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

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

**June 9, 2015 at 3:00 p.m.**

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**1. 13-32506-E-13 RICHARD EADDY**
**RJ-4 Richard Jare**

**MOTION FOR COMPENSATION FOR RICHARD JARE, DEBTORS ATTORNEY(S)**
**5-19-15 [71]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on May 19, 2015. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(6), 21 day notice requirement.)

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

**The Motion for Allowance of Professional Fees is denied without prejudice.**

Richard Jare, the Attorney ("Applicant") for Richard Eaddy, the Chapter 13 Debtor ("Client"), makes a Request for Additional Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period September 25, 2013 to May 19, 2015. Applicant requests fees in the amount of $2,000.00.

**TRUSTEE'S RESPONSE**

David Cusick, the Chapter 13 Trustee, filed a response to the instant Motion on May 26, 2015. Dckt. 75. The Trustee states the following:

1. The confirmed plan should not limit the fees that should be awarded in this case and the modified plan does require any fees to be paid by a handwritten check.

2. The Trustee notes that Applicant has discounted his work so the Plan and Debtor can afford in the requested additional fees.

3. The Applicant requests the fees be paid by the Trustee from funds on hand. The last confirmed plan did not project any fees and appeared to require the payment in the amount of $1,500.00 by June 25, 2015. Where the plan specifically calls for payments to be paid monthly, and also calls for monthly payments to be made no later than the 25th, the trustee does not believe the plan or the Motion requires the Trustee to issue payment of the attorney fees by only a handwritten check for $1,500.00.

4. The Trustee does not oppose to the fees requested but notes that:

   a. The Debtor has paid $21,611.44 into the plan, but only $13,611.44 counts toward the plan payments as the Debtor's exemption and the avoided judgment line of Cach, LLC, attaches to the remaining $8,000.00

   b. The Debtor has stopped making monthly payments with no monthly payment of $300.00 in either April or May 2015.

   c. The Trustee to date has disbursed $5,809.99 of the $21,611.44 paid into the plan.

**APPLICANT'S SUPPLEMENTAL DECLARATION**

The Applicant filed a supplemental declaration on June 1, 2015. Dckt. 78. The Applicant states that he has attempted to contact the Trustee multiple times on June 1, 2015 but was unable to reach anyone at the office. The Applicant states that he examined the Trustee's disbursement records and he is attempting to contact the Trustee over "pending erroneous disbursement." The Applicant states that he hopes his declaration will prompt a response from the Trustee.

The Declaration appears to not be in connection with the instant Motion nor does it address any of the points made by the Trustee in his response.

**TASK BILLING**

The court finds helpful, and in most cases essential, for professionals to provide a basic task billing analysis for the services provided and fees charged. This has long been required by the Office of the U.S. Trustee, and is nothing new for professionals in this District. The task billing analysis requires only that the professional organize his or her task billing. The more simple the services provided, the easier is for Applicant to quickly state the tasks. The more complicated and difficult to discern the tasks from the raw billing records, the more evident it is for Applicant to create the task billing analysis to provide the court, creditors, U.S. Trustee with fair and proper disclosure of the services provided and fees being requested by this Professional.

Included in the motion is Applicant's raw time and billing records, which has not been organized into categories. Rather than organizing the activities which are best known to Applicant, it is left for the court, U.S. trustee, and other parties in interest to mine the records to construct a task billing. The court declines the opportunity to provide this service to Applicant, instead leaving it to Applicant who intimately knows the work done and its billing system to correctly assemble the information. FN.1.

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FN.1. The requirement for a task billing analysis is not new to this district and was required well before the modern computer billings systems. More than 20 years ago a bright young associate (not the present judge) developed a system in which he used different color highlighters to code the billing statements for the time period for the fee application. General administrative matters were highlighted in yellow, sales of property in green, adversary proceedings in red, and so on. Subsequently, the billing procedure advanced so that each adversary proceeding was provided a separate billing number so that it would generate a separate billing. Within the bankruptcy case billing number the time entries were given a code on which the billing system could sort the entries and automatically produce a billing report which separates the activities into the different tasks.

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**"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 Applicant has elected the "no look" fee pursuant to Local Bankruptcy Rule 2016-1 at the time of confirmation.

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

*Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of 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.

Applicant's declaration admits that the decision to accept the set fee was improvident because the prosecution of the case within the scope of the set fee was more complicated than he projected at the start of the case. Such is not an exception to, or grounds to breach, the set fee agreement. Every consumer attorney could assert this as a grounds to ignore the agreed set fees when he or she spends more time than projected. However, in cases when the set fee works to be a bonus (Applicant spending less time than equal to the set fee), Applicant does not state that the rules require him to give the extra amount back. The set fee exists to allow Applicant to elect to accept such fees, taking the bonus in some cases and spending more time in other cases – but in the end the over and under amounts balance out.

It may be that Applicant could, consistent with Local Bankruptcy Rule 2016-1(c)(3), seek the payment of additional fees for "substantial and unanticipated work" outside of what is included in the agreed to set fee. But Counsel must seek such additional fees, not ignore the agreed set fee and Local Bankruptcy Rule 2016-1. In seeking such additional fees, Counsel shall provide the court with the standard lodestar analysis (even if from reconstructed records), which will include a statement as to the benefit of the services to the Debtor and estate.

However, Applicant's request to convert his set fee agreement into a hourly agreement for all services is not proper. Furthermore, the Applicant failed to provide the required task-billing. Therefore, 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 for Allowance of Fees and Expenses filed by Richard Jare ("Applicant"), Attorney having been presented to the court, no task billing analysis having been provided in support of the Application, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

**2. 15-22811-E-13 DENNIS/KIM CAMPBELL**
**BHT-1 Timothy Walsh**

**OBJECTION TO CONFIRMATION OF PLAN BY DEUTSCHE BANK NATIONAL TRUST COMPANY**
**5-14-15 [26]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and the Chapter 13 Trustee on May 14, 2015. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

**The court's decision is to sustain the Objection.**

Deutsche Bank National Trust Company, as Trustee for HSI Asset Securitization Corporation Trust 2006-OPT1, Mortgage-Pass-Through Certificates, Series 2006-OPT1, as serviced by Ocwen Loan Servicing, LLC ("Creditor") opposes confirmation of the Plan on the basis that the plan understates the Creditor's pre-petition arrears.

The Creditor asserts that there are approximately $27,780.89 in pre-petition arrears. However, the Debtor's plan only provides for $17,000.00 in arrears.

The Creditor's objections are well-taken. The Creditor holds a deed of trust secured by the Debtor's residence. The Creditor asserts that the Debtor owes $27,790.89 in pre-petition arrears. Dckt. 28. The Plan does not propose to cure these arrearages. Because the Plan does not provide for the surrender of the collateral for this claim, the Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments. *See* 11 U.S.C. §§ 1322(b)(2), (b)(5) & 1325(a)(5)(B). Because it fails to provide for the full payment of arrearages, the plan cannot be confirmed.

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

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

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

**3. 15-22811-E-13 DPC-1 DENNIS/KIM CAMPBELL Timothy Walsh**

**OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 5-13-15 [22]**

**Final Ruling: No appearance at the June 9, 2015 hearing is required.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors and Debtor's Attorney on May 13, 2015. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

**The court's decision is to sustain the Objection.**

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

1. The Trustee is uncertain if Debtor's plan is the Debtor's best effort. The Debtors appear to be over median income, and have proposed a plan paying $2,865.00 per month for 60 months with no less than 0% to unsecured creditors. Schedule I lists a payroll deduction on line 5h as "Vacation Offset" in the amount of $788.50 per month. According to the Debtor's testimony at the First Meeting of Creditors, this is an ongoing weekly deduction and he receives a check each February of approximately $3,500.00. The plan does not propose an annual increase to the payments upon receipt of the "vacation offset" check.

2. Debtors' plan relies on the motion to Value Collateral of Community Trust Self Help Credit Union.

As to the Trustee's second objection, the court at the hearing on June 9, 2015 granted the Motion to Value Collateral of Community Trust Self Help Credit Union, valuing the claim at $0.00. Therefore, the Trustee's second objection is overturned.

However, the Trustee's first objection is well-taken. The Debtors do not appear to provide for any increase or step up in plan payment given the anticipated $3,500.00 Debtor receives in February from the "vacation offset" deduction. The Debtors' plan does not appear to be the Debtors' best efforts given the fact it appears that the Debtors do not provide their full disposable income into the plan, especially when they actually anticipate the check. 11 U.S.C. § 1325(b). Therefore, the objection is sustained.

On June 3, 2015, Debtor filed an amended Chapter 13 Plan, which is a de facto dismissal of this plan before the court.

