**UNITED STATES BANKRUPTCY COURT**
**Eastern District of California**

**Honorable Ronald H. Sargis**
**Chief Bankruptcy Judge**
**Sacramento, California**

**May 21, 2019 at 3:00 p.m.**

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**1. 19-21161-E-13 RODERICK KENNEY** — **MOTION TO VACATE DISMISSAL OF CASE**
**5-10-19 [32]**

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

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

Sufficient Notice Provided. On May 10, 2019 the Debtor (*Pro Se*) filed this Motion. Dckt. 32. The court set the hearing on the Motion on 14 days' notice. Order, Dckt. 35.

The Motion to Vacate was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, **----------**.

**The Motion to Vacate is XXXXXXXXXX.**

Roderick Kenney ("Debtor") filed the instant case on February 19, 2019. Dckt. 1. On March 12, 2019 the case was dismissed for failure to timely file documents. Order, Dckt. 26.

Debtor's Motion provides an overview of the reason for filing the Chapter 13 case, including

Debtor's need to pay tax debts through a plan to avoid foreclosure of his and his 87 year old mother's home. Dckt. 32. Debtor states this case was filed at the same time Debtor returned to work after 3 years of disability.

**TRUSTEE'S OPPOSITION**

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition to the Motion on May 13, 2019. Dckt. 33. Trustee opposes the Motion on the basis that Debtor does not explain why he failed to timely file documents. Trustee notes further the Debtor did not set the motion for hearing and Debtor should not rely on the Motion To Vacate to prevent the May 17, 2019 foreclosure sale.

**INTERIM ORDER**

On May 13, 2019 the court issued an Interim Order vacating dismissal of the case, setting this Motion for hearing on May 21, 2019, and requiring the appearance of Debtor at the scheduled hearing–no telephonic appearance permitted. Dckt. 35.

**APPLICABLE LAW**

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

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

FED. R. CIV. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199, 1203 (5th Cir. 1993). The court uses equitable principles when applying Rule 60(b). *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2857 (3d ed. 1998). The so-called catch-all provision, Federal Rule of Civil Procedure 60(b)(6), is "a grand reservoir of equitable power to do justice in a particular case." *Uni-Rty Corp. V. Guangdong Bldg., Inc.*, 571 F. App'x 62, 65 (2d Cir. 2014) (citation omitted). While the other enumerated

provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, relief under Rule 60(b)(6) may be granted in extraordinary circumstances. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 & n.11 (1988).

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

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

**DISCUSSION**

Debtor has not explicitly stated why he was unable to timely file the necessary documents.

At the hearing, xxxxxxxxxxxxxx.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Vacate filed by Roderick Kenney ("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 **XXXXXXX**.

| | | | |
|---|---|---|---|
| **2.** | **19-22675-E-13**<br>**SMR-1** | **VANESSA BURTON**<br>**Pro Se** | **OBJECTION TO CERTIFICATION BY A DEBTOR**<br>**5-7-19 [17]** |

**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).**
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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 (*pro se*), Chapter 13 Trustee, and Office of the United States Trustee on May 7, 2019. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Objection To Certification was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

**The Objection To Certification is sustained.**

Mehrizi Properties, LLC ("Movant") filed this Objection To Certification by Debtor asserting that the debtor, Vanessa Jennine Burton ("Debtor"), on her Form 101A, Initial Statement About an Eviction Judgement Against You ("Initial Statement"). Dckt. 9. The Objection is made pursuant to 11 U.S.C. § 362(l)(3).

The Objection states Debtor was a tenant at Movant's real property commonly known as 1423 Seymour Circle, Lincoln, California (the "Property"). Dckt. 19. The Objection states further Movant received a default judgement against Debtor on April 23, 2019, which judgement is filed as Exhibit "B" along with the Objection. Exhibit B, Dckt. 21.

Movant filed the Declaration of Nasser Aboui in support of the Objection. Declaration, Dckt. 19. Abuoi provides testimony that the regular monthly rent that would come due in the 30 day period

after filing this case was $2,600.00. *Id.*, ¶¶ 1,16.

Movant herein seeks an order confirming the absence of stay in accordance with 11 U.S.C. § 362(B)(22) based on Debtor's failure to make a certification required by 11 U.S.C. § 362(l)(1)(B).

**APPLICABLE LAW**

11 U.S.C. § 362 (b)(22) provides an exception to the automatic stay as follows:

> subject to subsection (l), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor;

Then, 11 U.S.C. § 362(l)(1) sets the following limitation on the aforementioned exception:

> Except as otherwise provided in this subsection, subsection (b)(22) shall apply on the date that is 30 days after the date on which the bankruptcy petition is filed, if the debtor files with the petition and serves upon the lessor a certification under penalty of perjury that—
>
> (A) under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment for possession was entered; and
>
> (B) the debtor (or an adult dependent of the debtor) has deposited with the clerk of the court, any rent that would become due during the 30-day period after the filing of the bankruptcy petition.

11 U.S.C. § 362(l)(3) allows a lessor to file an objection to a debtor's certifications under 11 U.S.C. § 362(l)(1)(A), which the court then determining whether the certifications are true.

**DISCUSSION**

A review of the docket shows a statement was entered on April 29, 2019 indicating $40.00 was deposited with the clerk of the court for purposes of 11 U.S.C. § 362(l)(1)(A). The actual rent monies due during the 30-day period after the filing of the bankruptcy petition was $2,600.00. Declaration ¶¶ 1,16, Dckt. 19.

Therefore, there certification under 11 U.S.C. § 362(l)(1)(B) made by Debtor was not true, and the Objection is sustained. 11 U.S.C. § 362(l)(3). Subsection (b)(22) of 11 U.S.C. § 362 shall apply immediately and relief from the stay provided under subsection (a)(3) shall not be required to enable

Movant to complete the process to recover full possession of the Property.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection To Certification filed by Mehrizi Properties, LLC ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is sustained, and the court confirms that 11 U.S.C. § 362(b)(22) shall apply immediately to Movant's real property commonly known as 1423 Seymour Circle, Lincoln, California (the "Property") and relief from the stay provided under subsection (a)(3) shall not be required to enable Movant to complete the process to recover full possession.
>
> The clerk of the court shall immediately serve upon the Movant and the debtor, Vanessa Jennine Burton ("Debtor"), a certified copy of this Order.

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|---|---|---|---|
| **3.** | **19-21821-E-13 JM-1** | **DARRELL/CHUENTE RHYM Gabriel Liberman** | **OBJECTION TO CONFIRMATION OF PLAN BY LENDMARK FINANCIAL SERVICES, LLC 5-2-19 [24]** |

**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 Objection. 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) Objection—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection 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 May 2, 2019. 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 Chapter 13 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 Objection, 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 Objection. At the hearing ----------.

**The Objection to Confirmation of Plan is overruled.**

Lendmark Financial Services, LLC ("Creditor") holding a secured claim opposes confirmation of the Plan on the basis that:

A. The plan fails to cure arrearages on its claim.

B. Debtor improperly values the collateral without any basis for valuation.

C. The Plan fails to provide for a retention of lien securing the Secured Creditor's

claim and the value of the property to be distributed to the Secured Creditor is less than the allowed amount of its claim.

**DEBTOR'S RESPONSE**

The debtors, Darrell Kevin Rhym and Chuente Lenise Rhym ("Debtor") filed a Response on May 7, 2019. Dckt. 33. Debtor states the plan provides for Creditor's secured claim in full, which was valued by the court after notice and hearing.

**DISCUSSION**

The Chapter 13 Plan provides for Creditor's secured claim to be valued at $3,924.00 based on the collateral's value. Plan, Dckt. 2.

Debtor filed a Motion To Value on March 28, 2019. Dckt. 12. That motion was served on Creditor's agent for process. Dckt. 15. At the April 30, 2019 hearing on that motion the court considered the value asserted by Debtor and that asserted by Creditor in its proof of claim; granted the motion; and issued an Order valuing Creditor's secured claim at $3,924.00. Civil Minutes, Dckt. 30; Amended Order, Dckt. 35

Creditor argues Debtor's plan fails to provide the value of its claim. However, as the aforementioned demonstrates, its claim is fully provided for.

The Plan complies with 11 U.S.C. §§ 1322 and 1325(a). The Objection is overruled, and the Plan is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by Lendmark Financial Services, LLC ("Creditor") holding 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 is overruled, and the debtors, Darrell Kevin Rhym and Chuente Lenise Rhym ("Debtor"), Chapter 13 Plan filed on March 25, 2019, is confirmed. Counsel for Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

**4.** **19-21025-E-13** **TASSANNA MILES** **CONTINUED AMENDED OBJECTION**
**DPC-1** **Jeffrey Meissner** **TO CONFIRMATION OF PLAN**
**BY TRUSTEE DAVID P. CUSICK**
**4-3-19 [17]**

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on April 3, 2019. 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 Chapter 13 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 Objection, 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 Objection. At the hearing ----------.

**The Objection to Confirmation of Plan is sustained.**

The Chapter 13 Trustee, David Cusick ("Trustee"), opposes confirmation of the Plan on the basis that:

A. The debtor, Tassanna Miles ("Debtor"), is delinquent $1,800.00 in plan payments.

B. Debtor has not provided tax returns for the most recent prepetition filing year.

C. Debtor has not provided pay advices for the 60 days preceding filing.

D. Debtor's plan treats the claim of Flagship Credit Accept as a Class 4, but admitted at the Meeting of Creditors that claim will mature during the plan term.

E. Debtor did not list hr occupation, employer address, or employment length on her Schedule I.

F. Debtor lists an expense of $225.00 for both "Vehicle" and "Other" insurance on Schedule J. At the Meeting of Creditors, Debtor admitted this was an accidental duplication.

**APRIL 30, 2019 HEARING**

At April 30, 2019 hearing the court continued the hearing on the motion to May 21, 2019 and required opposition to be filed and served before May 17, 2019. Civil Minutes, Dckt. 20.

**DISCUSSION**

Trustee's objections are well-taken.

The Chapter 13 Trustee asserts that Debtor is $1,800.00 delinquent in plan payments, which represents one month of the plan payment. Before the hearing, another plan payment will be due. 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 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)(i); FED. R. BANKR. P. 4002(b)(3). Debtor has failed to provide the tax transcript. That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

Debtor has not provided the Chapter 13 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); FED. R. BANKR. P. 4002(b)(2)(A). Debtor has failed to provide all necessary pay stubs. That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

Additionally, Trustee raises several grounds which suggest the plan is not feasible or Debtor's best efforts. Debtor has provided for the claim of Flagship Credit Accept as a Class 4, where that claim matures during the plan term and should be treated as a Class 2. Declaration ¶ 6, Dckt. 18. Debtor listed expenses on Schedule J that she does not have. *Id.*, ¶ 7. Finally, Debtor does not provide details about her employment which the court needs to determine Debtor's financial circumstances. Schedule I, Dckt. 1.

The plan does not appear to be feasible or Debtor's best efforts. 11 U.S.C. §§ 1325(a)(6), (b)(1).

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee, David Cusick ("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.

**5.** **19-21026-E-13** **LISA MOORE** **MOTION TO CONFIRM PLAN**
**SLE-1** **Steele Lanphier** **4-2-19 [27]**

**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.

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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, parties requesting special notice, and Office of the United States Trustee on April 2, 2019. By the court's calculation, 49 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

Lisa Lynn Moore ("Debtor") seeks confirmation of the Chapter 13 Plan. The Plan provides for payments of $710.00 though March 2019, payments of $710.00 monthly for the remaining plan term, and for a 15 percent dividend to unsecured claims. Dckt. 31. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

**CHAPTER 13 TRUSTEE'S OPPOSITION**

David Cusick ("the Chapter 13 Trustee") filed an Opposition on May 1, 2019. Dckt. 39. Trustee opposes confirmation on the following grounds:

1. Section 3.06 of the plan requires payment of attorney's fees prior to distribution of Class 2 claims, leaving Capital One Auto Finance without adequate protection.

2. The claim of Specialized Loan Servicing is $6,874.73 in default, and thus should be a Class 1 and not a Class 4.

3. The Disclosure of compensation and the Rights and Responsibilities (Dckts. 10 and 12) state Debtor's counsel was paid $1,505.00 prior to filing, while the pan states Debtor's counsel was paid $1,195.00.

**CREDITOR'S OPPOSITION**

Creditor Specialized Loan Servicing LLC ("Creditor") filed an Opposition on April 5, 2019. Dckt. 33. Creditor opposes confirmation on the basis that Debtor does not provide for the prepetition arrearages on Creditor's claim. Creditor argues further that because the current plan absorbs all of Debtor's disposable income, that a plan providing for the arrearages would not be feasible.

**DISCUSSION**

Trustee and Creditor's arguments are well taken.

Creditor holds a deed of trust secured by Debtor's residence. Creditor has filed a timely proof of claim in which it asserts $6,874.73 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.

Furthermore, the Disclosure of compensation and the Rights and Responsibilities (Dckts. 10 and 12) state Debtor's counsel was paid $1,505.00 prior to filing, while the pan states Debtor's counsel was paid $1,195.00. Additionally, Debtor's Schedule I and J indicate Debtor's disposable income is $712.67–approximately the amount already committed in the proposed Chapter 13 Plan which excludes the arrearages owing on Creditor's claim. The aforementioned dm3eonstrate the proposed plan is not feasible. 11 U.S.C. § 1325(a)(6).

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by Lisa Lynn Moore ("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 Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

**6.** **15-22747-E-13 PLC-11** **GARY/VICTORIA TEDFORD** **Peter Cianchetta** **MOTION FOR COMPENSATION BY THE LAW OFFICE OF CIANCHETTA AND ASSOCIATES FOR PETER CIANCHETTA, DEBTORS' ATTORNEY(S)** **4-12-19 [158]**

**Final Ruling:** No appearance at the May 21, 2019 hearing is required.

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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, and Office of the United States Trustee on April 12, 2019. By the court's calculation, 39 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

**The Motion for Allowance of Professional Fees is granted.**

Peter L. Cianchetta, the Attorney ("Applicant") for Gary Franklin Tedford and Victoria Dawn Tedford, the Chapter 13 Debtor ("Client"), makes a Second Interim and Final Request For Fees and Expenses in this case. [FN.1.]

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FN.1. In reviewing the various pleadings filed along with this Application and in the case, there is some cause for confusion. First, the Order Confirming the Chapter 13 Plan provides that Debtor's counsel is entitled to $4,000.00 in attorney's fees pursuant to Local Bankruptcy Rule 2016-1(c). Order, Dckt. 75. However, the Chapter 13 Plan actually provided for an hourly fee agreement. Plan, Dckt. 55.

Second, the prior request for fees and expenses was treated by the court as a final allowance of fees and expenses. Order, Dckt. 120. However, the first fee application stated "This is the initial application for Attorney fees and expenses." Dckt. 104. The present Applicaiton states "This is the final application for Attorney fees and expenses." Dckt. 158.

Thus, it is clear this is the Second and Final Request for Fees.

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Fees are requested for the period June 8, 2017, through April 12, 2019. Applicant requests fees in the amount of $4,025.00 and costs in the amount of $ $65.80.

**STATUTORY BASIS FOR PROFESSIONAL FEES**

Pursuant to 11 U.S.C. § 330(a)(3),

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

compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A). An attorney must "demonstrate only that the services were reasonably likely to benefit the estate at the time rendered," not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

**APPLICABLE LAW**

**Reasonable Fees**

A bankruptcy court determines whether requested fees are reasonable by examining the circumstances of the attorney's services, the manner in which services were performed, and the results of the services, by asking:

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the attorney exercise reasonable billing judgment?

