11 U.S.C. § 1325(a)(6) because Debtor’s Schedule J reduces, without explanation, expenses from \$4,868.24 to \$1,964.56. Debtor reduced food, personal items, clothing, laundry, and miscellaneous items from \$1,420.00 to \$441.00. Child care and education were reduced from \$845.00 to \$0.00, and transportation was reduced from \$700.00 to \$150.00, and the Trustee believes that those two reductions are reasonable because daycare is no longer necessary and because Debtor Dan Miller no longer travels for work. Absent explanation from Debtor as to how the proposed drastic decrease in expenses will be achieved, the court does not believe that Debtor’s projection is in good faith. That is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(3).

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.

Debtor has reported paying a car loan with a balance of either \$15,000.00 or \$18,000.00 (Statement of Financial Affairs # 6 & 8) and a monthly payment of \$480.00. The Trustee calculates that the vehicle will be paid for while the Plan is ongoing, but Debtor has not proposed increasing plan payments when the balance of the loan is paid. Similarly, Debtor has not reported when a deduction for repayment of a retirement loan will be completed so as to provide additional funds to the Plan. Thus, the court may not approve the Plan.

Additionally, the Trustee argues that Debtor has proposed Ensminger Provisions that are inaccurate. Debtor has failed to explain why Section 7.02.1 (secured claim treatment) was omitted entirely and why Section 7.02.3 was altered by removing the final sentence that “Debtor shall not commence making payments under the terms of the loan modification until it has been approved by the court.”

DEBTOR'S REPLY

Debtor filed a Reply on March 27, 2017. Dckt. 43. Regarding feasibility, Debtor states that the proposed plan is an "APO plan" while Debtor pursues a loan modification. As to Debtor's ability to make plan payments, Debtor states that the proposed plan payments factor in Debtor Dan Miller being unemployed currently. Debtor promises to amend the Plan when he receives new employment.

Debtor argues that there was a voluntary deduction of \$904.63 prior to the filing of the case, meaning that it is not reported on Schedule I now because it would be improper to continue deducting. The amount is part of the disposable income analysis and is not a deduction.

For clarification of the family contribution, Debtor intends to file supplemental declarations before the hearing.

In response to the Trustee questioning Debtor's expenses, Debtor states that the budget has been cut drastically, with the father being at home with the children and with extended family members assisting Debtor currently. Debtor acknowledges that the budget is short-term until Debtor is re-employed, which Debtor projects (hopes) will occur within six months.

For auto insurance, Debtor states that Debtor's father makes insurance payments to protect the vehicle that is in his name until Debtor is re-employed.

Debtor does not oppose increasing the plan payment when the balance of Debtor's vehicle has been paid. The payoff date is estimated to be in thirty-six months. Debtor does not oppose raising the plan payment by \$480.00 in month thirty-seven.

Debtor asserts that Debtor Meghan Miller's mandatory retirement deduction was added mistakenly to the wrong column on Amended Schedule I. Debtor asserts that a June 30, 2016 paystub attached at Exhibit A shows the mandatory retirement contribution.

Finally, Debtor's counsel asserts that any omission of Ensminger Provisions was unintentional. Debtor does not including that "The debtor shall not commence making payments under the terms of the loan modification until it has been approved by the court."

APRIL 4, 2017 HEARING

At the hearing, the court continued the hearing on the matter to 3:00 p.m. on April 25, 2017. Dckt. 48.

TRUSTEE'S STATUS REPORT

The Trustee filed a Status Report on April 18, 2017. Dckt. 51. The Trustee reports that Debtor addressed an issue regarding disposable income by explaining that what is listed as a retirement loan is actually a retirement expense, but Debtor is willing to increase plan payments by \$480.00 for months 37 through 60.

The Trustee reports that Debtor has addressed his other grounds for opposing confirmation.

RULING

While Debtor has provided some information and argument in response to the Trustee's concerns, Debtor has not convinced the court that the proposed plan is confirmable yet. Debtor has made drastic reductions to expenses that appear unreasonable and unsustainable at this time, and apparently from Debtor's Reply, the ability to abide by such a slim budget relies upon the charity of family and friends.