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

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

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

**4. 15-22811-E-13 DENNIS/KIM CAMPBELL**
**TJW-2 Timothy Walsh**

**MOTION TO VALUE COLLATERAL OF COMMUNITY TRUST SELF HELP CREDIT UNION**
**5-7-15 [18]**

**Tentative Ruling:** The Motion to Value was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2).

Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion.

If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further.

If no opposition is offered at the hearing, the court will take up the merits of the motion.

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

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

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

Correct Notice Provided.

The Proof of Service states that the Motion and supporting pleadings were served on Creditor, Chapter 13 Trustee, and Office of the United States Trustee on May 7, 2015.

By the court's calculation, 33 days' notice was provided. 14 days' notice is required.

The Motion to Value was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2).

The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion.

At the hearing ----------.

**The Motion to Value secured claim of Creditor Community Trust, Self Help Credit Union ("Creditor") is granted and Creditor's secured claim is determined to have a value of $00.00.**

The Motion to Value filed by Dennis and Kim Campbell ("Debtor") to value the secured claim of Creditor Community Trust, Self Help Credit Union ("Creditor") is accompanied by Debtor's declaration. FN.1.

Debtor is the owner of the subject real property commonly known as 5010 Rowe Drive, Fairfield, California ("Property").

Debtor seeks to value the Property at a fair market value of $367,000.00 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).

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FN.1. The court has, and shall continue to format, rulings for this counsel using the same "unconventional" formatting which he uses in drafting his pleadings.

This "unnconventional" formatting makes the pleadings unnecessarily difficult to review - wasting the time and resources of the Trustee, other parties in

interest, and the court.

The court cannot envision any bona fide, good faith reason for so drafting the pleadings.

It appears that the court's prior written admonitions have not been sufficient.

Quite possibly the only proper method to address this will be to require counsel to appear personally for the matters he presents to the court – suspending his telephonic appearance privileges.

The court has, and will continue to format its rulings and order for counsel using the same formatting he uses in his motions and supporting pleadings.

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The valuation of property which secures a claim is the first step, not the end result of this Motion brought pursuant to 11 U.S.C. § 506(a).

The ultimate relief is the valuation of a specific creditor's secured claim. 11 U.S.C. § 506(a) instructs the court and parties in the methodology for determining the value of a secured claim.

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

11 U.S.C. § 506(a) [emphasis added].

For the court to determine that creditor's secured claim (rights and interest

in collateral), that creditor must be a party who has been served and is before the court.

U.S. Constitution Article III, Sec. 2; case or controversy requirement for the parties seeking relief from a federal court.

**DISCUSSION**

The senior in priority first deed of trust secures a claim with a balance of approximately $391,652.00.

Creditor's second deed of trust secures a claim with a balance of approximately $12,300.00.

Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized.

Creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997).

The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

The Motion for Valuation of Collateral filed by Dennis and Kim Campbell ("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 Creditor Community Trust, Self Help Credit Union secured by a second in priority deed of trust recorded against the real property commonly known as

5010 Rowe Drive, Fairfield, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan.

The value of the Property is $367,000.00 and is encumbered by senior liens securing claims in the amount of $391,652.00, which exceed the value of the Property which is subject to Creditor’s lien.

This Order, and the Civil Minutes, have been formatted using the same style as favored by counsel for Debtor in his pleadings filed with this court.

**5. 13-22312-E-13 DEBRA MCCASTLE MOTION TO MODIFY PLAN**
**DEF-6 David Foyil 4-23-15 [106]**

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

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

**Below is the court's tentative ruling.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on April 23, 2015. By the court's calculation, 47 days' notice was provided. 35 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

**The court's decision is to deny the Motion to Confirm the Modified Plan.**

Debra McCastle ("Debtor") filed the instant Motion to Confirm the Modified Plan on April 23, 2015. Dckt. 106.

**TRUSTEE'S OBJECTION**

David Cusick, the Chapter 13 Trustee, filed an objection to the instant Motion on May 21, 2015. Dckt. 117. The Trustee objects on the following grounds:

1. Debtor has not adequately explained the changes in her supplemental Schedules I and J. The Debtor's original Schedule I indicated that Debtor has two dependants and states she was retired. The original schedule I listed monthly income of $650.00 in rental property income, $3,672.00 in retirement or pension income, $664.00 in foster care

income, and $749.00 in monthly contribution from her daughter, totaling $5,690.00.

Debtor's supplemental Schedule I now indicates that the Debtor is employed but her occupation remains retired. The supplemental Schedule I indicates her current income consists of wages and overtime for a net monthly income of $2,711.89, rental income of $650.00, and foster care income of $1,394.00, for a total monthly income of $5,504.89.

The Trustee asserts that it appears the Debtor is no longer receiving pension income. The Trustee argues that the Debtor has not provided accurate information regarding her occupation. Additionally, it is not clear why Debtor's foster care income has increased from $664.00 to $1,394.00 when Debtor's supplemental Schedule J indicates the foster daughter no longer lives with the Debtor.

Debtor's supplemental Schedule J reflects Debtor has two dependents who appear to be the same dependants from the original Schedule J even though their ages have not changed. Debtor's Schedule J indicates that neither dependent lives with her.

The Trustee provides the following chart of the changed expenses:

| | Original Schedule J | Supplemental Schedule J | Difference |
|---|---|---|---|
| Rent/Mortgage | $1,611.00 | $1,450.00 | - $161.00 |
| Home Maintenance | $50.00 | $104.89 | + $54.89 |
| HOA dues | $230.00 | $0.00 | - $230.00 |
| Rental Expense | $95.00 | $0.00 | - $95.00 |
| Electricity/Heat | $150.00 | $250.00 | + $100.00 |
| Water/Sewer | $75.00 | $23.00 | - $52.00 |
| TV Cable/Bundle | $240.00 | $222.00 | - $18.00 |
| Food/Supplies | $400.00 | $800.00 | + $400.00 |
| Clothing/Laundry | $40.00 | $75.00 | + $35.00 |
| Medical/Dental | $40.00 | $200.00 | + $160.00 |
| Transportation | $150.00 | $300.00 | + $150.00 |
| Entertainment | $20.00 | $25.00 | + $5.00 |
| Charitable Contributions | $100.00 | $0.00 | - $100.00 |
| Health Insurance | $292.00 | $0.00 | - $292.00 |
| Vehicle Insurance | $176.00 | $85.00 | - $91.00 |

| | | | |
|---|---|---|---|
| Taxes w/h from pension | $491.00 | $0.00 | - $491.00 |
| Hygiene Supplies | $25.00 | $40.00 | + $15.00 |
| Pet Care/Food | $20.00 | $0.00 | - $20.00 |

Debtor's declaration only provides minimal explanation as to the changes in expenses.

2. Section 6.02 of Debtor's proposed plan does not authorize interest payments to Class 2 creditors. Debtor authorizes principal only payments through December 19, 2014 of $1,825.14 to Capital One Auto Finance, $3,135.85 to Sacramento County Tax Collector, $16,443.12 to HFC/HSBC Group, and $640.68 to Villa San Juan Owners Association. The Trustee disbursed interest payments during this same time period of $247.93 to Capital One Auto Finance, $2,775.67 to Sacramento County Tax Collector, and $1,954.88 to HFC/HSBC Group. No interest payments were disbursed to Villa San Juan Owners Association.

**DISCUSSION**

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

The Trustee's objections are well-taken. A review of the supplemental Schedule I and J show not only substantial changes in income and expenses but also neglects to provide necessary information, such as the name of the Debtor's recent employer. While the Debtor's declaration provides some clarification as to some changes in expenses, the majority of the changes remain unexplained. Furthermore, the increase in the Debtor's foster care income coupled with the fact the foster daughter no longer lives with the Debtor raises concerns with the court over whether the supplemental schedules, in fact, reflect the Debtor's financial reality. Absent explanation from the Debtor as to the actual changes in expenses and income, the court does not believe the Debtor's projection is in good faith. This is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(3).

As to the Trustee's second objection, while this could normally be addressed in the order confirming, the fact that the Debtor failed to properly authorize the Trustee to make interest payment to Class 2 creditors raises questions over whether the instant plan is Debtor's best efforts and whether, based on the unexplained changes in the Debtor's finances, these disbursements are proper.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the

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

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

**6. 14-30925-E-13 JAMES KENNEDY** **MOTION TO CONFIRM PLAN**
**TLA-3 Thomas Amberg** **5-5-15 [39]**

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

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

**Below is the court's tentative ruling.**

---

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 5, 2015. By the court's calculation, 35 days' notice was provided. 35 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

**The court's decision is to deny the Motion to Confirm the Modified Plan.**

James Kennedy ("Debtor") filed the instant Motion to Confirm the Modified Plan on May 5, 2015. Dckt. 39.