*In re Garcia*, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

**Lodestar Analysis**

For bankruptcy cases in the Ninth Circuit, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d

1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis cab be appropriate, however. *See id.* (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

**Reasonable Billing Judgment**

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. An attorney must exercise good billing judgment with regard to the services provided because the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

*In re Puget Sound Plywood*, 924 F.2d at 958–59 (citing *In re Wildman*, 72 B.R. 700, 707 (N.D. Ill. 1987)).

A review of the application shows that Applicant's services for the Estate include client communication and prosecution of motions to sell, avoid lien, and for approval of fees. The court finds the services were beneficial to Client and the Estate and were reasonable.

**FEES AND COSTS & EXPENSES REQUESTED**

**Fees**

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

Motion To Employ Broker & Sell Property: Applicant spent 7.3 hours in this category.

Motions to Avoid Lien: Applicant spent 2.8 hours in this category.

Motion for Approval of Fees: Applicant spent 1.4 hours in this category.

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

| **Names of Professionals and Experience** | **Time** | **Hourly Rate** | **Total Fees Computed Based on Time and Hourly Rate** |
|---|---|---|---|
| Peter Cianchetta | 11.5 | $350.00 | $4,025.00 |
| **Total Fees for Period of Application** | | | $4,025.00 |

Pursuant to prior Interim Fee Applications the court has approved pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330.

| **Application** | **Interim Approved Fees** | **Interim Fees Paid** |
|---|---|---|
| First Interim | $5,492.50 | $3,405.20 |
| **Total Interim Fees Approved Pursuant to 11 U.S.C. § 331** | $5,492.50 | |

**Costs & Expenses**

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $65.80 pursuant to this application. Pursuant to prior interim applications, the court has allowed costs of $463.36.

The costs requested in this Application are,

| **Description of Cost** | **Cost** |
|---|---|
| Postage | $47.00 |
| Printing | $18.80 |
| **Total Costs Requested in Application** | $65.80 |

**FEES AND COSTS & EXPENSES ALLOWED**

**Fees**

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. Second Interim and Final Fees in the amount of $5,492.50 are approved pursuant to 11 U.S.C. § 330 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 13 Trustee from the available Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case.

**Costs & Expenses**

Second Interim and Final Costs in the amount of $ $65.80 and prior Interim Costs in the amount of $463.36 are approved pursuant to 11 U.S.C. § 330 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 13 Trustee from the available Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case.

The court authorizes the Chapter 13 Trustee to pay the fees and the costs allowed by the court.

Applicant is allowed, and the Chapter 13 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

| | |
|---|---|
| Fees | $4,025.00 |
| Costs and Expenses | $65.80 |

pursuant to this Application and prior interim fees of $5,492.50 and interim costs of $463.36 as final fees pursuant to 11 U.S.C. § 330 in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Peter L. Cianchetta ("Applicant"), Attorney for Gary Franklin Tedford and Victoria Dawn Tedford, Chapter 13 Debtor, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Peter L. Cianchetta is allowed the following fees and expenses as a professional of the Estate:
>
> Peter L. Cianchetta, Professional employed by Chapter 13 Debtor

Fees in the amount of $4,025.00
Expenses in the amount of $65.80,

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

The fees and costs pursuant to this Motion, and fees in the amount of $5,492.50 and costs of $463.36 approved pursuant to prior Interim Application, are approved as final fees and costs pursuant to 11 U.S.C. § 330.

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

**7. 19-21530-E-13 BB-1 | GENEA PEERY, Bonnie Baker | MOTION TO CONFIRM PLAN 3-26-19 [9]**

**Final Ruling:** No appearance at the May 21, 2019 hearing is required.
---

Local Rule 9014-1(f)(1) Motion—Hearing Not 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 26, 2019. By the court's calculation, 24 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). 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 hearing on the Motion to Confirm the Plan is continued to June 11, 2019 at 3:00 p.m.**

Genea Marie Peery ("Debtor") seeks confirmation of the Chapter 13 Plan. The Plan proposes monthly payments of $189.00 for 36 months and a 0 percent dividend to unsecured claims totaling $148,256. Dckt. 12. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

**CHAPTER 13 TRUSTEE'S OPPOSITION**

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on May 7, 2019. Dckt. 24. Trustee argues the present Motion set a confirmation hearing prior to the dates set in the Notice of Meeting of Creditors for objections and requests the hearing be continued to June 11, 2019 at 3:00 p.m.

**TRUSTEE'S OBJECTION**

Trustee also filed an "Objection" to confirmation of the plan on May 14, 2019. Dckt. 28. In the Objection, Trustee adds that the plan relies on a motion to value secured claim, which if not granted would render the plan not feasible.

**DISCUSSION**

In light of the Trustee's request and good cause shown, the court shall continue the hearing on the Motion to June 11, 2019 at 3:00 p.m.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by Genea Marie Peery ("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 Confirm the Plan is continued to June 11, 2019 at 3:00 p.m.

**8.** **18-25150-E-13** **RICHARD GREENE** **MOTION TO SELL**
**LBG-2** **Lucas Garcia** **4-16-19 [79]**

**No 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.
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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, parties requesting special notice, and Office of the United States Trustee on April 16, 2019. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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 xxxxx.**

The Bankruptcy Code permits Richard Sterling Greene, 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 property identified as 8.94 percent interest in a partnership, commonly-known as Enterprise Group (Movant's "Partnership Interest").

The Motion does not identify whether this is a general partnership interest or a limited partnership interest. The Motion does not state any grounds relating to the partnership, other than to state that Debtor has an 8.94% interest therein.

Movant filed the Sale Agreement as an Exhibit with the motion. Dckt. 82. The proposed purchaser of the Partnership Interest, Lucinda J. Young ("Buyer") seeks to purchase Movant's Partnership Interest for $175,000.00, with $2,000.00 paid as a deposit and the remainder of $173,000.00 paid at the close of escrow. *Id.*

Movant's Declaration was filed along with the Motion. Dckt. 81. Movant provides testimony that:

1. All net proceeds of the sale of this property are not claimed as exempt and therefore the net proceeds must be turned over to the Trustee. *Id.*, ¶ 5.

2. Buyer is Movant's sister; however, Movant has always had a businesslike relationship with her. *Id.*, ¶ 7.

3. Sale of the Partnership interest will complete the Chapter 13 Plan and extract Movant from the hostile and toxic relationship with the Enterprise Group's other partners. *Id.*, ¶ 8.

**ENTERPRISE'S OPPOSITION**

Enterprise Group Partnership ("Enterprise") filed an Opposition to the motion on May 7, 2019. Dckt. 95. Enterprise opposes the Motion on the basis that (1) Movant's Partnership Interest is disputed and therefore cannot yet be sold free and clear, (2) as an executory agreement, the partnership agreement is not property of the Estate until assumed or rejected pursuant to 11 U.S.C. § 365, and (3) Movant cannot assume the partnership agreement because Movant's Partnership Interest terminated effective on the date Enterprise deposited the interpleader funds.

Enterprise identifies itself as a general partnership.

In support of its Opposition Enterprise filed the Declaration of Jan Halderman, a general partner of Enterprise. The Halderman Declaration provides the following testimony:

1. Enterprise operates under a written General Partnership Agreement its four general partners executed on or about October 15, 1990. Declaration, Dckt. 97.

2. Enterprise is a general partnership formed to build and manage its sole asset, a 20,000 square foot commercial building on land it owns located at 1 1800-11900 Enterprise Drive, Auburn, California ("Enterprise Property"). *Id.*, ¶ 2.

3. Each general partner of Enterprise has designated spaces within the Enterprise Property. *Id.,* ¶ 3.

4. Movant acquired an 8.94 percent partnership interest in Enterprise by making capital contributions to Enterprise totaling $36,522.14 toward Enterprise's purchase of the land and costs it incurred to construct the building and related improvements at the Enterprise Property. *Id.,* ¶ 5.

5. Halderman is "informed and believes" Movant transferred his Partnership Interest to a family trust in May 2009. *Id.,* ¶ 6.

6. Article 7.2 of the partnership agreement requires general partners to pay Enterprise's expenses pro rata. *Id.,* ¶ 7.

7. Paragraph 3.2 of the partnership agreement requires general partners to pay capital contributions when and in the amount determined by a majority (by interest) of partners. *Id.*, ¶ 8.

8. On March 19, 2018 Movant's family trust (as the holder of Movant's Partnership Interest) was required to make a $4,262.18 capital contribution to fund a roof replacement on the Enterprise Property. *Id.,* ¶¶ 9-10. Movant's family trust did not make the required contribution. *Id.,* ¶ 11.

9. Paragraph 3.3 provides and Enterprise has elected to buyout Movant's Partnership Interest after a default for the amount of Movant's capital contribution ($36,522.14). *Id.* ¶¶ 12-15, 17-18.

10. Enterprise commenced an interpleader action for the purpose of enforcing the right to buyout Movant's Partnership Interest under the partnership agreement. *Id.*, ¶19. Movant is responsible for Enterprise's expenses in bringing the interpleader action. *Id.*, ¶ 20.

11. The Enterprise Property is subject to the first deed of trust of Community lst/First Foundation in the amount of $489,649.00. *Id.*, ¶ 21.

12. A majority (in interest) of Enterprise's general partners do not consent to the sale of Movant's Partnership Interest. *Id.*, ¶ 24.

Enterprise also filed the Declaration of Anthony P. Fritz, an attorney representing Enterprise in the aforementioned interpleader action. Declaration, Dckt. 96. Fritz provides testimony that *Enterprise Group v, Richard S. Greene et al*, Case No. SCV 0041570 (the "Interpleader Action"), was commenced August 2, 2018 and is now pending in the Superior Court of the State of California, County of Placer. *Id.,* ¶¶ 2, 4. Fritz further provides testimony that the Internal Revenue Service, Franchise Tax Board, and Aronowitz Skidmore & Lyon have been named as defendants along with Movant and movant's family trust in the Interpleader Action. *Id.,* ¶¶ 3, 5.

The partnership agreement for Enterprise was filed as Exhibit 1. Dckt. 98. The agreement provides that California law and the California Uniform Partnership Act apply.

**TRUSTEE'S OPPOSITION**

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition to the Motion on May

10, 2019. Dckt. 100. Trustee opposes the motion on the grounds that Buyer is an insider, and Movant may not have the right to sell the Partnership Interest.

**APPLICABLE LAW**

**Sale of Property of the Estate**

As discussed above, the Bankruptcy Code permits Movant to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. The Bankruptcy Code also permits that sale to be free and clear of any interest in such property of an entity other than the estate if certain requirements are met. *See* 11 U.S.C. § 363(f). However, a court cannot permit the sale of property free and clear where the ownership is disputed. *In re Clark,* 266 B.R. 163, 171 (B.A.P. 9th Cir. 2001).

**Executory Contracts &**
**Nature of Partnership Agreement**

It has been stated that an executory contract does not become an asset of the estate until it is assumed pursuant to § 365 of the Code. *In re Qintex Entm't, Inc.,* 950 F.2d 1492, 1495 (9th Cir. 1991).

Whether a contract is executory for a party in bankruptcy is a question of federal law. *Id*. An executory contract is one "on which performance remains due to some extent on both sides." *National Labor Relations Board v. Bildisco and Bildisco,* 465 U.S. 513, 522–23 n. 6. The test for determining a contract is executory is whether "the obligations of both parties are so unperformed that the failure of either party to complete performance would constitute a material breach and thus excuse the performance of the other." *In re Robert L. Helms Constr. & Dev. Co., Inc.,* 139 F.3d 702, 705 (9th Cir. 1998).

Colliers provides an explanation of the background of the test:

> Section 365 does not define the term "executory contract." The legislative history refers with approval to the so-called Countryman definition, observing that the term executory contract "generally includes contracts on which performance remains due to some extent on both sides."
>
> Professor Countryman reasoned that, under nonbankruptcy contract law, there are three possible types of executory contracts. First, the debtor may have performed but the other party has not yet performed. Second, the other party may have performed but the debtor has not yet performed. Finally, both parties may have not yet substantially performed. Professor Countryman observed that if the debtor fully performed before the commencement of the case, and only the other party's performance was left to be done, the contract should not be viewed as executory because the debtor's right to receive the other party's obligation would simply be an asset of the estate. If the contract were considered an executory contract, the trustee might inadvertently reject the contract and forfeit the asset. Moreover, the provision of the bankruptcy law that views rejection of an executory contract as a

> breach entitling the other party to a claim for damages would make no sense if the debtor already fully performed.
>
> Similarly, if the other party fully performed and only the debtor's performance remained to be done, the estate already has whatever benefit is to be gained from the contract. The other party has a claim against the estate for breach of contract if the debtor or the estate does not perform, but that party cannot deprive the estate of the performance that the estate has already received. However, if this were considered an executory contract, the trustee might assume the contract and convert the other party's claim to a first priority administrative claim. Since the estate could receive no benefit from such a conversion in the status of the claim, it seems appropriate to simply bar the trustee from ever assuming such a contract by treating the contract as nonexecutory.
>
> **Once contracts fully performed on one side or the other are eliminated, only contracts materially unperformed on both sides remain. These are the contracts that are generally considered to be executory contracts in bankruptcy**.
>
> Some courts have suggested that the inquiry into whether there remain unperformed duties on both sides of a contract is too restrictive and that, instead, the inquiry should be into whether the debtor has unperformed duties that the trustee may elect to perform or breach, depending upon which will result in the best value for the estate. Despite their suggestions, however, no circuit has rejected the Countryman test outright in favor of the functional analysis, although the Court of Appeals for the Eleventh Circuit has approved the use of the functional test in several decisions.

3 COLLIER ON BANKRUPTCY P 365.02 [2][a] (16th 2019)(emphasis added).

The Countryman test asks two questions: (1) whether there is an ongoing duty to perform for both parties, and (2) whether failure of either party to complete performance would constitute a material breach and thus excuse the performance of the other. A contract is executory only if one party's failure to perform its obligation would excuse the other party's performance. *In re Int'l Fibercom, Inc.,* 503 F.3d 933, 941 (9th Cir. 2007); WILLISTON ON CONTRACTS § 78:39 (4th ed.)("most courts inquire not only into whether performance remains due to some extent on both sides but also whether the failure of either party to complete its promised performance would constitute a material breach and excuse the other party from rendering its own promised performance").

Some courts have held that partnership agreements are executory in nature, generally relying on an ongoing duty to make capital contributions and fiduciary duties. *In re Siegal,* 190 B.R. 639, 643 (Bankr. D. Ariz. 1996); *In re Cutler*, 165 B.R. 275, 282 (Bankr. D. Ariz. 1994); *In re Sunset Developers*, 69 B.R. 710, 713 (Bankr. D. Idaho 1987).

**California Partnership Law**

Except as provided by California Corporate Code section 16103(b), relations among the partners and between the partners and the partnership are governed by the partnership agreement. Cal. Corp. Code § 16103(a). The only transferable interest of a partner in the partnership is the partner's share of the profits and losses of the partnership and the partner's right to receive distributions. Cal. Corp. Code § 16502. In addition to the aforementioned limit on the transferable interest in a partnership, California Corporate Code section 16503 provides a list of what a transfer does and does not do, including that a transfer does not allow a transferee to participate in the management or conduct of the partnership business.

One treatise provides the following overview of limitations as to partnership interests:

> The mere purchase of a partner's interest does not make the purchaser a partner or create a new firm. In that respect, the Uniform Partnership Act of 1994 provides that a transfer of a partner's transferable interest in the partnership does not, as against the other partners or the partnership, entitle the transferee during the continuance of the partnership to participate in the management or conduct of the partnership business, to require access to information concerning partnership transactions, or to inspect or copy the partnership books or records. Accordingly, one who purchases a deceased partner's interest is charged with notice of the surviving member's right to administer the firm's affairs.
>
> The only statutory rights that a transferee of a partner's transferable interest in the partnership has are the rights (1) to receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled; (2) to seek a judicial determination that it is equitable to wind up the business of a partnership that was for a definite term or particular undertaking at the time of the transfer or entry of the charging order that gave rise to the transfer; and (3) to receive upon the dissolution and winding-up of the partnership business, in accordance with the transfer, the net amount otherwise distributable to the transferor. Moreover, in a dissolution and winding-up, a transferee is entitled to an account of partnership transactions only from the date of the latest account agreed to by all of the partners.