The court, despite Debtor's promise to file supplemental declarations, does not have testimony from interested third-parties in this case that they will support Debtor financially through the bankruptcy case. The Amended Plan does not comply with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is not confirmed.

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

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

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

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 2, 2017. By the court’s calculation, 72 days’ notice was provided. 42 days’ notice is required.

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

The Motion to Confirm the Amended Plan is confirmed.

Richard Holloway and Tina Holloway (“Debtor”) seeks confirmation of the Amended Plan because they have fixed the original plan so that it is now feasible. Dckt. 38. The Amended Plan corrected attorney fees, taxes, and other items in the original plan. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

TRUSTEE’S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on April 3, 2017. Dckt. 52.

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 ninety-seven months due to the priority Internal Revenue Service (“IRS”) claim in the amount of \$12,879.97 where Debtor’s plan provides only \$975.00. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

A review of Debtor's Plan shows that it relies on the court avoiding the secured lien of the IRS. Debtor has failed to file a Motion to Avoid Judicial Lien of the IRS, however. Without avoiding that lien, the Plan is not feasible. 11 U.S.C. § 1325(a)(6).

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). In Class 2b, Debtor list Santander Consumer USA with a monthly dividend of \$3,100.00, which exceeds Debtor's plan payment. The Trustee assumes that this figure was intended to be \$310.00 per month. The monthly dividend must be no less than \$185.00 per month to pay the claim within sixty months. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

DEBTOR'S REPLY

Debtor filed a Reply on April 14, 2017. Dckt. 55.

Debtor addresses the Trustee's objection to confirming the amended plan because it exceeds sixty months in the following points:

- A. There was an errant IRS proof of claim. Debtor's timely filed tax return was rejected by the IRS, so Debtor went in person to file the correct 2015 taxes. This was stamped and received by the IRS, showing \$0.00 owed for 2015.
 - 1. The IRS has been subsequently contacted by counsel and has been requested to file an amended claim showing the correct amounts owed.
 - 2. If the IRS fails to do so before the date of this hearing, then an objection to their claim will be filed.
 - 3. Debtor asks that this objection be overruled or continued out four weeks to allow time for the objection to be filed.

Debtor addresses the Trustee's objections to the need for a Motion to Avoid Judicial Lien being required in order to administer this Plan in the following points:

Debtor states that there are two potential resolutions to this objection:

- A. First, Debtor has calculated that there are enough funds in the plan to allow a full payment of the lien after the administrative attorney fees, trustee fees, and Class 2 vehicle claims are all administered. One resolution would be to allow the payment in full under Class 2 and not avoid the lien.
- B. Second, the court could allow a continuance of the hearing for four weeks again to allow the Motion to Avoid Judicial Lien to be heard.

Debtor addresses the Trustee's notice of a scrivener's error in the additional provisions.

Debtor admits to the error, but would propose that this could be fixed in an order confirming the plan. Debtor states that the mistake is too obvious to mislead any creditor.

RULING

The pleadings for this Motion indicate that Debtor has cured the Trustee's grounds for opposing confirmation. The Modified Plan, as amended, 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 Amended 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 the Motion is granted, as amended to reflect the Class 2b dividend to Santander Consumer USA is \$310.00, Debtor's Amended Chapter 13 Plan filed on February 2, 2017, is confirmed. Debtor's Counsel 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.

19. [17-20174-E-13](#) **DAVID BERMAN**
DPC-2 **Michael Hays**

OBJECTION TO DISCHARGE BY
DAVID P. CUSICK
3-21-17 [[58](#)]

Final Ruling: No appearance at the April 25, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, and Office of the United States Trustee on March 21, 2017. By the court’s calculation, 35 days’ notice was provided. 28 days’ notice is required.

The Objection to Discharge has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties’ pleadings.

The Objection to Discharge is sustained.

David Cusick, the Chapter 13 Trustee (“Objector”), filed the instant Objection to Debtor’s Discharge on March 21, 2017. Dckt. 58.