**TRUSTEE'S OBJECTION**

David Cusick, the Chapter 13 Trustee, filed an objection to the instant Motion on May 21, 2015. Dckt. 48. The Trustee objects on the following grounds:

1. There is an unexplained reduction in adequate protection payments. Section 6.01.2 provides an adequate protection payment to Loancare in the amount of $750.00 pending determination of a loan modification. Debtor's confirmed plan provided for an adequate protection payment of $1,000.00. Additionally, Section 6.01.2 states that the adequate protection payment shall be applied to the post-petition interest on this claim and that the amount is less than the contract rate. The Trustee states the Debtor provides no information as to how post petition principal payments on the mortgage are being made.

2. The Trustee is uncertain how taxes and insurance are being paid on Debtor's residential property. Debtor provides for an adequate protection payment in the additional provisions, but does not include anything for escrow.

3. Debtor has not provided any documentation verifying that a loan modification is pending

**DISCUSSION**

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

The Trustee's objections are well-taken. All three of the Trustee's objections deal with the treatment of Loancare and whether the adequate protection payments are proper and sufficient. The Debtor's declaration is silent as to why the adequate protection payments have reduced nor does it explain whether it include taxes or insurance payments. The failure to explain this reduction concerns the court as whether the plan adequately provides for all expenses (i.e. taxes and insurance) and whether the plan and schedules accurately reflect the Debtor's financial reality.

Furthermore, the failure of the Debtor to provide any evidence as to the alleged pending loan modification. Without this information, the court questions whether the Debtor is accurately perusing a loan modification to justify the adequate protection payment provision of the plan.

Therefore, based on the Trustee's objections, the court is concerned that the plan is not the Debtor's best efforts pursuant to 11 U.S.C. § 1325(b), and the objections are sustained.

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

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

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

appearing,

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

| | | | |
|---|---|---|---|
| **7.** | **15-22727-E-13** | **DERRICK NOBLES** | **OBJECTION TO DISCHARGE BY DAVID P. CUSICK** |
| | **DPC-1** | **Chinonye Ugorji** | **4-28-15 [16]** |

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

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

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

---

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on April 28, 2015. By the court's calculation, 42 days' notice was provided. 14 days' notice is required.

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

**The court's decision is to sustain the Objection.**

David Cusick, the Chapter 13 Trustee, filed the instant Objection to Debtor's Discharge on April 28, 2015. Dckt. 16.

The Trustee argues that Derrick Nobles ("Debtor") is not entitled to a discharge in the instant bankruptcy case because the Debtor previously received a discharge in a Chapter 7 case.

The Debtor filed a Chapter 7 bankruptcy case on April 4, 2011. Case No. 11-28458. The Debtor received a discharge on July 21, 2011. Case No. 11-28458, Dckt. 25.

The instant case was filed under Chapter 13 on April 2, 2015.

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

Here, the Debtor received a discharge under 11 U.S.C. § 727 on July 21, 2011, which is less than four-years preceding the date of the filing of the instant case. Case No. 11-28458, Dckt. 25. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), the Debtor is not eligible for a discharge in the instant case.

Therefore, the objection is sustained. Upon successful completion of the instant case (Case No. 15-22727), the case shall be closed without the entry of a discharge and Debtor shall receive no discharge in the instant case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Discharge filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to Discharge is sustained.
>
> **IT IS ORDERED** that, upon successful completion of the instant case, Case No. 15-22727, the case shall be closed without the entry of a discharge.

**8.** **15-22727-E-13 DERRICK NOBLES** **OBJECTION TO CONFIRMATION OF**
**DPC-2** **Chinonye Ugorji** **PLAN BY DAVID P. CUSICK**
**5-13-15 [26]**

**Final Ruling:** No appearance at the June 9, 2015 hearing is required.

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**The case having previously been dismissed, the Objection is overruled as moot.**

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 Confirmation having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is overruled as moot, the case having been dismissed.

**9. 15-22727-E-13 DERRICK NOBLES — MOTION TO DISMISS CASE**
**NUU-1 Chinonye Ugorji — 5-11-15 [22]**

**Final Ruling: No appearance at the June 9, 2015 hearing is required.**
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Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on May 11, 2015. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

This Motion to Dismiss the Chapter 13 bankruptcy case of Derrick Nobles ("Debtor") has been filed by Debtor. Debtor asserts that the case should be dismissed because the purpose in seeking chapter 13 relief was to discharge debts originating from a rental property that the Debtor is no longer able to meet the obligations on. The Debtor states that he filed the case two days earlier than he should have in order to be eligible for discharge under 11 U.S.C. § 1328(f). Because the Debtor wishes to receive a discharge to these rental property debts, the Debtor requests dismissal of the instant case so that he can refile and be eligible for discharge.

**RULING**

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson),* 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877

(B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

> [O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause....

11 U.S.C. § 1307(c). The court engages in a "totality-of circumstances" test, weighing facts on a case by case basis in determining whether cause exists, and if so, whether conversion or dismissal is proper. *In re Love*, 957 F.2d 1350 (7th Cir. 1992). Bad faith is one of the enumerated "for cause" grounds under 11 U.S.C. § 1307. *Nady v. DeFrantz (In re DeFrantz)*, 454 B.R. 108, 113 FN.4, (B.A.P. 9th Cir. 2011), citing *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1224 (9th Cir. 1999).

Cause exists to dismiss this case pursuant to 11 U.S.C. § 1307(b).

The Debtor filed a Chapter 7 bankruptcy case on April 4, 2011. Case No. 11-28458. The Debtor received a discharge on July 21, 2011. Case No. 11-28458, Dckt. 25.

The instant case was filed under Chapter 13 on April 2, 2015.

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

Here, the Debtor received a discharge under 11 U.S.C. § 727 on July 21, 2011, which is less than four-years preceding the date of the filing of the instant case. Case No. 11-28458, Dckt. 25. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), the Debtor is not eligible for a discharge in the instant case.

As the Debtor notes, he filed the case two days too soon in order to be eligible for discharge. Given the unique facts of this case, the court finds cause to dismiss the case.

The motion is granted and the case is dismissed.

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

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

**10. 15-22829-E-13 DANIEL/MALIA PALU**
**DPC-1 Scott Johnson**

**OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK**
**5-13-15 [25]**

**Final Ruling:** No appearance at the June 9, 2015 hearing is required.

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**The Objection to Confirmation of Plan is overruled as moot, and the matter is removed from the calendar.**

The Chapter 13 Trustee having filed a Withdrawal of the Objection to Confirmation of Plan, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(I) and Federal Rules of Bankruptcy Procedure 9014 and 7041 **the Objection to Confirmation of Plan is overruled as moot, and the matter is removed from the calendar.**

**11. 14-24643-E-13 LAQUETA MARTIN**
**DPC-3 Susan Dodds**

**NOTICE OF DEFAULT AND MOTION TO DISMISS CASE FOR FAILURE TO MAKE PLAN PAYMENTS**
**4-13-15 [41]**

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

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

**Below is the court's tentative ruling.**

---

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The BNC Certificate accompanying the Notice of Default and Application to Dismiss states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on April 15, 2015. By the court's calculation, 55 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor filed opposition. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

**The court's decision is to grant the Motion to Dismiss and dismiss the case.**

David Cusick, the Chapter 13 Trustee, issued a Notice of Default and Application to Dismiss on April 13, 2015. Dckt. 41. The Trustee made the application because LaQueta Lee Martin ("Debtor") is delinquent in plan payments in the amount of $1,040.00 with an additional payment of $280.00 due on April 25, 2015.

**DEBTOR'S OPPOSITION**

Debtor filed an opposition on May 11, 2015 and set the matter for hearing for June 9, 2015. Dckt. 43. The Debtor states that at the time of the scheduled hearing the Debtor will be delinquent $1,600.00. The Debtor states that she temporarily lost employment which resulted in the delinquency. The Debtor states that she is now employed and her wages are equal to what she was earning at the time of filing.

The Debtor asserts that she will be bringing her plan payment current by

the time of the hearing and will be able to make payments moving forward.

**TRUSTEE'S REPLY**

The Trustee filed a reply on May 27, 2015. Dckt. 47. The trustee states that the Debtor has made no additional payments since the notice of Default was filed and that the last payment was made on January 12, 2015.

**DISCUSSION**

The Trustee seeks dismissal of the case on the basis that the Debtor is $1,600.00 delinquent in plan payments, which represents multiple months of the $280.00 plan payment. Failure to make plan payments is unreasonable delay which is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

While the Debtor represents that she will be current by the time of the hearing, the Debtor has not provided any evidence that she has cured the delinquency. In fact, as of May 27, 2015, the Trustee reported that the Debtor remains delinquent.