48 CAL. JUR. 3D PARTNERSHIP § 93.

**DISCUSSION**

Enterprise argues that the Partnership Interest cannot be sold pursuant to 11 U.S.C. § 364(f) because the Movant's ownership interest is in dispute. However, the Motion does not request the sale be approved "free and clear" of other interests under 11 U.S.C. § 364(f). Rather, the proposed sale would be subject to a later determination of Enterprise's interest.

The main inquiry here is whether the Partnership Interest is property of the Estate which can

be sold, or whether the underlying partnership agreement is executory and must be assumed before it becomes property of the Estate.

**Nature of the Enterprise Partnership Agreement**

Enterprise argues the partnership agreement here is executory because it requires the general partners to make capital contributions and contributions toward Enterprise' expenses of operating the Enterprise Property. Opposition, Dckt. 95 at p. 7:15.5-19.5.

This however only informs the court that there are ongoing obligations to be performed. A contract is executory only if one party's failure to perform its obligation would excuse the other party's performance. *In re Int'l Fibercom, Inc.,* 503 F.3d at p. 941.

Here, it is uncertain whether failure to make ongoing payments for capital contributions and expenses is a material breach.

Section 3.2 of the partnership agreement requires the aforementioned ongoing payments. Exhibit 1, Dckt. 98 at p. 7. Section 3.3 specifies what happens in the event ongoing payments are not made:

> If, within fifteen (15) calendar days after the Partnership gives written notice to a Partner that such Partner is delinquent in making an additional capital contribution required of him under Section 3.2, such Partner fails to make such additional capital contribution, the Partnership may either: 1) permit the defaulting Partner to remain as a partner, provided, however, that his rights, interests and obligations in the Partnership shall be proportionately reduced to reflect the ratio of the actual capital contribution of the delinquent Partner to the total capital contributions made by the other Partners; or 2) purchase the interest of said defaulting Partner for an amount equal to his capital contributions made to the Partnership. Payment of said sum to a defaulting Partner shall be in accordance to the terms set forth in paragraph 9(d), subparagraphs 1 through 4 of this Agreement.

*Id*. at p. 8.

The above provision does not absolve any of the general partners of their duty to perform under the contract. The other partners are still required to make capital contributions.

Notably, Section 3.3 is not exercised by the other parties to the contract. The partnership, and not the partners, may make an election to purchase Movant's interest. Section 3.3 merely provides for the ongoing existence of the partnership–where one partner ceases to pay capital contributions, the partnership can ensure future contributions are made by reducing the interest of the nonpaying partner (and thereby requiring those capital contributions be made by the remaining partners).

As discussed above, some courts have held that partnership agreements are executory in nature, generally relying on an ongoing duty to make capital contributions and fiduciary duties. *In re*

*Sunset Developers*, 69 B.R. 710, 713 (Bankr. D. Idaho 1987)*; In re Siegal,* 190 B.R. 639, 643 (Bankr. D. Ariz. 1996)(finding the partnership agreement was executory because the partners had an ongoing obligation to contribute capital and because there were other continuing fiduciary obligations); *In re Cutler*, 165 B.R. 275, 282 (Bankr. D. Ariz. 1994)("the courts have generally assumed that partnership agreements are, at least in part, executory contracts").

However, those courts have generally focused solely on remaining performance, and failed to examine whether failure of either party to complete performance would constitute a material breach and thus excuse the performance of the other.

The court in *Sunset Developers* examined whether a general partnership was an executory contract. In that case, the debtor and his business partner agreed they had come to such disputes and disagreements so as to render joint management of the partnership impossible. *In re Sunset Developers*, 69 B.R. at p. 711. After the debtor filed bankruptcy, his business partner argued the partnership agreement and Idaho state law provided that the partnership be dissolved, with the non-bankrupt partner to wind up the partnership. *Id.* The court in *Sunset Developers* then provided the following analysis of whether a partnership agreement is executory:

> For 11 U.S.C. § 365(e) to apply the partnership agreement must be an executory contract. An executory contract is a contract under which the obligation of both parties are so far unperformed that the failure of either to completely perform would constitute a material breach excusing the performance of the other. Under the agreement the partners each have an obligation to contribute amounts in cash to the partnership when required. Failure to do so is a default. All management decisions or other matters affecting the partnership should be made by unanimous agreement. Mutural [sic] obligation among all the participants in partnership dissolution agreement create an executory relationship between the parties. An executory contract exists where "performance remains due to some extent on both sides". I find this partnership agreement is an executory contract subject to 11 U.S.C. § 365(e).

*Id*. The court concluded failure to provide capital contributions was a default, but did not examine whether the default was material, or what the effect of the default was.

Here, as discussed above, failure to make capital contributions is not in substance a default. Rather, failure to make contributions provides the partnership an option to buyout the failing partner or cause his interest in the partnership to reflect his portion of capital contribution.

Furthermore, treatment of fiduciary duties as *per se* determinative of an executory contract has not been applied consistently.

Fiduciary duties are either knowingly assumed or imposed by law. *City of Hope Nat'l Med. Ctr. v. Genentech, Inc.,* 43 Cal. 4th 375, 386 (2008). While the partnership agreement here does not impose any duties, under California partnership law partners owe each other fiduciary duties. Cal. Corp. Code § 16404.

However, owners of limited liability companies also have fiduciary duties to the company and other members. Cal. Corp. Code § 17704.09. Despite this, operating agreements have been held by many courts not to be executory contracts. *In re First Prot., Inc.,* 440 B.R. 821, 831 (B.A.P. 9th Cir. 2010); *In re Ehmann*, 319 B.R. 200 (Bankr. D. Ariz. 2005); *In re Alameda Investments LLC,* 2013 WL 3216129 (Bankr. C.D. Cal. 2013); *In re Allentown Ambassadors, Inc.*, 361 B.R. 422 (Bankr. E.D. Pa. 2007); *In re Denman*, 513 B.R. 720 (Bankr. W.D. Tenn. 2014); *In re Prebul*, 2011 WL 2947045 (Bankr. E.D. Tenn 2011); *In re Tsiaoushis,* 383 B.R. 616 (Bankr. E.D. Va. 2007); *In re Garrison-Ashburn*, L.C. 253 B.R. 700 (Bankr. E.D. Va. 2000).

Moreover, under California law majority shareholders owe fiduciary duties to minority shareholders and the corporation. *Eagle v. Am. Tel. & Tel. Co.*, 769 F.2d 541, 545 (9th Cir. 1985); *Jones v. H. F. Ahmanson & Co.*, 1 Cal. 3d 93, 110 (1969); *Smith v. Tele.-Communication, Inc.,* 134 Cal.App.3d 338, 343 (1982); *Jones v. H.F. Ahmanson & Co.*, 1 Cal.3d 93, 100 (1969); 12B FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, § 5811 (1984). It is hard to imagine shares being treated as an executory contract merely because majority shareholders have a legally imposed fiduciary duty.

At the hearing, xxxxxxxxxxxxxx.

**Authority to Sell the Partnership Interest**

Except as provided by California Corporate Code section 16103(b), relations among the partners and between the partners and the partnership are governed by the partnership agreement. Cal. Corp. Code § 16103(a).

What is salable here is merely Movant's share of the profits and losses of the Enterprise and right to receive distributions. Cal. Corp. Code § 16502.

Section 9.2 of the partnership agreement prohibits sale of a partner's interest without prior written consent of all other partners, subject to the rest of Article 9 of the agreement. Exhibit 1, Dckt. 98 at p. 22. Section 9.4 appears to permit the transfer of a partnership interest to a partner's sister without consent of the other partners.

At the hearing, xxxxxxxxxxxxxx.

**Sale of Estate's Interest**

The Motion requests the court authorize the Debtor to sell whatever saleable interest the estate has to Lucinda J. Young for $175,000.00. The sale is "as is," "where is," and "whatever is" the interests of the bankruptcy estate.

Enterprise argues that all that the Estate's interest in the Partnership is entitled to is the $36,522.14 that has been deposited into escrow in the State Court Interpleader Action. Thus, Ms. Young would be buying for $175,000.00 the right to either $36,522.14 or a fight in the State Court Action for

more.

In reviewing the Partnership Agreement, Section 9.7 (Exhibit 1, Dckt. 98) provides for giving optional purchase rights to the "Partners," which is a defined term in the Partnership agreement to be "1.10. Partners. "Partners: shall refer collectively to the General Partners holding Partnership interests in this Partnership, and reference to a "Partner" shall be to any one of the Partners unless the context shall require otherwise." Partnership Agreement ¶ 1.10.

In providing for the purchase of the Partnership Interest in the event of bankruptcy, the value is to be determined by agreement or arbitration (presumably to the extent not determined by the federal court having exclusive jurisdiction over property of the bankruptcy estate if the court does not elect to abstain to allow another forum make the determination or conclude that the arbitration is the binding process), but it does not provide for acquiring the bankruptcy estate interest by merely paying the capital contribution. Partnership Agreement ¶ 9.7(C).

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 Chapter 13 Debtor, Richard Sterling Greene ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion To Sell is **XXXXXXXX**.

**9.** **18-25150-E-13** **RICHARD GREENE** **MOTION TO CONFIRM PLAN**
**LBG-3** **Lucas Garcia** **4-16-19 [84]**

**No 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.

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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, parties requesting special notice, and Office of the United States Trustee on April 16, 2019. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

Richard Sterling Greene ("Debtor") seeks confirmation of the Second Amended Plan. Dckt. 84. The Plan provides for monthly payments of $250.00, a lump sum of $175,000.00 by month 12 from the sale of Debtor's partnership interest, and a 100 percent dividend to unsecured claims totaling $66,921.25. Dckt. 87. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

**CHAPTER 13 TRUSTEE'S OPPOSITION**

David Cusick ("the Chapter 13 Trustee") filed an Opposition on May 7, 2019. Dckt. 90. Trustee opposes confirmation on the grounds the plan depends on a pending Motion To Sell (Dckt. 79), and the plan does not address the Franchise Tax Board's claim as reflected in Proof of Claim, No. 6 filed on October 29, 2018.

**ENTERPRISE GROUP'S OPPOSITION**

Enterprise Group ("Enterprise") filed an Opposition on May 5, 2019. Dckt. 95. [FN.1.] Creditor argues the plan is not feasible and not proposed in good faith because it relies on the sale of a partnership interest that is not property of the Estate.

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FN.1. The Opposition is a joint opposition to Debtor's Motion To Confirm (Dckt. 84), and Debtor's Motion To Sell. The Local Bankruptcy Rules require documents to be filed separately, and for separate requests for relief to be brought separately. LOCAL BANKR. R. 9004-2(c)(1), 9014-1(d)(5).

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**DISCUSSION**

The Motion To Sell (Dckt. 79) upon which the plan relies is set to be heard the same day as the hearing on this Motion.

At the hearing, xxxxxxxxxxxxxx.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by Richard Sterling Greene ("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 Plan is XXXXXX.

**10.** **18-22010-E-13 JSO-2** **JERRY/CAROLINE CHAVEZ** **Jeffrey Ogilvie** **MOTION TO INCUR DEBT** **5-2-19 [58]**

**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 Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 2, 2019. By the court's calculation, 19 days' notice was provided. 14 days' notice is required.

The Motion to Incur Debt was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

**The Motion to Incur Debt is granted.**

The debtors, Jerry Robert Chavez and Caroline Margarit Chavez ("Debtor"), filed this Motion to Incur Debt seeking approval of a loan modification. Flagstar Bank, FSB ("Creditor"), whose claim the Plan provides for in Class 1, has agreed to a loan modification. The modification will provide for a total monthly payment of $2,051.25, interest at a fixed rate of 4.75 percent for the entire term; a principal amount of $284,505.45; and a maturity date of May 1, 2049.

The Motion is supported by the Declaration of Debtor. Dckt. 60. The Declaration affirms Debtor's desire to obtain the post-petition financing and provides evidence of Debtor's ability to pay this claim on the modified terms.

**TRUSTEE'S RESPONSE**

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response on May 7, 2019. Dckt 63. Trustee "questions" whether the loan modification is in Debtor's best interest where the monthly payment is increased from $1,942.80 to $2,051.25 and the interest is increased from 4.125 percent to 4.75 percent.

**DISCUSSION**

While Debtor's monthly payment is being increased by the loan modification, as stated by Trustee, the post-petition financing is consistent with the Chapter 13 Plan in this case (the plan payments for Creditor's Class 1 claim are currently $2,031.11 which is essentially what Debtor will be paying after the loan modification) and with Debtor's ability to fund that Plan. Debtor could have several sound reasons for wanting to modify the loan rather than cure the arrearages through the Confirmed Plan. The Motion complying with the provisions of 11 U.S.C. § 364(d), the Motion to Incur Debt is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Incur Debt filed by Jerry Robert Chavez and Caroline Margarit Chavez ("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 Jerry Robert Chavez and Caroline Margarit Chavez is authorized to incur debt pursuant to the terms of the agreement, Exhibit B, Dckt. 61.

**11.** **19-22411-E-13 MC-1** | **MONICA GUTIERREZ** **Muoi Chea** | **MOTION TO VALUE COLLATERAL OF ONEMAIN FINANCIAL GROUP, LLC 5-7-19 [18]**

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

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

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

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 May 7, 2019. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Value Collateral and Secured Claim was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

**The Motion to Value Collateral and Secured Claim of OneMain Financial Group, LLC ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $3,300.00.**

The Motion filed by Monica Tayag Gutierrez ("Debtor") to value the secured claim of OneMain Financial Group, LLC ("Creditor") is accompanied by Debtor's declaration. Declaration, Dckt. 20. Debtor is the owner of a 2004 Nissan Quest ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $4,469.00 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).

**Creditor's Proof of Claim**

Creditor filed an Amended Proof of Claim, No. 2-2, (the "Claim") on April 30, 2019. Creditor's Claim states the following information as to Creditor's claim:

Value of property: $ 3,300.00
Amount of the claim that is secured: $ 3,300.00
Amount of the claim that is unsecured: $ 4,404.84
Amount necessary to cure any
default as of the date of the petition: $0.00

**Trustee's Response**

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response on May 9, 2019. Dckt. 23. Trustee argues that Debtor's Declaration fails to state it is "true and correct," and thereby fails to meet the requirements of 28 U.S.C. § 1746.

Trustee further notes the Claim and treatment of Creditor's claim in the Chapter 13 Plan.

**DISCUSSION**

**Requirements of a Declaration**

An unsworn declaration executed within the United States must state, "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct." 28 U.S.C. § 1746.

Debtor's Declaration does not meet this requirement. Declaration, Dckt. 20.

Debtor has not presented the court with credible, properly authenticated, evidence and testimony in support of the Motion.

**Valuation of Creditor's Secured Claim**

It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of a proof of claim, and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006). As part of its burden of producing substantial evidence to rebut the presumptive validity, the objecting party bears the burden of producing substantial evidence as to the value of the collateral securing any portion of the claim. *In re Austin,* 583 B.R. 480, 483 (B.A.P. 8th Cir. 2018). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and requires financial information and factual arguments. *Id.* Notwithstanding the prima facie validity of a proof of claim, the ultimate burden of persuasion is always on the claimant. *In re Holm*, 931 F.2d at p. 623.

The Claim states the Vehicle's value is $3,300.00. Though the Motion seeks a slightly higher amount, which was filed only days after Amended Proof of Claim 2-2 was filed, the court accepts the prima facie evidentiary effect of Proof of Claim No. 2-2 for the value of the secured claim.