The Objector argues that David Berman (“Debtor”) is not entitled to a discharge in the instant bankruptcy case because the Debtor previously received a discharge in a Chapter 7 case.

The Debtor filed a Chapter 7 bankruptcy case on August 30, 2016. Case No. 16-25735. The Debtor received a discharge on January 3, 2017. Case No. 16-25735, Dckt. 17.

The instant case was filed under Chapter 13 on January 11, 2017.

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

Here, the Debtor received a discharge under 11 U.S.C. § 727 on January 3, 2017, which is less than four years preceding the date of the filing of the instant case. Case No. 16-25735, Dckt. 17. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), the Debtor is not eligible for a discharge in the instant case.

Therefore, the Objection is sustained. Upon successful completion of the instant case (Case No. 17-20174), the case shall be closed without the entry of a discharge, and Debtor shall receive no discharge in the instant case.

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

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

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

IT IS ORDERED that Objection to Discharge is sustained.

IT IS ORDERED that, upon successful completion of the instant case, Case No. 17-20174, the case shall be closed without the entry of a discharge.

Final Ruling: No appearance at the April 25, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) on March 23, 2017. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

The Objection to Claimed Exemptions 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 Objection to Claimed Exemptions is sustained, and the exemptions are disallowed in their entirety.

The Trustee objects to Brian Kindsvater's ("Debtor") use of the California exemptions without the filing of the spousal waiver required by California Code of Civil Procedure § 703.140. California Code of Civil Procedure § 703.140(a)(2), provides:

If the petition is filed individually, and not jointly, for a spouse, the exemptions provided by this chapter other than the provisions of subdivision (b) are applicable, except that, if **both** of the spouses effectively waive in writing the right to claim, during the period the case commenced by filing the petition is pending, the exemptions provided by the applicable exemption provisions of this chapter, other than subdivision (b), in any case commenced by filing a petition for either of them under Title 11 of the United States Code, then they may elect to instead utilize the applicable exemptions set forth in subdivision (b).

(emphasis added). The court's review of the docket reveals that the spousal waiver has not been filed. The Trustee's Objection is sustained, and the claimed exemptions are disallowed.

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 Claimed Exemptions filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Objection is sustained, and the claimed exemptions are disallowed in their entirety.

21. [16-27179-E-13](#) **DAVID GONZALES** **MOTION TO CONFIRM PLAN**
ALF-1 **Ashley Amerio** **3-14-17 [43]**

Final Ruling: No appearance at the April 25, 2017 hearing is required.

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

Sufficient 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 March 14, 2017. By the court’s calculation, 42 days’ notice was provided. 42 days’ notice is required.

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

The Motion to Confirm the Amended Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Debtor has provided evidence in support of confirmation. The Chapter 13 Trustee filed Non-Opposition on March 24, 2017. Dckt. 53. The Amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

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

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

IT IS ORDERED that the Motion is granted, Debtor's Amended Chapter 13 Plan filed on March 14, 2017, is confirmed. Debtor's Counsel 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.

22.

[17-21081](#)-E-13
DPC-1

DOREEN TORRES
Robert Gimblin

**OBJECTION TO CONFIRMATION OF
PLAN BY DAVID P. CUSICK**
3-29-17 [[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.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on March 29, 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 Debtor's Plan relies on a Motion to Value Secured claim of Ford Motor Credit Company, LLC.

The Trustee's objection is well-taken.

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

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

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

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

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

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

23. [17-20488-E-13](#) **PHILLIP/REHEMA PETE** **MOTION TO CONFIRM PLAN**
RKP-1 **Pro Se** **4-12-17 [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.

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

Sufficient Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee and creditor on April 10, 2017. By the court’s calculation, 15 days’ notice was provided. 42 days’ notice is required.

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

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

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Debtor has not provided sufficient time for notice of this Motion, however. Local Bankruptcy Rule 3015-1(d)(1) explains that forty-two days’ notice is required for a motion to confirm a plan, pursuant to Federal Rule of

Bankruptcy Procedure 2002(b) and Local Bankruptcy Rule 9014-1(f)(1). Debtor provided only fifteen days' notice, which is insufficient.