Therefore, cause exists to dismiss this case. The motion is granted and the case is dismissed.

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

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

**12. 15-22644-E-13 DANIEL/MERCEDES RIGGLEMAN — OBJECTION TO DISCHARGE BY DAVID P. CUSICK**
**DPC-1 Scott Johnson — 4-28-15 [16]**

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

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

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

---

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on April 28, 2015. By the court's calculation, 42 days' notice was provided. 14 days' notice is required.

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

**The court's decision is to sustain the Objection.**

David Cusick, the Chapter 13 Trustee, filed the instant Objection to Debtor's Discharge on April 28, 2015. Dckt. 16.

The Trustee argues that Daniel and Mercedes Riggleman ("Debtors") are not entitled to a discharge in the instant bankruptcy case because the Debtors previously received a discharge in a Chapter 7 case.

The Debtors filed a Chapter 7 bankruptcy case on October 21, 2012. Case No. 12-39341. The Debtors received a discharge on February 12, 2013. Case No. 12-39341, Dckt. 41.

The instant case was filed under Chapter 13 on March 31, 2015.

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

Here, the Debtor received a discharge under 11 U.S.C. § 727 on February 12, 2012, which is less than four-years preceding the date of the filing of the instant case. Case No. 12-39341, Dckt. 41. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), the Debtor is not eligible for a discharge in the instant case.

Therefore, the objection is sustained. Upon successful completion of the instant case (Case No. 15-22644), the case shall be closed without the entry of a discharge and Debtor shall receive no discharge in the instant case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Discharge filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to Discharge is sustained.
>
> **IT IS ORDERED** that, upon successful completion of the instant case, Case No. 15-22644, the case shall be closed without the entry of a discharge.

**13. 15-22644-E-13 DANIEL/MERCEDES RIGGLEMAN**
**DPC-2 Scott Johnson**

**OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK**
**5-13-15 [27]**

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

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

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

---

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors and Debtor's Attorney, and Office of the United States Trustee on May 13, 2015. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

**The court's decision is to sustain the Objection.**

David P. Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that the Debtors ("Debtor") failed to appear at the First Meeting of Creditors held on May 7, 2015.

The Trustee's objections are well-taken. The basis for the Trustee's objection was that the Debtor did not appear at the meeting of creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. To attempt to confirm a plan while failing to appear and be questioned by the Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). This is cause to deny confirmation. 11 U.S.C.

§ 1325(a)(1).

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

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

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

**14. 15-22644-E-13 MBJ-1 DANIEL/MERCEDES RIGGLEMAN Scott Johnson**

**OBJECTION TO CONFIRMATION OF PLAN BY SAFE CREDIT UNION 5-12-15 [22]**

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

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

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

---

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney and Office of the United States Trustee on May 12, 2105. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

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

**The court's decision is to sustain the Objection, the Chapter 13 Plan is not confirmed.**

Safe Credit Union ("Creditor") opposes confirmation of the Plan on the basis that the plan is not proposed in good faith. The Creditor argues that the Debtor lists no creditors or debts and that the case was filed for the sole purpose of delaying an eviction.

The Creditor's objections appears to neglect the fact that the Debtors have previously filed a Chapter 7. The Debtors filed a Chapter 7 bankruptcy case on October 21, 2012. Case No. 12-39341. The Debtors received a discharge on February 12, 2013. Case No. 12-39341, Dckt. 41. It appears that the Debtors do not have any unsecured creditors because of the prior discharge two years

ago.

However, the Creditor's objection as to its treatment does pose confirmation issues, as the Creditor had foreclosed on the Property prior to the instant bankruptcy case. Dckt. 42. As such, there is no Class 1 claim to be paid, the Creditor having conducted a pre-foreclosure sale. A review of the Debtor's propose plan shows that they list Creditor as a Class 1 claimant. However, there is no claim to be listed, post-foreclosure. Therefore, the objection is sustained, there appearing to be no claims to be paid.

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

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

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

**15. 12-40945-E-13 MANSOUR/MARTHA GANJI**
**PGM-6 Peter Macaluso**

**MOTION TO APPROVE LOAN MODIFICATION**
**5-6-15 [116]**

**Final Ruling:** No appearance at the June 9, 2015 hearing is required.
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Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 6, 2015. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

**The Motion to Approve Loan Modification is granted.**

The Motion to Approve Loan Modification filed by Mansour and Martha Ganji ("Debtor") seeks court approval for Debtor to incur post-petition credit. CitiMortgage, Inc. ("Creditor"), whose claim the plan provides for in Class 4, has agreed to a loan modification which will reduce Debtor's mortgage payment to $2,082.80 at 2.000% for sixty months and then the interest rate will increase to 3.000% for year six and increase again to 3.750% in year 7 for the remaining balance of the loan. The modified principal balance ($734,819.37) will include all amount and arrearages that will be past due as of the modification effective date.

The Motion is supported by the Declaration of Debtors. 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.

This post-petition financing is consistent with the Chapter 13 Plan in this case and Debtor's ability to fund that Plan. The modification provides for reduced interest as well as reduced monthly payments. The modification also provides for the payment of all past due arrearages.

There being no objection from the Trustee or other parties in interest, and the motion complying with the provisions of 11 U.S.C. § 364(d), the Motion

to Approve the Loan Modification 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 Approve the Loan Modification filed by Mansour and Martha Ganji 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 court authorizes Mansour and Martha Ganji ("Debtor") to amend the terms of the loan with CitiMortgage, Inc., which is secured by the real property commonly known as 6149 Van Alstine Avenue, Carmichael, California, on such terms as stated in the Modification Agreement filed as Exhibit A in support of the Motion, Dckt. 119.

**16. 15-23946-E-13 ANA RODRIGUEZ — MOTION TO IMPOSE AUTOMATIC STAY**
**PGM-1 Peter Macaluso — 5-22-15 [9]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 22, 2015. By the court's calculation, 18 days' notice was provided. 14 days' notice is required.

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

**The Motion to Impose the Automatic Stay is denied without prejudice.**

Ana Rodriguez ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) imposed. This is the Debtor's third bankruptcy petition pending in the past year.

The Debtor's first prior bankruptcy case (No. 13-33601) was dismissed on March 24, 2014, after Debtor failed to make necessary plan payments. *See* Order, Bankr. E.D. Cal. No. 13-33604, Dckt. 53, March 24, 2014. The Debtor's second

prior bankruptcy case (No. 14-28933) was dismissed on April 13, 2015, after Debtor failed to confirm a plan and was delinquent in plan payments. See Order, Bankr. E.D. Cal. No. 14-28933, Dckt. 46, April 13, 2015. Therefore, pursuant to 11 U.S.C. § 362(c)(4)(A)(I), the provisions of the automatic stay did not go into effect.

Upon motion of a party in interest and after notice and hearing, the court may order the provisions to take effect if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(4)(B). The subsequently filed case is presumed to be filed in bad faith if the Debtor failed to perform under the terms of a confirmed plan. *Id.* at § 362(c)(4)(D)(i)(II). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* at § 362(c)(4)(D).

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

1. Why was the previous plan filed?

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

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

Here, Debtor states that the instant case was filed in good faith and states that the prior cases were dismissed due to financial hardship and the loss of three family members during the pendency of the prior plans. The Debtor also states that she was also suffering from postpartum depression and separation anxiety. The Debtor states the instant case was filed to cure pre-petition arrears owed on the primary residence.

This Debtor is seeking relief from 11 U.S.C. § 362(c)(4) by which Congress has prevented the automatic stay due to multiple, non-productive bankruptcy cases. The court looks carefully at the prior cases and evidence presented in the current case. The court also looks carefully at the cases filed by Debtor, not only those dismissed within the one-year period, but during the several years preceding the case to consider the credibility of the evidence that the Debtor is proceeding in good faith in this case.