The lien on the Vehicle's title secures a debt owed to Creditor (in the nature of a title loan)

with a balance of approximately $7,704.84. Proof of Claim, No. 2. 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 $3,300.00, the value of the collateral. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value Collateral and Secured Claim filed by Monica Tayag Gutierrez ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of OneMain Financial Group, LLC ("Creditor") secured by an asset described as 2004 Nissan Quest ("Vehicle") is determined to be a secured claim in the amount of $3,300.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is $3,300.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

**12.** **18-25141-E-13** **BLAKE HARBIN** **MOTION TO MODIFY PLAN**
**BLG-4** **Chad Johnson** **3-19-19 [62]**

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

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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, parties requesting special notice, and Office of the United States Trustee on March 19, 2019. By the court's calculation, 63 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

**The Motion to Confirm the Modified Plan is denied.**

Blake Harbin ("Debtor") seeks confirmation of the Modified Plan because she has moved to Maryland and desires to defer payments on her Vacaville property until after it is sold. Dckt. 62. The Modified Plan provides for $17,000.00 to be paid through January 2019; payments of $1,453.00 for months 7 though 60; and for Debtor to sell his residence on or before month 13. Dckt. 63. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

**CHAPTER 13 TRUSTEE'S OPPOSITION**

The Chapter 13 Trustee, David Cusick ("Trustee") filed an Opposition on May 7, 2019. Dckt. 72. Trustee opposes confirmation on the grounds that Debtor is delinquent $1,453.00 under the Modified Plan payments proposed; Debtor's proposes plan does not provide adequate protection payments to secured creditors pending the sale of her residence; and Debtor has stated he moved to Mayland but has

not filed a Change of Address form.

**CREDITOR'S OPPOSITION**

Creditor Caliber Home Loans, Inc. as servicer for U.S. Bank National Association, as Trustee for COLT 2017-1 Mortgage Loan Trust ("Creditor") filed an opposition on May 7, 2019. Dckt. 75. Creditor opposes the Modified Plan on the basis that the it does not provide for ongoing payments on its claim or towards the cure of arrearages.

**DISCUSSION**

The Creditor and Trustee's grounds for opposition are well-taken.

The plan proposes to sell Debtor's residence in month 13 of the plan term. A review of the docket shows Debtor employed a realtor for that purpose, with the court issuing an Order approving employment on January 22, 2019. Dckt. 54.

With a respect to a sale of the property, the proposed Modified Plan requires nothing with respect to the timing of such sale. The Motion to Confirm states that the Debtor "anticipates" selling this rental property within six months.

In his Declaration Debtor states that he has moved to Baltimore, cannot keep the real property rented, and now, from Baltimore, intends to sell the property. Declaration, p. 2:25.5-26.5, 3:1-2.5, Dckt. 66.

The court notes that an order authorizing the employment of Sequoia Real Estate as Broker for Debtor was entered on January 22, 2019. Order, Dckt. 54. This employment was to market for sale the Vacaville property that Debtor now seeks to sell over the "anticipated" next six months. No declaration is provided by the broker testifying as to the commercially reasonable marketing efforts made since January 2019. By stretching out a sale for another "anticipated" six months would move a projected sale date to November 2019, well outside the know spring and summer sales season.

However, the plan delays any payment to Creditor's secured claim pending sale. 11 U.S.C. § 1325(a)(5) requires equal payments be made to a secured creditor–not a lump sum. Furthermore, 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). [FN. 1]

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FN. 1. The credibility of Debtor's Declaration is put further into doubt given what he has been willing to testify to under penalty of perjury (the court confident that Debtor's experienced bankruptcy counsel reviewed the requirements of Fed. R. Evid. 601, 602. The Debtor states, under penalty of perjury:

A. "My plan complies with applicable laws."

Debtor provides the court with no testimony as to his legal education and the basis for making such statement under penalty of perjury.

B. "a. The Modified Plan complies with the provisions of this chapter and with other applicable provisions of title 11 of the United States Code; ..."

C. "c. The plan is proposed in good faith and not by any means forbidden by law (See Good Faith Analysis);. . ."

While Debtor may provide a discussion in his Declaration of what he concludes is the basis for the court finding good faith, he does not show the legal knowledge and training to know what is "forbidden by law."

D. "e. All secured creditors provided for have either accepted the plan or I have provided for the surrender of property securing their claims, and the plan provides to pay the creditors pursuant to section 1325(a)(5)(B) (See Liquidation Analysis); . . ."

Debtor manifests a lack of knowledge of the economic terms of his plan, merely parroting the statutory alternatives for secured claim treatment under 11 U.S.C. § 1325.

Debtor being willing to sign a declaration in which he testifies under penalty of perjury to these legal conclusions and professes the legal knowledge and education to make such pronouncements to lawyers licensed to practice law and the court put in doubt all of the testimony, as well as other information provided under penalty of perjury, into doubt.

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Additionally, Trustee argues Debtor is delinquent $1,453.00 under the proposed plan. Delinquency indicates the plan is not feasible. 11 U.S.C. § 1325(a)(6).

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

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

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

**13.** **19-22841-E-13 BLC-1** **KRISHNAPRASAD NALAJALA** **Brian Coggins** **MOTION TO EXTEND AUTOMATIC STAY** **5-7-19 [8]**

**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 Chapter 13 Trustee, creditors, and Office of the United States Trustee on May 7, 2019. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Extend the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

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

Krishnaprasad Nalajala ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(a) extended beyond thirty days in this case. This is Debtor's second bankruptcy petition pending in the past year. Debtor's prior bankruptcy case (No. 18-26528) was dismissed on May 3, 2019, after Debtor caused unreasonable delay by failing to file a new amended plan after the prior plan was denied confirmation. *See* Order, Bankr. E.D. Cal. No. 18-26528, Dckt. 54, May 3, 2019. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to Debtor thirty days after filing of the petition.

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed because Debtor was injured and thereby detained outside the country. Declaration ¶

3, Dckt. 10. Debtor states he is now back in the United States and is proposes a viable plan. *Id.*, ¶ 4.

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.

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 Krishnaprasad Nalajala ("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.

**14. 19-22548-E-13 RJ-2** | **BRET BENZIGER** **Richard Jare** | **MOTION TO VALUE COLLATERAL OF CAPITAL ONE AUTO FINANCE** **5-7-19 [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 Chapter 13 Trustee, Creditor, and Office of the United States Trustee on May 7, 2019. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Value Collateral and Secured Claim was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, **----------**.

**The Motion to Value Collateral and Secured Claim of Capital One Auto Finance ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $9,000.00 .**

The Motion filed by Bret Michael Benziger ("Debtor") to value the secured claim of Capital One Auto Finance ("Creditor") is accompanied by Debtor's declaration. Declaration, Dckt.14. Debtor is the owner of a 2013 Chevrolet Volt ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $9,000.00 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).

**DISCUSSION**

The lien on the Vehicle's title secures a purchase-money loan incurred in June 2016, which is more than 910 days prior to filing of the petition, (assuming June 1, 2016 1,028 days would have passed before the April 24, 2019 filing date) to secure a debt owed to Creditor with a balance of approximately $15,772.00. Declaration ¶¶ 1 and 5, Dckt. 16. 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 $9,000.00, 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 Collateral and Secured Claim filed by Bret Michael Benziger ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of Capital One Auto Finance ("Creditor") secured by an asset described as 2013 Chevrolet Volt ("Vehicle") is determined to be a secured claim in the amount of $9,000.00, 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 $9,000.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

**15.** **19-21951-E-13 SS-4** | **JASMINE SMITH** **Scott Shumaker** | **MOTION TO VALUE COLLATERAL OF J.P. MORGAN CHASE BANK, N.A. 4-30-19 [35]**

**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 Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on April 30, 2019. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

The Motion to Value Collateral and Secured Claim was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

**The Motion to Value Collateral and Secured Claim of J.P. Morgan Chase Bank, N.A. ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $10,000.00.**

The Motion filed by Jasmine Rae Smith ("Debtor") to value the secured claim of J.P. Morgan Chase Bank, N.A. ("Creditor") is accompanied by Debtor's declaration. Declaration, Dckt. 37. Debtor is the owner of a 2015 Hyundai Elantra ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $10,000.00 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).

Debtor's Declaration states the Vehicle has approximately 54,000 miles presents the following testimony about the condition of the Vehicle:

Two tires need replacing, there is a gouge in the hood, and a dent in the roof

above the left rear door. The right quarter panel is scraped and dinged, both front doors and the left rear door have dings, and the right rear door is dented and scraped. The right outside mirror is scratched. Both bumper covers are scratched, and the windshield is chipped. Both alloy wheels on the right side are scraped.

Declaration ¶ 6, Dckt. 37.

**DISCUSSION**

The lien on the Vehicle's title secures a purchase-money loan incurred on June 1, 2015, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $19,301.97. Schedule D, Dckt. 27; Declaration ¶ 4, Dckt. 37. 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 $10,000.00, 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 Collateral and Secured Claim filed by Jasmine Rae Smith ("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 J.P. Morgan Chase Bank, N.A.. ("Creditor") secured by an asset described as 2015 Hyundai Elantra ("Vehicle") is determined to be a secured claim in the amount of $10,000.00, 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 $10,000.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

**16.** **19-22653-E-13 PGM-1** **REECE/RODINA VENTURA** **Peter Macaluso** **MOTION TO EXTEND AUTOMATIC STAY** **5-7-19 [12]**

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

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

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

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 May 7, 2019. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Extend the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

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

Reece Ventura and Rodina Cordero Ventura ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(a) extended beyond thirty days in this case. This is Debtor's second bankruptcy petition pending in the past year. Debtor's prior bankruptcy case (No. 18-25342) was dismissed on February 2, 2019, after Debtor failed to convert the case from Chapter 13 (the court having found Debtor was ineligible for Chapter 13 relief). *See* Order, Bankr. E.D. Cal. No. 18-25342, Dckt. 106, February 2, 2019. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to Debtor thirty days after filing of the petition.

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed because Debtor exceeded the debt limit for relief under chapter 13, and that since the

limits have been increased Debtor now is eligible. Declaration, Dckt. 15.

**TRUSTEE'S OPPOSITION**

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition to the Motion on May 9, 2019. Dckt. 17. Trustee opposes the Motion on the basis Debtor has not demonstrated a change in circumstances. While Debtor alleges Debtor is now eligible for Chapter 13 relief, no specifics are provided.

**CREDITOR'S OPPOSITION**

Creditors Benjamin Zamora Villanueva and Adela Bon Gaunia ("Creditor") filed an Opposition on May 16, 2019. Dckt. 32. Creditor argues (1) the changed debt limit is not a change in circumstances; (2) the limit includes undersecured claims; and (3) while the debt limit increased, claims in this case have also increased due to interest and fees.

**DEBTOR'S REPLY**

Debtor filed a Reply to Trustee's Opposition on May 14, 2019. Dckt. 26. Debtor argues the following:

> the total claims listed are $406,860.50, less the disputed amount of $149,718.00, plus the priority unsecured claims of $65,920.34, leaving a debt total of $323,005.84.

Debtor argues further the claims of two former employees Gaunia and Villanueva are disputed; Debtor filed this case in good faith and operates youth homes; and Debtor can remedy the feasibility of the proposed Chapter 13 Plan in the order confirming the plan.

**DISCUSSION**

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). 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 not sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay.

Debtor seems to have ignored the court's prior ruling, and proceeds as though the court only considered the claims alleged by Debtor to be noncontingent and liquidated. In the prior case, the court made the following finding:

> Excluding the $1.00 Gaunia claim and the $1.00 Villanueva claim, Schedules E/F lists unsecured debt totaling $319,663.26. None of that unsecured debt is scheduled as contingent or unliquidated which means for purposes of this motion it is all noncontingent and liquidated. As noted above, the court is aware that the Debtors dispute the Gaunia and Villanueva debts. **However, disputed debts are not excluded from the eligibility analysis**. *Sylvester v. Dow Jones & Co., Inc. (In re Sylvester)*, 19 B.R. 671, 673 (B.A.P. 9th Cir. 1982); *see also Nicholes v. Johnny Appleseed of Wash. (In re Nicholes)* , 184 B.R. 82, 90-91 (B.A.P. 9th Cir. 1995). Moreover, **the Gaunia and Villanueva proofs of claim are presumptively valid** as to their amount unless and until there is a sustained objection. See FED. R. BANKR. P. 3001(f). But an objection to the proofs of claim is a postpetition event and in determining eligibility the court does not look to postpetition events. *Slack v. Wilshire*
>
> The Gaunia and Villanueva proofs of claim assert unsecured debt as of the petition date totaling $303,793.34. Adding that to the other $319,663.26 of unsecured debt included on Schedule E/F, **the Debtors' noncontingent, liquidated unsecured debt totals $623,456.60**. That amount clearly exceeds the § 109(e) statutory eligibility limit which means the Debtors are ineligible for Chapter 13 relief.

Civil Minutes, Bankr. E.D. Cal. No. 18-25342, Dckt. 96, January 15, 2019(emphasis added).

Debtor computes the amount of debt computed for purposes of 11 U.S.C. § 109(e) by subtracting out the priority unsecured claims and the unsecured claims that debtor disputes. As previously explained in the prior case, merely disputing a debt does not take it out of the 11 U.S.C. § 109(e) calculation. Additionally, there is no exclusion of unsecured claims merely because they are priority unsecured claims.

Just as the court noted before, the court notes again a claim supported by a Proof of Claim is allowed unless a party in interest objects. 11 U.S.C. § 502(a). Debtor cannot merely state the claim is disputed and therefore should not be considered.

> e) Only an **individual with regular income** that **owes, on the date of the filing** of the petition, **noncontingent**, **liquidated**, **unsecured debts** of less than **$419,275** and noncontingent, liquidated, secured debts of less than $ 1,257,850 or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $419,275 and noncontingent, liquidated, secured debts of less than $ 1,257,850 may be a debtor under chapter 13 of this title.

11 U.S.C. § 109(e) [emphasis added].

Here, Debtor on Schedule E lists the California Franchise Tax Board having $2,171.90 and the Internal Revenue Service having $44,016.66 in priority unsecured claims, for a total of $46,188.56 in priority unsecured claims. On Schedule F Debtor lists $406,515.46 in general unsecured claims. Dckt. 1 at 24-52. On Schedule D Debtor lists Exeter Financial Corporation having an unsecured claim of $12,032.64 (the amount that this creditor's claim exceeds the value its collateral). *Id.* at 21.

In this 28 pages of unsecured claims, Debtor has listed many at just $1.00, as noted by the court in setting a Status Conference in this Chapter 13 case. Dckt. 30. It appears that such "$1.00" creditors may well likely have significantly higher claims. The Debtor has listed the Gaunia unsecured claim as being "Contingent," "Unliquidated," and "Disputed." Given the proceedings in this case, it does not appear that these amounts are contingent or unliquidated, but just disputed by the Debtor. The amounts are known, but disputed. The events upon which claims are based have occurred, but the liability for such acts disputed. *See* Proof of Claim No. 5-1 filed by Ms. Gaunia, Attachment specifying events during the period of 2013 through 2015 upon which the claim is based and computation of obligation.

Adding of the non-contingent, liquidated unsecured claims as stated on the Schedules (including Ms. Gaunia's claim), the unsecured claims in this case (without taking into account any additional amounts the Debtor in good faith should state for the $1 claims) total $452,704.02 even without including the additional $12,032.64 in the Exeter unsecured claim, and well exceed the Chapter 13 debt limits prescribed in 11 U.S.C. § 109(e).