Additionally, Debtor has not provided any evidence in support of confirmation. Federal Rules of Evidence 601 & 602 instruct that testimony be provided by a witness who is knowledgeable and competent about supporting facts. Here, Debtor has not presented to the court any proof that Debtor can comply with the Plan and make all plan payments.

No opposition to the Motion has been filed by the Chapter 13 Trustee or by creditors, but as stated above, there are other deficiencies with the Motion that prevent the court from confirming the Plan.

A review of the docket shows that the court ruled on the Trustee's Motion to Dismiss on March 29, 2017. Dckt. 18. At that hearing, the court conditionally granted the motion. The court ruled that "the case [will be] dismissed if the Debtor is not current in all payments by April 7, 2017." *Id.* No pleadings were filed after the hearing indicating whether Debtor was delinquent in plan payments still. At the hearing, the Trustee reported that Debtor **has / has not** made the necessary plan payments.

At the March 29, 2017 hearing, the court also informed Debtor that a motion to confirm the amended plan had not been filed and was required. This Motion appears to be in direct response to the court's comments to Debtor, but Debtor apparently has not reviewed all of Local Bankruptcy Rule 3015-1, especially subsection (d)(1) that specifies the amount of time required for noticing an amended plan.

Debtor has not provided a sufficient amount of time to notice this Motion, and Debtor has not provided any evidence in support of confirmation. The Motion is denied without prejudice.

This is Debtor's third bankruptcy that has been pending in the past one year, with the two prior cases dismissed—16-27534 and 16-23673.

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

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

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

IT IS ORDERED that the Motion is denied without prejudice.

DISCUSSION

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed because Debtor neglected her plan payments when her mother became ill and needed care. Dckt. 10. Debtor states that in this case she has secured salaried employment and earns additional income through part-time bookkeeping. *Id.*

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). 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 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 Debtor, the plain language of 11 U.S.C. § 362(c)(3) is limited to the automatic stay as to only Debtor. 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). An important indicator of good faith is a realistic prospect of success in the second case, contrary to the failure of the first case. *See, e.g., In re Jackola*, No. 11-01278, 2011 Bankr. LEXIS 2443, at *6 (Bankr. D. Haw. June 22, 2011) (citing *In re Elliott-Cook*, 357 B.R. 811, 815–16 (Bankr. N.D. Cal. 2006)). 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 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. Debtor explains that she became delinquent in plan payments in the prior case when her mother became ill—a situation that the court believes would be adequate to cause a debtor to forget (or neglect) a bankruptcy case. This subsequent case appears to be filed in good faith because Debtor is earning a salary plus additional income, and she is no longer distracted by her mother's illness now that her mother's health has improved. Additionally, the Trustee has voiced his non-opposition to this Motion, indicating to the court that he does not see any reason to think that this case was not filed in good faith.

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

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

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

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

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

DISCUSSION

The lien on the Vehicle's title secures a purchase-money loan incurred on March 5, 2014, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately \$17,330.00. Therefore, Creditor's claim secured by a lien on the asset's title is under-collateralized. Creditor's secured claim is determined to be in the amount of \$14,381.00, 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 Kristin Jackson ("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 Toyota Financial Services International Corporation ("Creditor") secured by an asset described as 2014 Toyota Camry L ("Vehicle") is determined to be a secured claim in the amount of \$14,381.00, 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 \$14,381.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

Final Ruling: No appearance at the April 25, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on March 29, 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 hearing on the Objection to Confirmation of Plan is continued to 3:00 p.m. on May 9, 2017.

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

- A. Debtor failed to appear at the First Meeting of Creditors.
- B. Debtor's Plan relies on a pending Motion to Value Secured Claim of Celtic Bank, AKA Kabbage and On Deck Capital, Inc. set for hearing on April 4, 2017.