**SURVEY OF PRIOR CASES FROM MOST RECENT TO OLDEST**

| | | | |
|---|---|---|---|
| **11-49633** | Filed: December 27, 2011<br><br>Dismissed: March 26, 2012 | | |
| Chapter 13<br>In Pro Se | Chapter 13 Plan Confirmed: None<br><br>Chapter 13 Plan Payments: None | | |

| | | | | |
|---|---|---|---|---|
| | Highlights in Case | A. Case Dismissed due to failure to:<br><br>(1) failure to make plan payment;<br><br>(2) failure to provide employer payment advices;<br><br>(3) failure to provide copies of tax returns. Civil Minutes, 11-49633 Dckt. 28.<br><br>In addition, Debtor did not file proof of having completed pre-petition debtor education.<br><br>B. Chapter 13 Plan (11-49663 Dckt. 17):<br><br>(1) Though the original plan filed, Debtor titled it "Second Modified Chapter 13 Plan).<br><br>(2) Plan provided for $200.00 a month payments.<br><br>(3) Term of Plan 36 months.<br><br>(4) Plan fails to provide for payment of any creditor claims.<br><br>appear at First Meeting of Creditors and provide documents. | | |
| | | | | |

| | | | |
|---|---|---|---|
| **12-25917** | Filed: March 26, 2012<br><br>Dismissed: September 16, 2013 | Period Between Dismissal of Prior Case and Filing of This Case.....**0 days** | |
| Chapter 13<br><br>Attorney For Debtor: Peter Macaluso | Chapter 13 Plan Confirmed: May 31, 2012<br><br>Chapter 13 Plan Payments: $16,000<br><br>Debtor's Attorney Paid: $2,535 through the Plan and $965 prior to filing the case. | | |
| | Highlights in Case | | |

| | |
|---|---|
| | A. Notice of Default in Payments Filed July 15, 2013.<br><br>(1) Default for April 2013 Payment and months thereafter.<br><br>B. Plan<br><br>(1) Plan provided for $250.00 a month payments on Class 1 claim for $11,000 arrearage, in addition to the regular $945.57 a month current monthly mortgage payment. |

| | | | | |
|---|---|---|---|---|
| **13-33601** | Filed: October 22, 2013.<br><br>Dismissed: March 24, 2014 | | Period Between Dismissal of Prior Case and Filing of This Case.....**35 days** | |
| Chapter 13<br><br>Attorney For Debtor: Peter Macaluso | Chapter 13 Plan Confirmed: None<br><br>Chapter 13 Plan Payments: $1,200<br><br>Debtor's Attorney Paid: $90 through the Plan and $1,500 prior to filing the case. | | | |
| | Highlights in Case | | | |
| | A. Notice of Default in Payments Filed February 13, 2014.<br><br>(1) Default for December 2013 and months thereafter.<br><br>B. Chapter 13 Plan Provides:<br><br>(1) Plan provided for adequate protection payments for claim, including arrearage secured by Debtor's residence.<br>(2) Debtor sought loan modification of the claim secured by the residence.<br><br>(3) No provision for payment any other claims. | | | |

| | | |
|---|---|---|
| **14-28933** | Filed: September 3, 2014.<br><br>Dismissed: April 13, 2015 | Period Between Dismissal of Prior Case and Filing of This Case.....**5 Months** |

| | | | |
|---|---|---|---|
| Chapter 13<br><br>Attorney For Debtor: Peter Macaluso | Chapter 13 Plan Confirmed: None<br><br>Chapter 13 Plan Payments: $3,940<br><br>Debtor's Attorney Paid: $(Trustee's final report not yet filed) through the Plan and $1,000 prior to filing the case. | | |
| | Highlights in Case | | |
| | A. Motion to Impose the Automatic Stay<br><br>(1) The grounds stated in the Motion include:<br><br>"5. The instant case was filed in order to cure the pre-petition arrears that the debtor fell behind during the original chapter 13 case as to the primary residence. The debtor is a Nurse for Sutter Health, has been employed for more than eight years, has a current gross monthly income of $3,661.63, deductions of $957.17, and a net income of $2,704.06."<br><br>14-28933 Dckt. 8. | | |

| | |
|---|---|
| | (2) Debtor's testimony under penalty of perjury in her declaration includes:<br><br>"10. I am refiling bankruptcy due to financial hardship. I have been continually trying to keep my property. We have lived there for several years and it would be very difficult to find an affordable place for myself and my children to live if we lost the house.<br><br>11. I have been trying to juggle everything on my own, thinking I could keep my kids in sports and pay all my bills. I was also involved in two car accidents and while they were not serious, it did end up being costly. I ended up having to borrow money from family and friends, but each time it seemed like I was borrowing from one to pay the other.<br><br>12. All of my financial difficulties have caused me to be under a lot of stress. I don't want to have to move and be afraid that the property I live in will be sold in a month or two. I want my children to be able to stay in our neighborhood and stay in the same school.<br><br>13. Since my case was dismissed, my situation has changed as I have a full time job where I can work overtime if needed. I have a family member who has relocated here to help me with my children. I have also reopened a child support case, which is now pending in Court.<br><br>14. I now understand that I have to stop making excuses, losing and wasting money and work toward what I value in my life, which is my children and my home. As a result, I am now enrolled in a money management class to better myself.<br><br>15. I am pursuing a loan modification for my home to allow me to succeed in my case.<br><br>14-28933 Dckt. 10. |
| | C. Trustee's Motion to Dismiss<br><br>(1) After denial of confirmation, Debtor failed to file an amended plan or prosecute confirmation of a Chapter 13 Plan.<br><br>(2) Debtor was in default in $2,460 in Plan Payments (2 months).<br><br>14-28933 Dckt. 36. |
| | |

**REVIEW OF CURRENT MOTION TO IMPOSE STAY**

A review of the substantive grounds as stated in the Motion upon which the current relief is based is instructive. These stated grounds are:

> "6. There has been a substantial change in the personal affairs of the debtor since the dismissal of the last case, and the debtor believes that this case will succeed."
>
> Unnumbered Argument Paragraphs
>
> "Good cause exists for the granting of the Motion to Impose the Automatic Stay as to all creditors in this case. The imposition is necessary to protect the debtor's residence, as the lender could foreclose on this real property, their residence, absent the instant filing as the debtor's current case overcomes any presumption of bad faith."
>
> "Good cause exists for the granting of the Motion to Impose the Automatic Stay as to all creditors in this case. The imposition is necessary to protect the debtor's residence, as the lender could foreclose on this real property, their residence, absent the instant filing as the debtor's current case overcomes any presumption of bad faith."

Motion, Dckt. 9. The Motion offers little as grounds why the Debtor, in this fifth bankruptcy case, will now prosecute a plan in good faith and consistent with her duties under the Bankruptcy Code.

The court also consider's the Debtor's testimony under penalty of perjury in the Declaration filed in support of the Motion. Her testimony, in substantive part, includes the following:

"10. I am refiling bankruptcy due to financial hardship. I lost three very important people in our family back to back. I was also suffering from postpartum depression and separation anxiety.

11. Since my case was dismissed, my situation has changed as I am now healing and can focus on completing my bankruptcy plan."

Declaration, Dckt. 11. What is glaringly absent from the Motion and this Declaration is any testimony or allegations as to Debtor's ability to fund the plan and not default in this fifth case, as she has in the prior four cases.

Debtor's Chapter 13 Plan states that Debtor's counsel has been paid an additional $1,500 to file this fifth bankruptcy case. Dckt. 15. The proposed Chapter 13 Plan requires monthly payments of $1,280, the same amount as in the prior cases in which Debtor was unable to make the payments. The Plan provides for making payments to no creditors, other than the Wells Fargo Bank, N.A., which holds a claim secured by Debtor's residence. Debtor now reports that there is a $34,000.00 arrearage on this one debt to be paid through the Plan. As with plans in the prior cases, Debtor does not propose to pay this one creditor's claim, but merely seeks to make an "adequate protection payment" while Debtor prosecutes a loan modification.

The court review of the prior and current case, the arrearage on this one claim has increased as follows:

| **Case Number** | **Class 1 Wells Fargo Bank, N.A. Arrearage Reported by Debtor in Chapter 13 Plan** |
|---|---|
| 11-49633 | $0.00 |
| 12-25917 | $11,000<br>POC No. 3 Lists Arrearage of $14,247 |
| 13-33601 | $20,191 |
| 14-28933 | $32,000<br>POC No. 5 Lists Arrearage of $29,941 |

By Debtor's account, the result of three and one-half years of four prior bankruptcy cases is that the arrearage has grown by at least $21,000 (using the $11,000 arrearage amount stated in the second bankruptcy case).