Debtor's filing of this second Chapter 13 case following the dismissal of the prior case, that judge's review of the 11 U.S.C. § 109(e) computation, and Debtor's return filing of this case raises

serious good faith issues. Rather than diligently prosecuting the prior case in Chapter 11 as the opportunity was presented in the prior case, or electing to convert it to Chapter 7, Debtor elected to have the case voluntarily dismissed on Debtor's own motion.

The Motion is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Extend the Automatic Stay filed by Reece Ventura and Rodina Cordero Ventura ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to extend the automatic stay, which terminates only as to Debtor pursuant to 11 U.S.C. § 362(c)(3)(A) thirty days after the commencement of this case, is denied. No determination is made by the court to the other provisions of 11 U.S.C. § 362(a) that apply to property of the bankruptcy estate.

| | | | |
|---|---|---|---|
| **17.** | **15-29454-E-13 MJD-4** | **MICHAEL/KAYLENE YANDEL Matthew DeCaminada** | **MOTION FOR COMPENSATION BY THE LAW OFFICE OF STUTZ LAW OFFICE, P.C. FOR MATTHEW J. DECAMINADA, DEBTORS' ATTORNEY(S) 4-5-19 [122]** |

**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.

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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, parties requesting special notice, and Office of the United States Trustee on April 5, 2019. By the court's calculation, 46 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

**The Motion for Allowance of Professional Fees is granted.**

Stutz Law Office, P.C., the Attorney ("Applicant") for Michael Walter Yandel and Kaylene Marie Yandel, the Chapter 13 Debtor ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period February 7, 2019, through April 5, 2019. On February 12, 2019, Applicant because counsel "substituted in" [FN.1.] as counsel by filing a change in designation of counsel for service. Dckt. 99.

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FN.1. Applicant was previously an employee of Sagaria Law, P.C. After Scott Sagaria passed away, Client approached Applicant, whom has already ben working in this case, for post-confirmation services. The Confirmed Modified Plan provides that Applicant was paid $0.00 prior to filing of the case, and should court approval for fees. Dckt. 107; Order, Dckt. 132.

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Applicant requests a reduced fee in the amount of $1,000.00.

**COUNSEL OF RECORD/SUBSTITUTION OF COUNSEL**

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

**STATUTORY BASIS FOR PROFESSIONAL FEES**

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A). An attorney must "demonstrate only that the services were reasonably likely to benefit the estate at the time rendered," not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

**APPLICABLE LAW**

**Reasonable Fees**

A bankruptcy court determines whether requested fees are reasonable by examining the circumstances of the attorney's services, the manner in which services were performed, and the results of the services, by asking:

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the attorney exercise reasonable billing judgment?

*In re Garcia*, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

**Lodestar Analysis**

For bankruptcy cases in the Ninth Circuit, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis cab be appropriate, however. *See id.* (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the

lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

**Reasonable Billing Judgment**

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. An attorney must exercise good billing judgment with regard to the services provided because the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

*In re Puget Sound Plywood*, 924 F.2d at 958–59 (citing *In re Wildman*, 72 B.R. 700, 707 (N.D. Ill. 1987)).

A review of the application shows that Applicant's services for the Estate include general case administration and prosecution of motions to confirm modified plan, approve loan modification, and approve fees. The court finds the services were beneficial to Client and the Estate and were reasonable.

**FEES AND COSTS & EXPENSES REQUESTED**

**Fees**

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

General Case Administration: Applicant spent 0.8 hours in this category.

Motion To Approve Loan Modification: Applicant spent 3.8 hours in this category.

Motion To Confirm Modified Plan: Applicant spent 5.6 hours in this category.

Motion For Fees: Applicant spent 1.2 hours in this category.

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

| **Names of Professionals and Experience** | **Time** | **Hourly Rate** | **Total Fees Computed Based on Time and Hourly Rate** |
|---|---|---|---|
| "GL" FN.2. | 8.7 | $175.00 | $1,522.50 |
| "MJD" | 1.5 | $275.00 | $412.50 |
| **Total Fees for Period of Application** | | | $1,935.00 |

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FN.2. The initials included in the Billing Statement are not explained or readily discernable. Exhibit A, Dckt. 125.

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**FEES ALLOWED**

**Fees**

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $1,000.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 13 Trustee from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

The court authorizes the Chapter 13 Trustee to pay the fees allowed by the court.

Applicant is allowed, and the Chapter 13 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees $1,000.00

pursuant to this Application in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Stutz Law Office, P.C. ("Applicant"), Attorney for Michael Walter Yandel and Kaylene Marie Yandel, Chapter 13 Debtor, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Stutz Law Office, P.C. is allowed the following fees and expenses as a professional of the Estate:

Stutz Law Office, P.C., Professional employed by Chapter 13 Debtor

Fees in the amount of $1,000.00,

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

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

**18.** **18-27157-E-13 GTB-1** **LATOYA KAMILAH SMITH** **George Burke** **MOTION TO CONFIRM PLAN** **3-18-19 [37]**

**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.

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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, parties requesting special notice, and Office of the United States Trustee on March 18, 2019. By the court's calculation, 64 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

Latoya Kamilah E Smith ("Debtor") seeks confirmation of the Amended Plan. The Amended Plan . Dckt. 40. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

**CHAPTER 13 TRUSTEE'S OPPOSITION**

David Cusick ("the Chapter 13 Trustee") filed an Opposition on May 1, 2019. Dckt. 45. Trustee opposes confirmation on the basis that the plan will take longer than 60 months to complete because the Proof of Claim filed by Lobel Financial states a claim higher than estimated by the Plan. Trustee further opposes confirmation on the basis that section 7.03 stating as follows:

> With respect to the Class 1 mortgage payment, Debtor hereby demands that the mortgage servicer (Lakeview Loan Servicing, LLC) immediately initiate the process required to remove the private mortgage insurance (PMI) and stop charging Debtor PMI premiums. If the mortgage servicer does not stop charging Debtor for the PMI by the time the trustee files the notice of filed claims then Debtor may object to claim number 10.

is an impermissible modification of that creditor's claim secured by Debtor's principle residence.

**CREDITOR'S OPPOSITION**

Creditor Lakeview Loan Servicing, LLC ("Creditor") filed an Opposition on May 7, 2019. Dckt. 48. Creditor joins Trustee in arguing that section 7.03 of the Plan is an impermissible modification of its claim.

**DEBTOR'S REPLY**

Debtor filed a Reply on May 10, 2019. Dckt. 54. Debtor states an Objection To claim (Dckt. 50) has been filed to address the disputed claim of Lobel Financial, and requests the hearing be continued to June 25, 2019 to allow a determination of that Objection.

Debtor further argues that section 7.03 of the Amended Plan merely provides notice of Debtor's right to object, and therefore does not modify Creditor's claim.

**DISCUSSION**

Debtor argues section 7.03 only provides "notice." The plain language of the provision is:

> If the mortgage servicer does not stop charging Debtor for the PMI by the time the trustee files the notice of filed claims then Debtor may object to claim number 10.

Amended Plan, Dckt. 40.

If it is merely "notice," then it is not a proper plan term. The provision for Claims in Class 1 is for the payment of the claim and arrearage - not merely "notice" that the Debtor will take some future act if the creditor does not voluntarily modify its claim at some future date. Thus, as a plan payment term, there is no provision for payment.

To the extent that the provision provides for a payment amount, the proposed modification violates 11 U.S.C. § 1322(b)(2), which prohibits the modification of an obligation secured only by Debtor's residence.

While Debtor has subsequently filed an Objection to the claim of Lobel Financial, only after trying to get a "notice of future activity if specified future activity does not occur," denial of the Motion is proper. There is no showing that the "notice of future activity if specified future activity does not occur" proposed modified plan term will be confirmable.

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

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

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

The Motion to Confirm the Chapter 13 Plan filed by Latoya Kamilah E Smith ("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 Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

**19. 15-28959-E-13 TOG-2 — ANTHONY/ANGEL GUTIERREZ — Thoms Gillis — MOTION TO MODIFY PLAN — 4-10-19 [70]**

**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 April 10, 2019. By the court's calculation, 41 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

**The Motion to Confirm the Modified Plan is denied.**

("Debtor") seek confirmation of the Modified Plan because Debtor cannot afford the payments under the Confirmed Plan. Dckt. 72. The Modified Plan provides for payments of $559.00

from month one of the plan through December 2018; $110.00 from January through March 2019; and $164 for the remainder of the Plan term. Modified Plan, Dckt. 74. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

**CHAPTER 13 TRUSTEE'S OPPOSITION**

David Cusick ("the Chapter 13 Trustee") filed an Opposition on May 7, 2019. Dckt. 84. Trustee opposes confirmation on the following grounds:

1. Debtor's prior proposed modified Plan (Dckt. 53) was denied confirmation due to insufficient evidence.

2. Debtor filed the two most recent updated sets of Schedule I ad J as Amended Schedules where the case was filed in 2015. Dckts. 55, 76. Furthermore, many expenses increased from filing are not explained, including a $255 increase to home maintenance, $185 increase to entertainment, and $185 increase to "miscellaneous."

3. Debtor's reason for reducing payments is not credible where Debtor's income has increased $520 monthly; Debtor proposes reducing the payment from $626 to $164; and Debtor intends to surrender the vehicles Debtor was paying $487.92 a month for.

**DISCUSSION**

Trustee's grounds for opposition is well-taken.

At the confirmation hearing on the first proposed modified plan, the court noted that amended schedules and not supplemental schedules had been filed. More significantly, the court addressed the following with the Debtor:

> Making statements under penalty of perjury, such as Schedules I and J, has significance, with the trustee, other parties in interest, and the court relying on such statements. The court accepts that "things change," but **a party providing different testimony/statements under penalty of perjury needs to provide an explanation under penalty fo perjury as to why and how the changes have occurred (and are reasonable)**. Otherwise, such is nothing more than dictating to the court, trustee, and creditors that they just accept, without support, whatever the Debtor says is the true facts.

Civil Minutes, Dckt. 64.

Despite the court's guidance, the most recent filed Schedules I and J were filed as Amended Schedules without an accompanying declaration explaining the changes in financial circumstances. Dckt. 76.

It is unclear what good faith basis Debtor could have, after hearing the court's concerns at the prior confirmation hearing, for claiming an unexplained "miscellaneous" expense of $185 on the Amended Schedule J. *Id*. Debtor now states the following under penalty of perjury:

> 2. The reason we are filing this modified plan is because we cannot afford the payments. We have decided to remove our vehicles from class 2 to surrender, class 3.
>
> 3. We need to modify our confirmed plan because I could no longer afford to keep the vehicles.
>
> 4. Since my filing in 2015, I have had certain changes to my schedules I and J.
>
> 5. I still work for the same employer. My salary has increased to $4,476 from $3,954 (see amended I and Exhibit A current paystubs).
>
> 6. However, my wife is not working. She hasn't worked for the last four years and has no income from any other source.
>
> ...
>
> 10. I have provided for an additional $50 per month to unsecured creditors, but cannot afford more than that.
>
> ...
>
> 15. Our plan provides for unsecured creditors to be paid (3) percent through this plan. That amount is the maximum amount we can afford to pay from our disposable income.

Declaration, Dckt. 72.

While Debtor concludes the "maximum amount" is now being provided to creditors through the plan, such has not been demonstrated to the court. Debtor's net monthly income has actually risen significantly, from $3,171.00 to $3,906.00 (a 23 percent increase in income). *Compare* Schedule I, Dckts. 1 *with* Schedule I, Dckt. 76.

Debtor has not provided an explanation for an increase to the necessary expenses stated under penalty of perjury on Schedule I, which might help the court understand why Debtor is struggling even after a significant increase in income. Such an explanation is necessary as a general matter, but even more so here where Debtor is claiming a significant increase in "miscellaneous" expenses.

At the hearing, xxxxxxxxxxxxxx.

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

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

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

**20.** **19-22262-E-13** **PAUL MAYARD** **MOTION TO VALUE COLLATERAL OF**
**MC-1** **Muoi Chea** **YOLO FEDERAL CREDIT UNION**
**5-6-19 [16]**

**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 Chapter 13 Trustee, Creditor, and Office of the United States Trustee on May 6, 2019. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion to Value Collateral and Secured Claim was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

**The Motion to Value Collateral and Secured Claim of Yolo Federal Credit Union ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $52,253.00.**

The Motion filed by Paul Michael Mayard ("Debtor") to value the secured claim of Yolo Federal Credit Union ("Creditor") is accompanied by Debtor's declaration. Declaration, Dckt. 18. Debtor is the owner of a 2016 Dodge Challenger SRT Hellcat ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $52,253.00 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).

**Creditor's Proof of Claim**

Creditor filed a Proof of Claim, No. 3 (the "Claim") on April 25, 2019. Creditor's Claim states the following information as to Creditor's claim:

> Value of property: $ 61,251.64
> Amount of the claim that is secured: $ 52,253.00
> Amount of the claim that is unsecured: $ 8,998.64
> Amount necessary to cure any
> default as of the date of the petition: $1,211.40

**DISCUSSION**

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). As part of its burden of producing substantial evidence to rebut the presumptive validity, the objecting party bears the burden of producing substantial evidence as to the value of the collateral securing any portion of the claim. *In re Austin,* 583 B.R. 480, 483 (B.A.P. 8th Cir. 2018). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and requires financial information and factual arguments. *Id.* Notwithstanding the prima facie validity of a proof of claim, the ultimate burden of persuasion is always on the claimant. *In re Holm*, 931 F.2d at p. 623.

Here, the Claim states the value of the Vehicle is $61,251.64 (the total amount of Creditor's claim), but further states that Creditor's claim is secured in the amount of $52,253.00. The Debtor's Declaration presents testimony that the value of the Vehicle is $52,253.00. Declaration, Dckt. 18.

In reviewing the Claim, it appears that Creditor only mistakenly listed the value of the Vehicle as the full claim amount. If Creditor believed the Vehicle is worth $61,251.64, it would have a fully secured claim, not a claim secured in the amount of $52,253.00 and unsecured secured in the amount of $8,998.64.

The lien on the Vehicle's title secures a purchase-money loan incurred on August 2016, which is more than 910 days prior to filing of the petition (assuming August 31, 2016, 953 days passed prior to filing), to secure a debt owed to Creditor with a balance of approximately $61,251.64. Declaration ¶ 3, Dckt. 18; Proof of Claim, No. 3. 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 $32,253.00, 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 Collateral and Secured Claim filed by Paul Michael Mayard ("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 Yolo Federal Credit Union ("Creditor") secured by an asset described as 2016 Dodge Challenger SRT Hellcat ("Vehicle") is determined to be a secured claim in the amount of $52,253.00, 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 $52,253.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

**21. 19-20371-E-13 WW-1** | **CHARLES RATLIFF** **Mark Wolff** | **CONTINUED MOTION TO CONFIRM PLAN** **3-19-19 [26]**

**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.

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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 19, 2019. By the court's calculation, 42 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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.**

Charles A. Ratliff ("Debtor") seeks confirmation of the Amended Plan. The Amended Plan

provides for payments of $3,357.00 for 60 months commencing April 25, 2019. Dckt. 30. The Amended Plan also provides 100 percent to unsecured claims totaling $22,350.00. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

**CHAPTER 13 TRUSTEE'S OPPOSITION**

David Cusick ("the Chapter 13 Trustee") filed an Opposition on April 3, 2019. Dckt. 37. Trustee opposes confirmation of the plan on the basis that the Meeting of Creditors has yet to be concluded. While Debtor appeared at the Meeting of Creditors on both February 21, 2019 and March 21, 2019, Trustee did not conclude the Meeting because there appeared to be an Order Appointing Temporary Conservator.

Trustee further opposes confirmation because the Plan states that payments shall commence April 25, 2019 in the additional provisions. Because the case was filed January 22, 2019, the plan term would be extended beyond 60 months.

**APRIL 30, 2019 HEARING**

At the hearing on the Motion, the court continued the hearing to allow Debtor to appear at the Meeting of Creditors. Civil Minutes, Dckt. 45.