DEBTOR'S RESPONSE

Debtor filed a Response on April 5, 2017. Dckt. 30. Debtor agrees with the Trustee's request to have this matter continued to May 9, 2017 at 3:00pm. The Motions to Value Secured Claims of Celtic Bank, AKA Kabbage and On Deck Capital, Inc. were granted on April 4, 2017.

Debtor states that the First Meeting of Creditors was set for March 23, 2017 at 9:00 am. Debtor is a self-employed attorney and had a multi-hour court hearing scheduled for one of her clients in Roseville at the same time. The meeting was continued to April 27, 2017 at 11:00am.

DISCUSSION

The Trustee's objection regarding motions to value secured claims has been resolved, leaving one ground for objecting to confirmation.

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

The court agrees with the parties' request and continues the hearing on this matter to 3:00 p.m. on May 9, 2017.

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

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

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

IT IS ORDERED that the hearing on the Objection is continued to 3:00 p.m. on May 9, 2017.

Final Ruling: No appearance at the April 25, 2017 hearing is required.

Local Rule 3007-1 Objection to Claim—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor, Chapter 13 Trustee, and Office of the United States Trustee on March 7, 2017. By the court’s calculation, 49 days’ notice was provided. 44 days’ notice is required. Fed. R. Bankr. P. 3007(a) (thirty-day notice); L.B.R. 3007-1(b)(1) (fourteen-day opposition filing requirement).

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties’ pleadings.

The Objection to Proof of Claim Number 3-1 of Midland Credit Management Inc. is sustained, and the claim is disallowed in its entirety.

Nestor Roces (“Objector”) requests that the court disallow the claim of Midland Credit Management Inc. (“Creditor”), Proof of Claim No. 3-1 (“Claim”), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of \$23,385.10. Objector asserts that the Statute of Limitations on the collection of contract claims in California is four years from the date the balance was due under the contract or four years from the date the last payment was made under the contract. The Objector states that according to the Proof of Claim, the last transaction date and charge off date was November 30, 2007. The date of last payment on the Statement of Account Information attached to the Proof of Claim states November 30, 2007.

DISCUSSION

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof

of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of a proof of claim, and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

California Code of Civil Procedure § 337 states in relevant part:

2. An action to recover (1) upon a book account whether consisting of one or more entries; (2) upon an account stated based upon an account in writing, but the acknowledgment of the account stated need not be in writing; (3) a balance due upon a mutual, open and current account, the items of which are in writing; provided, however, that where an account stated is based upon an account of one item, the time shall begin to run from the date of said item, and where an account stated is based upon an account of more than one item, the time shall begin to run from the date of the last item.

The Bankruptcy Code provides certain extensions of time for actions a creditor may take when a debtor files for bankruptcy. Specifically, 11 U.S.C. § 108(c) provides:

Except as provided in section 524 of this title, if **applicable nonbankruptcy law**, an order entered in a nonbankruptcy proceeding, or an agreement **fixes a period for commencing or continuing a civil action on a claim against the debtor**, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then **such period does not expire until the later of--**

- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
- (2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.**

A review of Proof of Claim No. 3-1 lists the charge off date as July 31, 2008. The court takes judicial notice that a creditor does not "charge off" an account if payments are being made or further credit is being extended. (This basic fundamental point of credit transactions is commonly known by both creditors and consumers alike.)

No payment or other transaction occurred after November 30, 2007. Thus, the four-year statute of limitations expired on November 30, 2011.

This bankruptcy case was filed on June 25, 2015—1,304 days after the statute of limitations expired. There was no period of time for 11 U.S.C. § 108 to preserve and extend for Creditor.

Based on the evidence before the court, the creditor's claim is disallowed in its entirety due to the statute of limitations expiring prior to the filing of the case. The Objection to the Proof of Claim is sustained.

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

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

The Objection to Claim of Midland Credit Management Inc., Creditor filed in this case by Nestor Roces, Chapter 13 Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection to Proof of Claim Number 3-1 of Midland Credit Management Inc. is sustained, and the claim is disallowed in its entirety.