The court has also considered the information in Schedules I and J filed by Debtor under penalty of perjury in these bankruptcy cases.

| | Current Case | 14-28933 | 13-33601 | 12-25917 | 11-49633 |
|---|---|---|---|---|---|
| Schedule I Highlights | | | | | |
| Gross Income Reported | $3,504 | $3,661 | $4,165 | $3,511 | $1,550 |
| Take Home Income Reported | $2,862 | $2,704 | $3,018 | $2,363 | $1,250 |
| | | | | | |
| Schedule J Highlights | | | | | |
| In the current case Debtor lists four dependents, ages 15 yrs to 2 months. | | Three dependents, ages 12 yrs to 7 yrs. | Three dependents, ages 11 yrs to 5 yrs. | Three dependents, ages 11 yrs to 5 yrs | No dependents listed |

| | | | | | |
|---|---|---|---|---|---|
| Total Expenses | ($1,582) | ($1,424) | ($2,038) | ($1,063) | ($3,233) [includes $1,450 mortgage payment] |
| Food and Housekeeping Supplies | ($750) | ($500) | ($1,000) | ($400) | ($585) |
| Telephone | $0 | $0 | $0 | $0 | ($25) |
| Medical Exp. | ($10) | ($10) | $0 | $0 | ($10) |
| Transportation | ($280) | ($200) | ($400) | ($200) | ($250) |
| Vehicle Ins FN.1. | $0 | ($220) | $0 | ($127) | $0 |

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FN.1. On Schedule B Debtor lists owning two vehicles.

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Unfortunately, the Debtor has not sufficiently rebutted the presumption of bad faith under the facts of this case and the prior cases for the court to extend the automatic stay. While the court is sympathetic as to the personal matters that the Debtor had to deal with during the pendency of the prior cases, the Debtor has failed to provide any evidence or explanation to explain a change in financial circumstances to justify the imposition of the automatic stay. The prior two bankruptcy cases were dismissed due to the Debtor's failure to make plan payments. Nothing in the Motion nor Declaration provide information on what has changed that would enable the Debtor to comply with any proposed plan.

It appears that the Debtor has launched, and been assisted by counsel, in an economically destructive spiral of delay and irrationality. While Debtor may desperately desire to stop a foreclosure, her finances have not allowed her even to make the adequate protection payments required in the prior cases. It appears that over the past three and one-half years Debtor and her counsel have been unable to submit a loan modification application with Wells Fargo Bank, N.A.

Therefore, 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 Impose the Automatic Stay filed by the Debtor having been presented to the court, and upon review of

the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is denied without prejudice.

**17. 12-28547-E-13 PGM-7** | **RUBEN GUTIERREZ AND GRACIELA GUITIERREZ** Peter Macaluso | **CONTINUED MOTION TO APPROVE LOAN MODIFICATION** 1-8-15 [99]

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

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

**Below is the court's tentative ruling.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 8, 2015. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

The Motion to Approve Loan Modification has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1).

**The hearing on the Motion to Approve Loan Modification is granted.**

The Motion to Approve Loan Modification filed by Ruben and Graciela Gutierrez ("Debtor") seeks court approval for Debtor to incur post-petition credit. Ocwen Loan Servicing, LLC ("Creditor"), whose claim the plan provides for in Class 4, has agreed to a loan modification which will reduce Debtor's mortgage payment to $2,896.40 a month. The terms of the modification are as follow:

1. The modified principal balance of the Note will include all amount and arrearages that will be past due as of the Modification Effective Date (including unpaid and deferred interest, fees, escrow advances and other costs, but excluding unpaid late charges), less any amount paid to the Creditor but not previously credited to the Debtor's loan.

2. The Principal Balance will be $431,239.77.

3. $34,429.77 of the new Principal Balance shall be deferred and now interest or monthly payments will be made on this amount.

4. The new Principal Balance, less the deferred principal balance, shall be referred to as the "Interest Bearing Principal Balance" and this amount is $396,900.00.

5. Interest rate of 4.625% will begin to accrue on the new Principal Balance as of December 1, 2014.

6. The maturity date will be July 1, 2037.

The Motion is supported by the Declaration of Debtor. 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**

David Cusick, the Chapter 13 Trustee, filed a response to the instant Motion on January 26, 2015. Dckt. 105. The Trustee states that he is uncertain of which loan this modification applies to. The loan modification document (Dckt. 102) filed in support of, names Ocwen Loan Servicing, LLC. According to the Trustee's records, the first deed of trust is being held by creditor Deutsche Bank National Trust Company, as Trustee, whom filed proof of claim No. 9-1 on June 28, 2012. The Trustee believes loan modification to be reasonable and does not oppose to the loan modification otherwise.

**DEBTOR'S REPLY**

The Debtor filed a reply on February 3, 2015. Dckt. 111. The Debtor states that:

1. The Proof of Claim reflects that GMAC, LLC is where the notices and payments should be sent, which was filed by Pite Duncan, LLP.

2. The phone number listed on the Proof of Claim forwards the line to a second phone number belonging to Ocwen Loan Servicing, LLC., which is the granted to the Trial Loan Modification, and whom is listed as the "Servicer" of the loan. In this case, Ocwen purports to have the authority to modify the loan pursuant to the servicing agreement. The Debtor requests that Ocwen be ordered to provide the servicing agreement to insure the authority to modify the loan as provided in the modification agreement.

**FEBRUARY 10, 2015 HEARING**

At the hearing, the court continued the hearing to 3:00 p.m. on March 3,

2015 to give the Debtor the opportunity to contact Ocwen Loan Servicing, LLC to get the necessary documentation and evidence showing that Ocwen Loan Servicing, LLC has the authority to enter into a loan modification.

**MARCH 3, 2015 HEARING**

At the hearing, the court continued the hearing to 3:00 p.m. on May 5, 2015 to give the Debtor the opportunity to contact Ocwen Loan Servicing, LLC to get the necessary documentation and evidence showing that Ocwen Loan Servicing, LLC has the authority to enter into a loan modification. Dckt. 117.

**MAY 5, 2015 HEARING**

At the hearing, the court continued the hearing to 3:00 p.m. on June 9, 2015 to give the Debtor the opportunity to contact Ocwen Loan Servicing, LLC to get the necessary documentation and evidence showing that Ocwen Loan Servicing, LLC has the authority to enter into a loan modification. Dckt. 123.

**DBTCA'S RESPONSE**

Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans, Inc., Mortgage Asset-Backed Pass-Through Certificates, Series 2007-QS9 ("Creditor") filed a response to the instant Motion on May 29, 2015. Dckt. 124.

Creditor asserts that Ocwen Loan Servicing, LLC is the loan servicer for the Creditor and authorized and empowered to enter into and execute a loan modification agreement with the Debtors pursuant to the Pooling and Servicing Agreement.

After reviewing the history of the Debtor's loan, the Creditor argues that the Pooling and Servicing Agreement authorizes the Master Servicer and, in turn, any subservicers acting on its behalf, the power to modify any term of any mortgage loan held by the Trust, subject to limitations that the Creditor summarily says are not presently at issue. The Creditor also states that the limited power of attorney entered into between the Creditor acknowledged that Ocwen Loan Servicing, LLC is servicing the mortgage loans held by the Trust pursuant to the Pooling and Servicing Agreement, and acknowledged those powers granted. Dckt. 126, Exhibits E and H.

The Creditor has attached a copy of a loan modification that now lists the Servicer as "Ocwen Loan Servicing, LLC, as attorney-in-fact for Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans, Inc., Mortgage Asset-Backed Pass-Through Certificates, Series 2007-QS9." Dckt. 126, Exhibit J. However, the dates for the signatures of the Debtors are still December 10, 2014, the same as the original loan modification that just listed "Ocwen Loan Servicing, LLC" as the Servicer.

**DEBTOR'S STATUS REPORT**

The Debtor filed a status report on June 1, 2015. Dckt. 128. The Debtor states that the Debtor has propounded discovery on Ocwen Loan Servicing, LLC on April 20, 2015, but Ocwen Loan Servicing, LLC has failed to respond. The first set of discovery was due on May 22, 2015. On May 23, 2015, the Debtors state that they sent a safe harbor letter, giving an extension to respond until May 29, 2015.

On May 29, 2015, the Creditor filed a response. The Debtors state that Ocwen Loan Servicing, LLC has failed to responds to the discovery request, even with the extension.

Debtors set a hearing for a Motion to Compel Discovery from Ocwen Loan Servicing, LLC for June 30, 2015.

**DEBTORS' REPLY**

The Debtors filed a reply on June 2, 2015. Dckt. 136. The Debtors state that Ocwen Loan Servicing, LLC has failed to respond to discovery. Instead, the Debtors state that the information sought from the discovery request was filed as a response by the Creditor.

The Debtors request that the Motion be granted and that the court resolve the issue over discovery at the hearing on the Motion to Compel.

**DISCUSSION**

The instant Motion and identifying the proper creditor should not be this difficult. The only reason for the three continuances on the instant Motion is the failure of the parties to properly identify the holder of the note and to provide evidence that Ocwen Loan Servicing, LLC has the authority to enter into a modification on behalf of the holder.