**DISCUSSION**

A review of the docket and Trustee's Report entered May 3, 2019 indicates Debtor (presumably with the appointed representative, Dorothy Ann Ratliff (Order, Dckt. 47)) appeared at the Continued Meeting of Creditors.

At the April 30, 2019 hearing the court addressed Trustee's other ground for opposition–where the plan proposes 60 payments and plan payments commence on April 25, 2019, the plan appears to extend beyond the 60 month term.

Two sections of the Bankruptcy Code are relevant to determining the plan term limits. 11 U.S.C. § 1325(b)(emphasis added) provides a minimum term period as follows:

> (b)
>
> (1) 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—
>
> > (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
> >
> > (B) **the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period**

**beginning on the date that the first payment is due under the plan** will be applied to make payments to unsecured creditors under the plan.

. . .

(4) For purposes of this subsection, the "applicable commitment period"—

(A) subject to subparagraph (B), shall be—

(i) 3 years; or

(ii) not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than—

(I) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(II) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(III) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $525 per month for each individual in excess of 4; and

(B) may be less than 3 or 5 years, whichever is applicable under subparagraph (A), but only if the plan provides for payment in full of all allowed unsecured claims over a shorter period.

Then, 11 U.S.C. § 1322(d)(emphasis added) sets the following maximum term:

If the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than–

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

> (C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $7501 per month for each individual in excess of 4,
>
> **the plan may not provide for payments over a period that is longer than 5 years**.

The plain meaning of the above Bankruptcy Code sections sets the limitation that (1) the payment period not be longer than 5 years, and (2) the payment period commences on the date the first plan payment is due. *In re Profit*, 283 B.R. 567, 575 (B.A.P. 9th Cir. 2002).

Unless the court orders otherwise, the first payment is due 30 days after filing of the petition. *See* 11 U.S.C. §§ 301, 1326(a)(1); 8 COLLIER ON BANKRUPTCY P 1326.02 [1] (16th 2019)("Section 1326(a)(1) provides that payments to the trustee normally must begin not later than 30 days after the filing of the plan or the order for relief, whichever is earlier. Because it is hard to imagine a circumstance in which a plan would be filed before the order for relief, which is normally the petition . . . this amendment effectively requires payments to commence within 30 days after the petition or conversion to chapter 13").

Here, Debtor's Amended Chapter 13 Plan seeks to commence plan payments on April 25, 2019 merely because Debtor missed the payments for February and March 2019. Where the case was filed January 22, 2019, the first payment was due February 2019. 11 U.S.C. § 1326. Debtor did not seek an order from the court providing that payment should commence on another date.

Because the payment period by default started in February 2019, the plan term would run longer than 60 months. Therefore, the Amended Plan cannot be confirmed. 11 U.S.C. § 1322.

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 Charles A. Ratliff ("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.

**22.** **19-20075-E-13 SLE-2** | **BENJAMIN/KRISTIE AVILA** **Steele Lanphier** | **CONTINUED MOTION TO CONFIRM PLAN** **2-5-19 [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.

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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, parties requesting special notice, and Office of the United States Trustee on February 5, 2019. By the court's calculation, 49 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

Benjamin Edward Avila and Kristie Lea Avila ("Debtor") seek confirmation of the Plan , which is their first proposed plan in this case. The Plan provides for payments of $3,758.50 and a 10 percent dividend to unsecured claims. Plan, Dckt. 26.

**TRUSTEE'S OPPOSITION**

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on February 26, 2019. Dckt. 29. Trustee opposes confirmation on the following grounds:

1. Debtor's proposed plan relies on 2 motions to avoid lien of Capital One.

2. Debtor's plan relies on claimed exemptions to which Trustee has filed an Objection. Debtor's non-exempt equity (if the Objection is successful) is

$5,631.85.

3. Based on Debtor's prior tax returns, Debtor will likely see a tax refund. However, no refund is provided through the plan.

4. Debtor proposes to pay Attorney's fees before Class 1, Class 2, or unsecured claims. Debtor proposes only $250.00 monthly for the $2,000.00 in fees, but could proposed higher monthly dividend which would later be used towards the Class 2 claim of Travis Credit Union.

5. Debtor has not provided the class 1 Checklist to Trustee.

**CREDITOR'S OPPOSITION**

Creditor, Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, not individually but as trustee for Pretium Mortgage Acquisition Trust ("Creditor") filed an Opposition on March 11, 2019. Dckt. 52. Creditor opposes confirmation because **Debtor's plan only provides $61,984.12 to cure the arrears of Creditor amounting to $63,168.59.** Creditor argues this fails to provide the full value of its secured claim, does not promptly cure arrears, and the plan is not feasible.

**MARCH 26, 2019 HEARING**

At the March 26, 2019 hearing the court continued the hearing on the Objection to April 30, 2019. Dckt. 56.

**APRIL 30, 2019 HEARING**

At the hearing the Debtor, Creditor, and the Chapter 13 Trustee discussed necessary amendments, requesting a continuance so the Parties can work on the necessary language and documentation. Civil Minutes, Dckt. 64. The court continued the hearing to May 21, 2019.

**DISCUSSION**

The Opposing grounds of Trustee and Creditor are well-taken.

Debtor's proposed plan relies on the avoidance of two of creditor Capital One's liens. A review of the docket shows that while the court granted those motions, one of the liens remains in the amount of $2,342.34. Therefore, the plan is not feasible. 11 U.S.C. § 1325(a)(6).

Trustee filed an Objection to claim of exemptions, set to be heard the same day as the hearing on this Motion. Dckt. 32. A review of the docket shows the court sustained that Objection. Therefore, Debtor has significant non-exempt equity and appears to fail the liquidation test. 11 U.S.C. § 1325(a)(4).

Debtor received several thousands of dollars from tax refunds in 2018 and 2017. Declaration, Dckt. 30. However, the proposed plan does not contemplate Debtor committing any refund. Therefore,

the Plan violates 11 U.S.C. § 1325(b)(1).

Debtor has failed to provide the Class 1 Checklist and Authorization to Release Information forms. Local Bankruptcy Rule 3015-1(b)(6) requires Debtor to provide the Class 1 Checklist and Authorization to Release Information forms to Trustee. Debtor has not provided these forms. Without Debtor submitting all required documents, the court and Trustee are unable to determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325. That is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Additionally, Debtor is not providing for the full claim of Creditor, holding a secured claim. Failure to so provide demonstrates the plan is not feasible. 11 U.S.C. § 1325(a)(6).

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by Benjamin Edward Avila and Kristie Lea Avila ("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 Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

**23.** **19-22077-E-13** **DARIN DOWD** **MOTION TO VALUE COLLATERAL OF**
**SJT-1** **Susan Turner** **ELITE ACCEPTANCE**
**4-17-19 [10]**

**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.

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

Sufficient Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on April 17, 2019 (as discussed below, service on the creditor was not provided). By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

A review of the Certificate of Service shows that it does not clearly document service on the creditor whose claim is to be valued. Cert. of Serv.. Dckt. 13.

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

**The Motion to Value Collateral and Secured Claim of Elite Acceptance ("Creditor") is denied without prejudice**

The Motion filed by Darin Wayne Dowd ("Debtor") to value the secured claim of Elite Acceptance ("Creditor") is accompanied by Debtor's declaration. Declaration, Dckt. 12. Debtor is the owner of a 2008 Toyota Prius ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $5,575.00 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).

**Trustee's Response**

The Chapter 13 Trustee, David Cusick ("Trustee"), filed Response on May 7, 2019. Dckt. 18. Trustee notes the Creditor has not filed a proof of claim to date.

**DISCUSSION**

**Insufficient Service**

The Proof of Service states under penalty of perjury that service was provided to creditor at:

Elite Acceptance
1485 River Park Dr. #100
Sacramento, CA 95815-0000

Proof of Service, Dckt. 13.

In reviewing the Secretary of State's website, which provides detailed information on businesses authorized to do business in California [FN.1.], there is no entity with the name "Elite Acceptance."

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FN.1. https://businesssearch.sos.ca.gov/CBS/Detail.

---

Likely the creditor here is the entity "Elite Acceptance Corp." Elite Acceptance Corp lists the aforementioned address, upon which service was allegedly provided, as its street address and location of its executive office and principal business office.

However, Elite Acceptance's mailing address and the address for its agent for service of process is stated to be:

Steven V. Maita
2500 Auburn Blvd.,
Sacramento, CA 95821

To the extent that the River Park Drive address is the main business office for the creditor, the Certificate of Services does not state that it was sent to an officer of the corporation or was titled: "Attn: Officer or Agent for Service of Process." Rather, it was sent in the same manner as junk mail sent to a business.

Federal Rules of Bankruptcy Procedure 9014(b) and 7004 state that service by mail upon a domestic corporation is made:

> by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to

receive service and the statute so requires, by also mailing a copy to the defendant.

Here, there is no indication service was made on an officer, a managing or general agent, or to any other agent authorized by appointment or by law. Rather, service was made to the creditor's street address, not addressed to any specific person.

Based on the foregoing, the Motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value Collateral and Secured Claim filed by Darin Wayne Dowd ("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.

**24.** **19-20880-E-13 FF-2** **LAURA/DONALD ENGLAND** **Gary Fraley** **MOTION TO AVOID LIEN OF CACH, LLC** **4-16-19 [46]**

**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, Creditor, and Office of the United States Trustee on April 17, 2019. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

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

This Motion requests an order avoiding the judicial lien of Name of Cach, LLC ("Creditor") against property of Laura Elizabeth England and Donald Lee England ("Debtor") commonly known as 7235 Larchmont Drive in North Highlands, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $16,407.86. Exhibit 4, Dckt. 51. An abstract of judgment was recorded with Sacramento County on June 8, 2010, that encumbers the Property. *Id.*

**TRUSTEE'S OPPOSITION**

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition to the Motion on May 7, 2019. Dckt. 112. Trustee opposes the Motion on the basis that (1) Debtor does not include the first deed of trust in Debtor's avoidance calculation; (2) Debtor includes the claimed exemption of $16,892.00 twice in Debtor's avoidance calculation; and (3) based on in Debtor's avoidance calculation there appears to be equity in the Property.

**DISCUSSION**

The Trustee's argument is well-taken. Debtor does not in the Motion provide the correct lien avoidance analysis - not stating with particularity senior liens that consume the value of the property (along with the properly computed homestead exemption).

Debtor's Motion is clear on its face, stating that there is $204,731.31 in value (after adjusting for the improper double claiming of the exemption) to secure this judgment lien

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is equity to support the judicial lien, at least as stated in the Motion.

Notwithstanding the grounds stated in the Motion establishing that equity exists for the judgement lien, there appears to be "something rotten in Denmark" with respect to such a determination.

Therefore, the court denies the Motion without prejudice.

**ISSUANCE OF A COURT-DRAFTED ORDER**

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Laura Elizabeth England and Donald Lee England ("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.

**25.** **19-20880-E-13** **LAURA/DONALD ENGLAND** **MOTION TO AVOID LIEN OF GCFS, INC.**
**FF-3** **Gary Fraley** **4-16-19 [60]**

**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, Creditor, and Office of the United States Trustee on April 17, 2019. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

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

This Motion requests an order avoiding the judicial lien of GCFS, Inc., a California Corporation ("Creditor") against property of Laura Elizabeth England and Donald Lee England ("Debtor") commonly known as 7235 Larchmont Drive in North Highlands, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $7,551.29. Exhibit 4, Dckt. 66. An abstract of judgment was recorded with Sacramento County on February 6, 2012, that encumbers the Property. *Id*.

**TRUSTEE'S OPPOSITION**

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition to the Motion on May 7, 2019. Dckt. 115. Trustee opposes the Motion on the basis that (1) Debtor does not include the first deed of trust in Debtor's avoidance calculation; (2) Debtor includes the claimed exemption of $16,892.00 twice in Debtor's avoidance calculation; and (3) based on in Debtor's avoidance calculation there appears to be equity in the Property.

**DISCUSSION**

The Trustee's argument is well-taken. Debtor does not in the Motion provide the correct lien avoidance analysis - not stating with particularity senior liens that consumer the value of the property (along with the properly computed homestead exemption).

Debtor's Motion is clear on its face, stating that there is $204,731.31 in value (after adjusting for the improper double claiming of the exemption) to secure this judgment lien

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is equity to support the judicial lien, at least as stated in the Motion.

Notwithstanding the grounds stated in the Motion establishing that equity exists for the judgement lien, there appears to be "something rotten in Denmark" with respect to such a determination.

Therefore, the court denies the Motion without prejudice.

**ISSUANCE OF A COURT-DRAFTED ORDER**

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Laura Elizabeth England and Donald Lee England ("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.

**26.** **19-20880-E-13** **LAURA/DONALD ENGLAND** **MOTION TO AVOID LIEN OF KELKRIS**
**FF-4** **Gary Fraley** **ASSOCIATES, INC.**
**4-16-19 [39]**

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

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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, Creditor, and Office of the United States Trustee on April 17, 2019. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

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

This Motion requests an order avoiding the judicial lien of Kelkris Associates, Inc. dba Credit Bureau Associates ("Creditor") against property of Laura Elizabeth England and Donald Lee England ("Debtor") commonly known as 7235 Larchmont Drive in North Highlands, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $27,656.52. Exhibit 4, Dckt. 45. An abstract of judgment was recorded with Sacramento County on January 28, 2010, that encumbers the Property. *Id*.

**TRUSTEE'S OPPOSITION**

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition to the Motion on May 7, 2019. Dckt. 118. Trustee opposes the Motion on the basis that (1) Debtor does not include the first deed of trust in Debtor's avoidance calculation; (2) Debtor includes the claimed exemption of $16,892.00 twice in Debtor's avoidance calculation; and (3) based on in Debtor's avoidance calculation there appears to be equity in the Property.

**DISCUSSION**

The Trustee's argument is well-taken. Debtor does not in the Motion provide the correct lien avoidance analysis - not stating with particularity senior liens that consumer the value of the property (along with the properly computed homestead exemption).

Debtor's Motion is clear on its face, stating that there is $204,731.31 in value (after adjusting for the improper double claiming of the exemption) to secure this judgment lien

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is equity to support the judicial lien, at least as stated in the Motion.

Notwithstanding the grounds stated in the Motion establishing that equity exists for the judgement lien, there appears to be "something rotten in Denmark" with respect to such a determination.

Therefore, the court denies the Motion without prejudice.

**ISSUANCE OF A COURT-DRAFTED ORDER**

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Laura Elizabeth England and Donald Lee England ("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.

**27.** **19-20880-E-13** **LAURA/DONALD ENGLAND** **MOTION TO AVOID LIEN OF**
**FF-5** **Gary Fraley** **HOUSEHOLD FINANCE CORP.**
**4-16-19 [67]**

**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.

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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, Creditor, and Office of the United States Trustee on April 17, 2019. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

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

This Motion requests an order avoiding the judicial lien of Household Finance Corp. of California ("Creditor") against property of Laura Elizabeth England and Donald Lee England ("Debtor") commonly known as 7235 Larchmont Drive in North Highlands, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $13,720.17. Exhibit 4, Dckt. 73. An abstract of judgment was recorded with Sacramento County on May 19, 2009, that encumbers the Property. *Id.*

**TRUSTEE'S OPPOSITION**

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition to the Motion on May 7, 2019. Dckt. 121. Trustee opposes the Motion on the basis that (1) Debtor does not include the first deed of trust in Debtor's avoidance calculation; (2) Debtor includes the claimed exemption of $16,892.00 twice in Debtor's avoidance calculation; and (3) based on in Debtor's avoidance calculation there appears to be equity in the Property.

**DISCUSSION**

The Trustee's argument is well-taken. Debtor does not in the Motion provide the correct lien avoidance analysis - not stating with particularity senior liens that consumer the value of the property (along with the properly computed homestead exemption).

Debtor's Motion is clear on its face, stating that there is $204,731.31 in value (after adjusting for the improper double claiming of the exemption) to secure this judgment lien

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is equity to support the judicial lien, at least as stated in the Motion.

Notwithstanding the grounds stated in the Motion establishing that equity exists for the judgement lien, there appears to be "something rotten in Denmark" with respect to such a determination.

Therefore, the court denies the Motion without prejudice.

**ISSUANCE OF A COURT-DRAFTED ORDER**

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Laura Elizabeth England and Donald Lee England ("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.

**28.** **19-20880-E-13** **LAURA/DONALD ENGLAND** **MOTION TO AVOID LIEN OF**
**FF-6** **Gary Fraley** **DICKINSON FINANCIAL, LLC**
**4-16-19 [81]**

**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.

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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, Creditor, and Office of the United States Trustee on April 17, 2019. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

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

This Motion requests an order avoiding the judicial lien of Dickinson Financial LLC ("Creditor") against property of Laura Elizabeth England and Donald Lee England ("Debtor") commonly known as 7235 Larchmont Drive in North Highlands, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $2,468.43. Exhibit 4, Dckt. 86. An abstract of judgment was recorded with Sacramento County on March 6, 2012, that encumbers the Property. *Id.*

**TRUSTEE'S OPPOSITION**

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition to the Motion on May 7, 2019. Dckt. 124. Trustee opposes the Motion on the basis that (1) Debtor does not include the first deed of trust in Debtor's avoidance calculation; (2) Debtor includes the claimed exemption of $16,892.00 twice in Debtor's avoidance calculation; and (3) based on in Debtor's avoidance calculation there appears to be equity in the Property.

**DISCUSSION**

The Trustee's argument is well-taken. Debtor does not in the Motion provide the correct lien avoidance analysis - not stating with particularity senior liens that consumer the value of the property (along with the properly computed homestead exemption).

Debtor's Motion is clear on its face, stating that there is $204,731.31 in value (after adjusting for the improper double claiming of the exemption) to secure this judgment lien

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is equity to support the judicial lien, at least as stated in the Motion.

Notwithstanding the grounds stated in the Motion establishing that equity exists for the judgement lien, there appears to be "something rotten in Denmark" with respect to such a determination.

Therefore, the court denies the Motion without prejudice.

**ISSUANCE OF A COURT-DRAFTED ORDER**

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Laura Elizabeth England and Donald Lee England ("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.

**29.** **19-20880-E-13** **LAURA/DONALD ENGLAND** **MOTION TO AVOID LIEN OF CHASE BANK USA, N.A.**
**FF-7** **Gary Fraley** **4-16-19 [74]**

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

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

Sufficient Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditor, and Office of the United States Trustee on April 17, 2019 (as discussed below, it is unclear the right creditor was served this Motion). By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

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

This Motion requests an order avoiding the judicial lien of Chase Bank USA, N.A. ("Creditor") against property of Laura Elizabeth England and Donald Lee England ("Debtor") commonly known as 7235 Larchmont Drive in North Highlands, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $11,511.26. Exhibit 4, Dckt. 80. An abstract of judgment was recorded with Sacramento County on May 8, 2014, that encumbers the Property. *Id.*

**TRUSTEE'S OPPOSITION**

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition to the Motion on May 7, 2019. Dckt. 127. Trustee opposes the Motion on the basis that (1) Debtor does not include the first deed of trust in Debtor's avoidance calculation; (2) Debtor includes the claimed exemption of

$16,892.00 twice in Debtor's avoidance calculation; and (3) based on in Debtor's avoidance calculation there appears to be equity in the Property.

**DISCUSSION**

**Identification of Real Party in Interest**

Upon reviewing Exhibit 4 (Dckt. 80) it is unclear the real party in interest to this Motion has been identified.

The abstract of judgment indicates judgment was entered in the case entitled *Chase Bank USA, NA, a Corporation v. Donald L. England, Jr, et al.* However, the abstract further provides the following information:

> 1. The assignee of record applies for abstract of judgement and represents the following
>
> . . .
>
> 3. Judgement Creditor (name and address)
> FIRST RESOLUTION INVESTMENT CORPORATION,
> c/o NELSON & KENNARD PO Box 13807 Sacramento, CA 95853

Exhibit 4, Dckt. 80 at p. 1(emphasis in original). The recording information indicates Nelson & Kennard requested the recording.

From the above, it appears the creditor here is actually First Resolution Investment Corporation. That creditor was not provided service of the Motion.

At the hearing, xxxxxxxxxxxxxx.

**Lien Avoidance**

The Trustee's argument is well-taken. Debtor does not in the Motion provide the correct lien avoidance analysis - not stating with particularity senior liens that consumer the value of the property (along with the properly computed homestead exemption).

Debtor's Motion is clear on its face, stating that there is $204,731.31 in value (after adjusting for the improper double claiming of the exemption) to secure this judgment lien

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is equity to support the judicial lien, at least as stated in the Motion.

Notwithstanding the grounds stated in the Motion establishing that equity exists for the

judgement lien, there appears to be "something rotten in Denmark" with respect to such a determination.

Therefore, the court denies the Motion without prejudice.

An order substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Laura Elizabeth England and Donald Lee England ("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.

**30.** **19-20880-E-13** **LAURA/DONALD ENGLAND** **MOTION TO AVOID LIEN OF EMPLOYMENT DEVELOPMENT DEPARTMENT**
**FF-8** **Gary Fraley** **4-16-19 [53]**

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

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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, Creditor, and Office of the United States Trustee on April 17, 2019. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

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

This Motion requests an order avoiding the judicial lien of the State of California Employment Development Department ("Creditor") against property of Laura Elizabeth England and Donald Lee England ("Debtor") commonly known as 7235 Larchmont Drive in North Highlands, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $3,252.35. Exhibit 4, Dckt. 59. An abstract of judgment was recorded with Sacramento County on September 6, 2017, that encumbers the Property. *Id*.

**TRUSTEE'S OPPOSITION**

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition to the Motion on May 7, 2019. Dckt. 130. Trustee opposes the Motion on the basis that (1) Debtor does not include the first

deed of trust in Debtor's avoidance calculation; (2) Debtor includes the claimed exemption of $16,892.00 twice in Debtor's avoidance calculation; and (3) based on in Debtor's avoidance calculation there appears to be equity in the Property.

**DISCUSSION**

The Trustee's argument is well-taken. Debtor does not in the Motion provide the correct lien avoidance analysis - not stating with particularity senior liens that consumer the value of the property (along with the properly computed homestead exemption).

Debtor's Motion is clear on its face, stating that there is $204,731.31 in value (after adjusting for the improper double claiming of the exemption) to secure this judgment lien

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is equity to support the judicial lien, at least as stated in the Motion.

Notwithstanding the grounds stated in the Motion establishing that equity exists for the judgement lien, there appears to be "something rotten in Denmark" with respect to such a determination.

Therefore, the court denies the Motion without prejudice.

**ISSUANCE OF A COURT-DRAFTED ORDER**

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Laura Elizabeth England and Donald Lee England ("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.

**31.** **19-21483-E-13** **JUDITH GEE** **CONTINUED MOTION TO CONFIRM PLAN**
**FF-1** **Gary Fraley** **3-29-19 [23]**

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

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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 29, 2019. By the court's calculation, 39 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

Judith Ann Gee ("Debtor") seeks confirmation of the Chapter 13 Plan. The Plan provides for monthly payments of $2,273.00 and a 0 percent dividend to unsecured claims. Dckt. 11. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

**CHAPTER 13 TRUSTEE'S OPPOSITION**

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on April 23, 2019. Trustee argues the present Motion set a confirmation hearing prior to the Meeting of Creditors, and the dates set in the Notice of Meeting of Creditors for objections.

Trustee further argues Deutsche Bank and not Wells Fargo, N.A. is the mortgage holder in this case–Trustee believes the wrong creditor was served.

Trustee requests the hearing on the Motion be continued to May 21, 2019.

**MAY 7, 2019 HEARING**

At the May 7, 2019 hearing the court continued the hearing on the Motion to May 21, 2019. Dckt. 44.

**DISCUSSION**

No supplemental pleadings have been filed since the prior hearing.

Proof of Claim, No. 3 ("Claim") was filed by Deutsche Bank National Trust Company, as Trustee for Soundview Home Loan Trust 2006-3, Asset-Backed Certificates, Series 2006-3 ("Deutsche Bank") on April 18, 2019. The Claim states Deutsche Bank is the current creditor holding a secured claim in the amount of 318,751.32. The Claim states further the amount necessary to cure any default as of the date of the petition is $21,992.36.

While the Claim identifies Deutsche Bank as the creditor, the Claim also states that notices and payments should be sent to Wells Fargo Bank, N.A.

The Chapter 13 Plan filed by Debtor on March 22, 2019 lists Wells Fargo Bank, N.A. as a Class 1 and not the actual creditor, Deutsche Bank.

At the hearing, xxxxxxxxxxxxxx.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by Judith Ann Gee ("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 Confirm the Plan is denied.

**32.** **19-21686-E-13 CJO-1** **DAVID/BROOKE LEITE** **Seth Hansen** **OBJECTION TO CONFIRMATION OF PLAN BY PENNYMAC LOAN SERVICES, LLC** **5-2-19 [12]**

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

**Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the Objection. 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) Objection—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on May 2, 2019. 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 Chapter 13 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 Objection, 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 Objection. At the hearing ----------.

**The Objection to Confirmation of Plan is sustained.**

PennyMac Loan Services, LLC ("Creditor") holding a secured claim opposes confirmation of the Plan on the basis that the Plan does not provide for the total amount of pre-petition arrears due and owing to Creditor which totals $918.03 and thereby fails to comply with § 1322(b)(2), § 1322(b)(5), and § 1325.

Creditor filed Proof of Claim, No. 4 ("Claim") on May 2, 2019. The Claim states Creditor holds a secured claim in the amount of $ 366,735.69 with $918.03 necessary to cure any default as of the date of the petition.

The amount of the default is stated to be for "Projected escrow shortage." Proof of Claim No. 4, Attachment, p. 4. The Objection does not explain how this amount is calculated.

**DEBTOR'S RESPONSE**

Debtor filed a Response to the Objection on May 10, 2019 arguing that there is no prepetition arrearage. Dckt. 16.

In support of the Response Debtor filed his Declaration providing testimony that as of March 11, 2019, (8 days before the March 19, 2019 filing) Debtor received a mortgage statement from Creditor showing no past due fees or charges owing. Dckt. 18.

Debtor also filed as Exhibit A, a copy of the March 11 Mortgage Statement. Exhibit A, Dckt. 17.

**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 evidence 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). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and requires financial information and factual arguments. *In re Austin,* 583 B.R. 480, 483 (B.A.P. 8th Cir. 2018). Notwithstanding the prima facie validity of a proof of claim, the ultimate burden of persuasion is always on the claimant. *In re Holm*, 931 F.2d at p. 623.

Here, the Claim states there is an arrearage of $918.03 which is necessary to cure any default as of the date of the petition. In reviewing the Mortgage Proof of Claim Attachment, that arrearage is explained to be for a projected escrow shortage.

Reviewing the docket, Debtor has not filed any objection to the Claim. Rather, Debtor filed a Response to this Objection essentially seeking to bypass the process, asking the court determine the amount of the Claim while assessing whether the Chapter 13 Plan is suitable for confirmation. Even assuming the court could waive the requirement to bring a claim objection separately, determining the extent and validity of the Claim here would deny Creditor due process. *See* FED. R. BANKR. P. 3007(a)(1).

Creditor holds a deed of trust secured by Debtor's residence. Creditor has filed the Claim in which it asserts $918.03 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. [FN. 1.]

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FN. 1. If Debtor is correct and Debtor must prosecute a claim objection to address an erroneously claimed pre-petition arrearage then, presumably, the Debtor and Debtor's counsel will assert all rights to recover attorney's fees and costs to the extent that such right exists under the promissory note and deed of trust.

Of course, before pursuing such litigation the Debtor and Counsel will send a polite letter(s) communicating the request/demand before commencing such litigation. If creditor fails to correct such error, if it is in error, such creditor would be hard pressed to state that such objection litigation was not necessary in light of a proof of claim (given *prima facie* evidentiary value) that would otherwise require payment of an obligation that does not exist.

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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 PennyMac Loan Services, LLC ("Creditor") holding 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.

**33.** **19-20912-E-13 PGM-1** | **MARK/MARCIA CLARK** **Peter Macaluso** | **MOTION TO VALUE COLLATERAL OF CAPITAL ONE AUTO FINANCE 4-12-19 [24]**

**Final Ruling:** No appearance at the May 21, 2019 hearing is required.

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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, parties requesting special notice, and Office of the United States Trustee on April 12, 2019. By the court's calculation, 39 days' notice was provided. 28 days' notice is required.

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

**The Motion to Value Collateral and Secured Claim of Capital One Auto Finance ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $16,000.00.**

The Motion filed by Mark Dewayne Clark and Marcia Jenine Clark ("Debtor") to value the secured claim of Capital One Auto Finance ("Creditor") is accompanied by Debtor's declaration. Declaration, Dckt. 27. Debtor is the owner of a 2015 Chevrolet Silverado ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $16,000.00 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).

Debtor's Declaration provides testimony that the Vehicle has approximately 36,659 miles and requires repair as to the following items:

A. A worn front seat
B. Leaking 4 wheel drive

C. Half dozen door dings
D. Deep scrapes in truck bed
E. Rust and faded paint

Declaration, Dckt. 27. By this description, this four year old vehicle has seen a lot of wear and tear.

**Creditor's Proof of Claim**

Creditor filed a Proof of Claim, No. 5 (the "Claim") on March 8, 2019. Creditor's Claim states the following information as to Creditor's claim:

Value of property: $ 37,941.00
Amount of the claim that is secured: $ 22,334.19
Amount of the claim that is unsecured: $ _____
Amount necessary to cure any
default as of the date of the petition: $_____

**Trustee's Response**

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response on May 7, 2019. Dckt. 36. Trustee provides an overview of the Debtor's Chapter 13 Plan (Dckt. 2) and the Claim, but does not take a clear position in support or opposition of the Motion.

**DISCUSSION**

Here, Debtor has presented testimony as to his opinion of the Vehicle's value, which includes factual detail about the condition of the Vehicle and repairs necessary to make the Vehicle saleable. Declaration, Dckt. 27.

While the Proof of Claim is *prima facie* evidence of Creditor's claim, the Creditor has the actual burden of proof on the claim if that *prima facie* evidence is rebutted. 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).

> "Inasmuch as Rule 3001(f) and section 502(a) provide that a claim or interest as to which proof is filed is "deemed allowed," the burden of initially going forward with the evidence as to the validity and the amount of the claim is that of the objector to that claim. In short, the allegations of the proof of claim are taken as true. If those allegations set forth all the necessary facts to establish a claim and are not self-contradictory, they *prima facie* establish the claim. Should objection be taken, the objector is then called upon to produce evidence and show facts tending to defeat the claim by probative force equal to that of the allegations of

> the proofs of claim themselves. But the ultimate burden of persuasion is always on the claimant. Thus, it may be said that the proof of claim is some evidence as to its validity and amount. It is strong enough to carry over a mere formal objection without more."

*Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991) (quoting 3 L. King, Collier on Bankruptcy § 502.02, at 502-22 (15th ed. 1991)). The presumptive validity of the claim may be overcome by the objecting party only if it offers evidence of equally probative value in rebutting that offered by the proof of claim. *Holm* at 623; *In re Allegheny International, Inc.*, 954 F.2d 167, 173-74 (3rd Cir. 1992); *See In re Austin,* 583 B.R. 480, 483 (B.A.P. 8th Cir. 2018). The burden then shifts back to the claimant to produce evidence meeting the objection and establishing the claim. *In re Knize*, 210 B.R. 773, 779 (Bankr. N.D. Ill. 1997).