As the court has stated numerous times in connection with loan servicers, if these parties wish to act on behalf of the actual creditor, the servicer must indicate they are acting as such and provide evidence that they are authorized to do so. Instead, these servicers, most notably Ocwen Loan Servicing, LLC, continue to represent that they are modifying the loans on their own behalf which leaves this court questioning if the ever had the authority in the first place. The court continues to be baffled why, after years of these conversations, why Ocwen Loan Servicing, LLC does not either indicate they are acting pursuant to a power of attorney or under a Pooling and Servicing Agreement. Instead, simple Motions to Approve Loan Modification become unnecessarily long and drawn out proceedings.

However, reviewing the instant Motion, the response of the Creditor has provided the information as well as the evidence that should have been provided from at the time the loan modification was proposed. The Creditor has provided the agreements and power of attorney that grant Ocwen Loan Servicing, LLC the authority to enter into loan modification on behalf of the Creditor. While the Creditor's response does not excuse Ocwen Loan Servicing, LLC from answering the discovery requests of the Debtors, for purposes of this Motion, the information provided by the Creditor satisfies the court that Ocwen Loan Servicing, LLC had the authority to enter into the loan modification.

This post-petition financing is consistent with the Chapter 13 Plan in this case and Debtor's ability to fund that Plan. The terms of the modification allow for a reduction in monthly payment and the new principal balance includes any arrearage. There being no objection from the Trustee or other parties in interest after the Creditor has provided evidence that Ocwen Loan Servicing, LLC is authorized to enter into such modification, and the motion complying with the provisions of 11 U.S.C. § 364(d), the Motion to Approve the Loan Modification is granted. FN.1.

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FN.1. Neither Deutsche Bank National Trust Company nor Owen Loan Servicing, LLC, Deutsche Bank National Trust Company's chosen agent should take the approval of this modification as approving the failure to comply with discovery. The court shall address with both Ocwen Loan Servicing, LLC and Deutsche Bank National Trust Company, the principal who is responsible (liable) for the misconduct of its agent in acting for Deutsche Bank National Trust Company in this bankruptcy case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve the Loan Modification filed by Ruben and Graciela Gutierrez 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 court authorizes Ruben and Graciela Gutierrez ("Debtor") to amend the terms of the loan with Ocwen Loan Servicing, LLC, as attorney-in-fact for Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans, Inc., Mortgage Asset-Backed Pass-Through Certificates, Series 2007-QS9, which is secured by the real property commonly known as 2636 Babson Drive, Elk Grove, California, on such terms as stated in the Modification Agreement filed as Exhibit A in support of the Motion, Dckt. 102.

**18. 13-30248-E-13 DARRIN/CARMEL HILL**
**SDB-2 Scott de Bie**

**MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH FRED FINCH YOUTH CENTER**
**5-21-15 [28]**

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

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

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

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

Correct Notice NOT Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 21, 2015. By the court's calculation, 19 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(3), 21 day notice.)

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

**The Motion For Approval of Compromise is denied without prejudice.**

Darrin and Carmel Hill, the 13 Debtors, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Fred Finch Youth Center ("Settlor"). The claims and disputes to be resolved by the proposed settlement are for a claim of wrongful termination of Debtor Carmel

Hill's employment.

**FAILURE TO PROVIDE SUFFICIENT NOTICE**

Unfortunately, the Movant only provided 19 days notice. Pursuant to Fed. R. Bankr. P. 2002(a)(3), a minimum of 21 days notice is required for a Motion for Approval of Comprise. According to the Movant's Proof of Service, the Movant's served necessary parties on May 21, 2015, only 19 days prior to the date of hearing. Dckt. 33. Without sufficient notice provided, the Motion is denied without prejudice.

**MOTION**

Besides the failure to provide sufficient notice, the Motion itself does not provide sufficient evidence and argument for the court to approve the settlement.

Movant and Settlor has resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement is set forth in the Settlement Agreement filed as Exhibit A in support of the Motion, Dckt. 32):

A. Settlor shall pay to Debtor Carmel Hill a total of $150,000.00, plus reimbursement of mediator fees of $3,525.00.

B. Debtor Carmel Hill shall dismiss with prejudice any civil actions for damages now pending (if any) or that is filed in the future concerning Debtor Carmel Hill's employment with Settlor, including the Alameda County superior Court Case No. RG 12-659010.

C. The Settlor shall issue one check for $86,545.64, made payable to Paul Glusman, Trustee for Carmel Hill and Paul Glusman for which a 1099 shall issue to Debtor Carmel Hill

D. The Settlor shall issue a second check in the amount of $66,979.36, payable to Paul Glusman Trust Account for which a 1099 will issue to Paul Glusman

**DISCUSSION**

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

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

3. The complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and

4. The paramount interest of the creditors and a proper deference to their reasonable views.

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

Under the terms the Settlement all claims of the Estate, including any pre-petition claims of the Debtor, are fully and completely settled, with all such claims released. Settlor has granted a corresponding release for Debtor and the Estate.

However, the Movant does not address any of the factors outlined in *A & C Props* and *Woodson* as to whether the compromise is in the best interest of the estate. The Motion merely outlines the terms of the settlement while the Declaration of Debtor Carmel Hill only states that while a higher award may be gained through trial, the settlement amount is reasonable. Dckt. 30. The Declaration of Gary Glusman, the attorney in the state court action, merely reiterates what Debtor Carmel Hill stated as well as discussing his fees.

While the court notes that David Cusick, the Chapter 13 Trustee, filed a non-opposition, the Movant does not provide sufficient argument for the court to determine that the settlement is in the best interest of the Debtors, the creditors, and the estate.

For the court to approve the proposed settlement, the court staff would have to either guess at the required analysis of the proposed settlement or merely be Debtor's rubber stamp. Neither is appropriate.

Therefore, 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 Approve Compromise filed by Darrin and Carmel Hill, the 13 Debtors, ("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 Approve Compromise is denied without prejudice.

**19. 15-21257-E-13 DAVID SEARS** **MOTION TO VACATE DISMISSAL OF CASE**
**PRO SE** **5-6-15 [47]**

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

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

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

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Local Rule 9014-1(f)(3) Motion.

Correct Notice Provided. The BNC Certificate accompanying the Order Setting Hearing on Motion to Vacate Dismissal states that the Order and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on May 10, 2015. By the court's calculation, 30 days' notice was provided.

The Motion to Vacate Dismissal was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

**The Motion to Vacate Dismissal is denied.**

On May 6, 2015, David Sears, the Debtor, filed a Motion to Vacate Dismissal of this bankruptcy case. Motion, Dckt. 47. The Motion states the following grounds upon which the relief is based:

> [f]or the purpose of allowing me to file the amended official from EDC 2-01.5 to allow adding the pending Lawsuit case number 34-201500176115 in the Superior Court of California County of Sacramento to the official form 6B of Schedule B and onto the Official form of Statement of Financial Affairs Official form B7.

Id.

This case was dismissed on March 20, 2015, pursuant to the request of Debtor. Order, Dckt. 32; Application to Dismiss, Dckt. 31. This is not Debtor's first case since 2012, but his fourth. See, Prior cases 14-31815 (closed March 10, 2015); 12-37194 (closed November 26, 2012), and 12-34804 (closed September 14, 2012).

The only basis for vacating the dismissal stated by Debtor is to amend a schedule. An Amended Schedule B was filed with the court on June 3, 2015. Dckt. 58. While devoid of many assets one would expect to see on Schedule B, it has added the following:

> "Case Pending
> Lawsuit Case # 34-2015-00176115-CU-BT-GDS
> Sears vs. Parkview Edge Properties, LLC C/O
> Law offices of Sam Chandra"

Though not stated in the Motion, the court surmises that Debtor filed the above action and the defendants asserted that it was an undisclosed bankruptcy estate asset which was still property of the estate.

**TRUSTEE'S RESPONSE**

David Cusick, the chapter 13 Trustee, filed a response to the Motion on May 19, 2015. Dckt. 55. The Trustee states that he is not aware of why the Debtor seeks to reinstate the dismissed bankruptcy case. The Trustee had filed a motion to dismiss as it appeared that the Debtor in his prior case (Case no. 14-31815), had voluntarily dismissed the case after a motion for relief was filed, rendering him ineligible for relief under 11 U.S.C. § 109(g)(2). The Trustee also notes that the plan was filed blank.

The Trustee states that if the court reconsiders the order dismissing made on the Debtor's Motion to Dismiss (Dckt. 31 and 32) that the court also reconsider the order on the Trustee's Motion to Dismiss which was dismissed as moot (Dckt. 41).

**DISCUSSION**

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

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is

based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

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

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

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

Here, the Debtor has not filed any supplemental pleadings, as ordered by the court, "identifying the grounds for vacating the dismissal, and if it is to file additional pleadings, what bona fide, bankruptcy law purpose such vacating of the dismissal is served." Dckt. 52.