The Claim asserting the Vehicle's value is $37,941.00 is based solely upon that amount being stated in the Claim. The Proof of Claim is signed by Rejoy Nalkara, a claims processor for AIS Portfolio Services, LP. As opposed to the books and records of Creditor in which the amount of the debt and the various transactions are maintained, there is nothing to indicate a high probative value as to the statement of the value of the Vehicle. Further, where Creditor could have included an authenticated KBB or NADA valuation with the Proof of Claim, no such documents were included to enhance the probative value of the prima facie evidence.

Debtor, as the owner of the vehicle, states an opinion as to value, concluding that the Vehicle's value is $16,000.00. Declaration, Dckt. 27. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The value asserted by Debtor is significantly lower (more than $20,000.00 lower) than the value asserted in the Claim. However, Debtor's testimony here is substantial evidence supported by Debtor's actual knowledge of the Vehicle and its condition. Creditor has opted to rely solely on the amounts stated in the Claim–not responding to the Motion which was brought 28 days' notice (39 days' notice actually having been provided by Debtor), not providing testimony or argument as to the Vehicle's value, and not explaining the conclusion of value stated in the Claim. A bare conclusion provided by a claims processor (creditor's loan servicer) without knowledge of the Vehicle's actual condition does not assist the finder of fact in determining the Vehicle's value.

Though the $20,000+ difference is significant, Creditor has chosen not to respond. The difference is not so grossly offensive that the court will not issue a ruling consistent with Debtor's evidence.

The lien on the Vehicle's title secures a purchase-money loan incurred on October 3, 2015, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $22,334.19. Proof of Claim, No. 5. 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 $16,000.00, 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 Collateral and Secured Claim filed by Mark Dewayne Clark and Marcia Jenine Clark ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of Capital One Auto Finance ("Creditor") secured by an asset described as 2015 Chevrolet Silverado ("Vehicle") is determined to be a secured claim in the amount of $16,000.00, 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 $16,000.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

**34.** **19-20912-E-13** **MARK/MARCIA CLARK** **MOTION TO VALUE COLLATERAL OF**
**PGM-2** **Peter Macaluso** **GOLDEN 1 CREDIT UNION**
**4-12-19 [29]**

**Final Ruling:** No appearance at the May 21, 2019 hearing is required.
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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 Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on April 12, 2019. By the court's calculation, 39 days' notice was provided. 28 days' notice is required.

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

**The Motion to Value Collateral and Secured Claim of Golden 1 Credit Union ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $15,000.00.**

The Motion filed by Mark Dewayne Clark and Marcia Jenine Clark ("Debtor") to value the secured claim of Golden 1 Credit Union ("Creditor") is accompanied by Debtor's declaration. Declaration, Dckt. 32. Debtor is the owner of a 2016 Kia Cadenza ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $15,000.00 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).

**Creditor's Proof of Claim**

Creditor filed a Proof of Claim, No. 3 (the "Claim") on February 27, 2019. Creditor's Claim states the following information as to Creditor's claim:

Value of property: $ _____
Amount of the claim that is secured: $ 15,000.00
Amount of the claim that is unsecured: $ 11,169.83
Amount necessary to cure any
default as of the date of the petition: $426.05

**DISCUSSION**

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). As part of its burden of producing substantial evidence to rebut the presumptive validity, the objecting party bears the burden of producing substantial evidence as to the value of the collateral securing any portion of the claim. *In re Austin,* 583 B.R. 480, 483 (B.A.P. 8th Cir. 2018). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and requires financial information and factual arguments. *Id.* Notwithstanding the prima facie validity of a proof of claim, the ultimate burden of persuasion is always on the claimant. *In re Holm*, 931 F.2d at p. 623.

Here, both Debtor and Creditor assert the value of the Vehicle is $15,000.00.

The lien on the Vehicle's title secures a purchase-money loan incurred on July 23, 2016, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $26,169.83 . Proof of Claim, No. 3. 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 $15,000, 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 Collateral and Secured Claim filed by Mark Dewayne Clark and Marcia Jenine Clark ("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 Golden 1 Credit Union ("Creditor") secured by an asset described as 2016 Kia Cadenza ("Vehicle") is determined to be a secured claim in the amount of $15,000.00, 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 $15,000.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

# FINAL RULINGS

| | | | |
|---|---|---|---|
| **35.** | **16-27277-E-13<br>SDH-7** | **KENNETH/SANDRA WILSON<br>Scott Hughes** | **MOTION FOR COMPENSATION FOR SCOTT D. HUGHES, DEBTORS' ATTORNEY<br>4-10-19 [68]** |

**Final Ruling:** No appearance at the May 21, 2019 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 April 10, 2019. By the court's calculation, 41 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

**The Motion for Allowance of Professional Fees is granted.**

Scott Hughes, the Attorney ("Applicant") for Kenneth and Sandra Wilson, the Chapter 13 Debtor ("Client"), makes a Request for the Additional Allowance of Fees and Expenses in this case.

Fees are requested for the period January 18, 2017, through April 10, 2019. Applicant requests fees in the amount of $3,562.50.00.

**APPLICABLE LAW**

**Statutory Basis For Professional Fees**

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A). An attorney must "demonstrate only that the services were reasonably likely to benefit the estate at the time rendered," not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

**Reasonable Fees**

A bankruptcy court determines whether requested fees are reasonable by examining the circumstances of the attorney's services, the manner in which services were performed, and the results of the services, by asking:

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the attorney exercise reasonable billing judgment?

*In re Garcia*, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

**Reasonable Billing Judgment**

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the services provided because the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign to run up a [fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney is obligated to consider:

(a) Is the burden of the probable cost of legal services disproportionately large in relation to the size of the estate and maximum probable recovery?

(b) To what extent will the estate suffer if the services are not rendered?

(c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

*In re Puget Sound Plywood*, 924 F.2d at 958–59 (citing *In re Wildman*, 72 B.R. 700, 707 (N.D. Ill. 1987)).

A review of the application shows that Applicant's services for the Estate include prosecution of a modified plan, motion to value secured claim, and motion to sell Client's residence. The court finds the services were beneficial to Client and the Estate and were reasonable.

**"No-Look" Fees**

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

> (a) Compensation. Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c). The failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall signify that the attorney has opted out of Subpart (c). When there is an objection or when an attorney opts out, compensation shall be determined in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017, and any other applicable authority."
> . . .
> (c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.
>
> (1) The maximum fee that may be charged is $4,000.00 in nonbusiness cases, and $6,000.00 in business cases.
>
> (2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.
>
> (3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor's attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed

by Fed. R. Bankr. P. 2002(a)(6).

The Order Confirming the Chapter 13 Plan expressly provides that Applicant is allowed $4,000.00 in attorneys' fees, the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Dckt. 28. Applicant prepared the order confirming the Plan.

**Lodestar Analysis**

If Applicant believes that there has been substantial and unanticipated legal services that have been provided, then such additional fees may be requested as provided in Local Bankruptcy Rule 2016-1(c)(3). The attorney may file a fee application, and the court will consider the fees to be awarded pursuant to 11 U.S.C. §§ 329, 330, and 331. For bankruptcy cases in the Ninth Circuit, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A compensation award based on the lodestar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles Cty. Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of a professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). It is appropriate for the court to have this discretion "in view of the [court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437. Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis can be appropriate. *See In re Placide*, 459 B.R. at 73 (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

**FEES AND COSTS & EXPENSES REQUESTED**

**Fees**

Applicant in the Motion states the following work was performed which services were substantial and unanticipated:

> Prepared, filed and served a Notice of Motion, Motion and Declaration to Confirm a First Modified; Prepared filed and served a First Modified Plan;

Prepared, changed and re-noticed a second motion to value because the debtors provided the wrong creditor on a car loan;

Prepared an *Ex Parte* Motion to employ Bill Boone as debtors' real estate broker; Worked with the debtors, two real estate brokers, two Title Companies, lenders and the trustee regarding obtaining court approval of the sale of the debtor's residence and the purchase of another one; Prepared and filed an *Ex Parte* Motion to Approve the Sale of the Debtor's Residence; Worked with the trustee's office regarding the specific language needed for the *Ex Parte* Motion and order approving the sale;

Worked with the trustee's office regarding the amount of the payoff demand made by the trustee to the Title Company; Prepared, filed and served an *Ex Parte* Motion to approve the purchase of a another residence; Worked with the trustee's office regarding specific language needed in the motion and Order;

Counsel has also prepared this Motion for Additional Attorney's Fees.

Motion, Dckt. 68 at 5:7.5-22.5. Though there is no task billing analysis provided, the court can see there are essentially four areas of work performed: prosecution of a modified plan, motion to value secured claim, motion to sell debtor's residence, and this Application.

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

| **Names of Professionals and Experience** | **Time** | **Hourly Rate** | **Total Fees Computed Based on Time and Hourly Rate** |
|---|---|---|---|
| Scott Hughes | 9.5 | $375.00 | $3,562.50 |
| **Total Fees for Period of Application** | | | $3,562.50 |

**FEES AND COSTS & EXPENSES ALLOWED**

**Fees**

The unique facts surrounding the case, including the need for a modified plan and Client's decision to sell their home to complete the Chapter 13 case early, raise substantial and unanticipated work for the benefit of the Estate, Debtor, and parties in interest. The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. The request for additional fees in the amount of $3,562.50 is approved pursuant to 11 U.S.C. § 330 and authorized to be paid by David Cusick ("the Chapter 13 Trustee") from the available funds of the Plan in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

The court authorizes the Chapter 13 Trustee under the confirmed plan to pay the fees allowed by the court.

Applicant is allowed, and the Chapter 13 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees $3,562.50

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Scott Hughes ("Applicant"), Attorney having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Scott Hughes is allowed the following fees and expenses as a professional of the Estate:
>
> Scott Hughes, Professional Employed by Kenneth and Sandra Wilson ("Debtor")
>
> Fees in the amount of $3,562.50,
>
> as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for Debtor.
>
> **IT IS FURTHER ORDERED** that David Cusick ("the Chapter 13 Trustee") is authorized to pay the fees allowed by this Order from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

**36.** **17-28206-E-13** **EDWARD/JANET CASARINO** **MOTION TO MODIFY PLAN**
**BLG-3** **Chad Johnson** **3-19-19 [70]**

**Final Ruling:** No appearance at the May 21, 2019 hearing is required.
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Local Rule 9014-1(f)(1) Motion—Hearing Not 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 19, 2019. By the court's calculation, 63 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

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

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. Edward C Casarino and Janet L. Casarino ("Debtor") have filed evidence in support of confirmation.

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on May 7, 2019 opposing the Motion on good faith grounds where Debtor was reducing the payment by $1,341.30 after Debtor's income was only reduced $500.00. Dckt. 77.

On May 14, 2019 Debtor filed a Reply clarifying that the reduced payment is intended to cover only the ongoing mortgage payment as 100 percent of claims will be paid after the sale of debtor's residence. Dckt. 80.

Trustee filed a Supplemental Response on May 15, 2019 indicating nonopposition so long as

the order confirming specifies the a lump sum payment of $64,500.53 in month 26 shall be made to pay 100 percent of claims as Debtor indicates.

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 Edward C Casarino and Janet L. Casarino ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Debtor's Modified Chapter 13 Plan filed on March 19, 2019, is confirmed. Debtor's Counsel shall prepare an appropriate order, with language specifying the lump sum amount of $64,500.53 to be paid in month 26, confirming the Chapter 13 Plan, transmit the proposed order to David Cusick ("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.

**37. 19-21660-E-13 DAVID EMBERLIN MOTION TO CONFIRM PLAN**
**FF-3 Gary Fraley 4-15-19 [33]**

**Final Ruling:** No appearance at the May 21, 2019 hearing is required.
---

Local Rule 9014-1(f)(1) Motion—Hearing Not Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 15, 2019. By the court's calculation, 36 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). 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 hearing on the Motion to Confirm the Plan is continued to June 4, 2019 at 3:00 p.m.**

David Charles Emberlin ("Debtor") seeks confirmation of the Chapter 13 Plan. The Plan provides for payments of $3,255.00 for 7 months and $3,312.00 for 53 months [FN.1.] . Dckts. 25, 26. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

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FN.1. The Plan (Dckt. 25) and the additional provisions of the Plan (Dckt. 26) were filed as separate documents.
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**CHAPTER 13 TRUSTEE'S OPPOSITION**

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on April 24, 2019. Dckt. 41. Trustee argues the present Motion set a confirmation hearing prior to the Meeting of Creditors, and the dates set in the Notice of Meeting of Creditors for objections.

**DISCUSSION**

In light of the Trustee's request and good cause shown, the court shall continue the hearing on the Motion to May 21, 2019 at 3:00 p.m

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by David Charles Emberlin ("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 Confirm the Plan is continued to June 4, 2019 at 3:00 p.m.

| | | | |
|---|---|---|---|
| **38.** | **18-27699-E-13 DBJ-3** | **WALTER ZWALD AND CYNTHIA RAITT-ZWALD Douglas Jacobs** | **AMENDED MOTION TO CONFIRM PLAN 3-14-19 [64]** |

**WITHDRAWN BY M.P.**

**Final Ruling:** No appearance at the May 21, 2019 hearing is required.

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**The Motion to Confirm Amended Chapter 13 Plan is dismissed without prejudice.**

Walter Andrew Zwald and Cynthia Ann Raitt-Zwald ("Debtor") having filed a Notice of Withdrawal, which the court construes to be an *Ex Parte* Motion to Dismiss the pending Motion on May 7, 2019, Dckt. 73; no prejudice to the responding party appearing by the dismissal of the Motion; the Debtor having the right to request dismissal of the motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041; and the dismissal being consistent with the opposition filed by The Chapter 13 Trustee, David Cusick ("Trustee"); the *Ex Parte* Motion is granted, Debtor's Motion is dismissed without prejudice, and the court removes this Motion from the calendar.

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

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

The Motion to Confirm Amended Chapter 13 Plan filed by Walter Andrew Zwald and Cynthia Ann Raitt-Zwald ("Debtor") having been presented to the court, Debtor having requested that the Motion itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, Dckt. 73, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Confirm Amended Chapter 13 Plan is dismissed without prejudice, and the Amended Plan filed on March 13, 2019 (Dckt. 61), is not confirmed.

**39.** **19-21310-E-13 DPC-1** **WANDA COLLIER-ABBOTT** **Richard Jare** **OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS** **4-16-19 [33]**

**WITHDRAWN BY M.P.**

**Final Ruling:** No appearance at the May 21, 2019 hearing is required.

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

**40.** **18-25929-E-13 BLG-1** | **JEFFREY YOUNG** **Chad Johnson** | **MOTION TO MODIFY PLAN** **3-19-19 [38]**

**WITHDRAWN BY M.P.**

**Final Ruling:** No appearance at the May 21, 2019 hearing is required.

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Jeffrey Young ("Debtor") having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Motion to Confirm Modified Plan was dismissed without prejudice, and the matter is removed from the calendar.**

**41.** **19-21301-E-13 DPC-1** | **ANTHONY/KAYLA YAZZIE** **Peter Macaluso** | **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **4-16-19 [19]**

**Final Ruling:** No appearance at the May 21, 2019 hearing is required.

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The Chapter 13 Trustee, David Cusick (the "Trustee"), having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Objection to Confirmation was dismissed without prejudice, the matter is removed from the calendar, and the Chapter 13 Plan filed on March 13, 2019, is confirmed.**

Counsel for Anthony David Yazzie and Kayla India Yazzie ("Debtor") shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Trustee for approval as to form, and if so approved, the Trustee will submit the proposed order to the court.