The Debtor has filed a supplemental Schedule B which adds a pending litigation in state court. Dckt. 58. The Debtor has also filed a proposed plan. Dckt. 59. However, a review of the proposed plan shows that the only information filed out is the monthly payment of $100.00 and the length of the plan being 24 months. The remaining parts of the plan are blank.

The Debtor has failed to provide any evidence, explanation, or justification that would justify the court in vacating the dismissal of the bankruptcy case. The Motion fails to state with particularity the grounds for relief as required by Fed. R. Bankr. P. 9013 and the Debtor has failed to file supplemental pleadings to meet this requirement.

The Debtor has not provided the court with any specific grounds that justify the court vacating the dismissal of the bankruptcy case nor provides any declaration or explanation of any bona fide bankruptcy law purpose to vacate the dismissal.

Therefore, the Motion to Vacate is denied. The court does authorize the filing of the Amended Schedule B, and only that amended schedule, to preclude this failed bankruptcy case unduly impeding the parties and the judge in that

lawsuit fully and completely resolving all claims and rights asserted therein by and against the Debtor.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Vacate Dismissal by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Vacate Dismissal is denied.
>
> **IT IS FURTHER ORDERED** that the filing of the Amended Schedule B on June 3, 2015, Dckt. 58, is authorized by the court and the lawsuit therein is a disclosed asset in this bankruptcy case. The court does not, and has not, the filing of any other amendments or a Chapter 13 Plan.
>
> The disclosure of the lawsuit does not alter the prior grounds for or the appropriateness of the dismissal of the case.
>
> **IT IS FURTHER ORDERED** that the Amended Schedule B having been filed and the order dismissing the case not having been vacated, the Clerk of the Court shall immediately re-close this bankruptcy case.

**20. 11-42659-E-13 GARAY/KAREN HARPER**
**TGB-1 W. Scott de Bie**

**MOTION FOR COMPENSATION BY THE LAW OFFICE OF TRAVIS G. BLACK AND ASSOCIATES AND WEINBERGER LAW FIRM OTHER PROFESSIONAL(S) 4-23-15 [136]**

**Final Ruling: No appearance at the June 9, 2015 hearing is required.**
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Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 23, 2015. By the court's calculation, 47 days' notice was provided. 28 days' notice is required.

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

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

Travis Black and Joseph Weinberger, the Non-Bankruptcy Attorneys ("Applicant") for Garay and Karen Harper, the Chapter 13 Debtors ("Client"), makes a Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the work done in a third party negligence civil proceeding. The order of the court approving employment of Applicant was entered on June 10, 2014, Dckt. 75. Applicant requests fees in the amount of $80,000.00 and costs in the amount of $12,558.24.

David Cusick, the Chapter 13 Trustee, filed a non-opposition.

The Applicant states that $92,558.21 is currently held in trust for the Applicant.

**STATUTORY BASIS FOR PROFESSIONAL FEES**

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

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

**Benefit to the Estate**

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the services provided as the court's authorization to employ an attorney to work

in a bankruptcy case does not give that attorney "free reign [sic] to run up a [professional fees and expenses] without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

*Id.* at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including settling the third party negligence civil action. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

**FEES AND COSTS & EXPENSES REQUESTED**

**Fees**

Applicant computes the fees for the services provided as a percentage of the monies recovered for Client. Applicant represented Client in litigation for damages from a civil negligence claim, for which Client agreed to a contingent fee of 40% of the gross settlement amount. In approving the employment of applicant, the court did not approve the contingent fee. $200,000.00 of net monies (exclusive of these requested fees and costs) was recovered for Client.

The Applicant seeks to have the contingency fee split as followed:

| **Attorney** | **Amount** |
|---|---|
| Travis Black, Non-Bankruptcy Attorney for Karen Harper | $32,000.00 |
| Joseph Weinberger, Non-Bankruptcy Attorney for Garay Harper | $32,000.00 |
| Jim Cunningham, referring Non-Bankruptcy Attorney | $16,000.00 |

**Costs and Expenses**

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $12,558.24 pursuant to this applicant.

The costs requested in this Application are,
Travis Black

| Description of Cost | Per Item Cost, If Applicable | Cost |
|---|---|---|
| Medical records and bills. | | $3,982.16 |
| Depositions. | | $4,839.00 |
| Court fees. | | $170.00 |
| Expert fees. | | $3,100.00 |
| Total Costs Requested in Application | | $12,091.16 |

Jim Cunningham

| Description of Cost | Per Item Cost, If Applicable | Cost |
|---|---|---|
| Medical records and bills. | | $145.30 |
| Court fees. | | $470.00 |
| Total Costs Requested in Application | | $615.30 |

Joe Weinberger

| Description of Cost | Per Item Cost, If Applicable | Cost |
|---|---|---|
| Medical records and bills. | | $514.85 |
| Court fees. | | $680.00 |
| Postage and copies. | | $109.62 |
| Total Costs Requested in Application | | $1,304.47 |

Total Costs:

| Name of Professionals | Cost |
|---|---|
| Travis Black | $12,091.16 |
| Jim Cunningham | $615.30 |
| Joe Weinberger | $1,304.47 |
| Total Costs Requested in Application | $14,011.93 |

The court's own calculation found that, based on the itemized cost sheet, the actual amount requested is $14,011.93. However, the Applicant only requests $12,558.24. The court interprets that as a request by the Applicant to reduce the requested costs.

**FEES AND COSTS & EXPENSES ALLOWED**

**Fees**

The court finds that the fees computed on a percentage basis recovery for Client to be reasonable and a fair method of computing the fees of Applicant in this case. Such percentage fees are commonly charged for such services provided in non-bankruptcy transactions of this type. The court allows Final Fees of $80,000.00 pursuant to 11 U.S.C. § 330 for these services provided to Client by Applicant. The Applicant is authorized to be paid from the available funds of the settlement funds held in trust.

**Costs and Expenses**

The Costs in the amount of $12,558.24 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid from the available funds of the settlement funds held in trust.

Applicant is allowed, and the Applicant is authorized to be paid from the settlement funds held in trust, the following amounts as compensation to this professional in this case:

Fees $80,000.00

| **Attorney** | **Amount** |
|---|---|
| Travis Black, Non-Bankruptcy Attorney for Karen Harper | $32,000.00 |
| Joseph Weinberger, Non-Bankruptcy Attorney for Garay Harper | $32,000.00 |
| Jim Cunningham, referring Non-Bankruptcy Attorney | $16,000.00 |

Costs and Expenses $12,558.24

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

Travis Black and Joseph Weinberger, the Non-Bankruptcy Attorneys (“Applicant”) for Garay and Karen Harper, the Chapter 13 Debtors (“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 Travis Black and Joseph Weinberger is allowed the following fees and expenses as a professional of the Estate:

Travis Black and Joseph Weinberger, Professional Employed by Chapter 13 Debtor

Fees in the amount of $80,000.00

| **Attorney** | **Amount** |
|---|---|
| Travis Black, Non-Bankruptcy Attorney for Karen Harper | $32,000.00 |
| Joseph Weinberger, Non-Bankruptcy Attorney for Garay Harper | $32,000.00 |
| Jim Cunningham, referring Non-Bankruptcy Attorney | $16,000.00 |

Expenses in the amount of $12,558.24,

The Fees and Costs pursuant to this Applicant are approved as final fees and costs pursuant to 11 U.S.C. § 330.

**IT IS FURTHER ORDERED** that the Applicant is authorized to pay the fees allowed by this Order from the settlement funds held in trust.

**21. 15-20077-E-13 CARL/CAROLYN FORE** **CONTINUED MOTION TO CONFIRM PLAN**
**TJW-3 Timothy Walsh** **3-12-15 [40]**

**Continued from 5/5/15**

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

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

**Below is the court's tentative ruling.**

---

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on March 12, 2015. By the court's calculation, 54 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

**The court's decision is to deny the Motion to Confirm the Amended Plan.**

Carl and Carolyn Fore ("Debtors") filed the instant Motion to Confirm the Amended Plan on April 17, 2015. Dckt. 40.

**TRUSTEE'S OBJECTION**

David Cusick, the Chapter 13 Trustee, filed an objection to the instant Motion on April 17, 2015. Dckt. 53. The Trustee objects stating that it appears that the Debtors cannot make the payments required under 11 U.S.C. § 1325(a)(6). The Debtors' plan proposes to increase plan payments from $3,785.00 to $4,050.00 beginning in month 2 through 59. However, the Debtors have failed to indicate how they can increase the plan payments when the monthly projected income listed on Schedule J reflects $3,785.00.

**MAY 5, 2015 HEARING**

At the hearing, the court continued the hearing to 3:00 p.m. on June 9, 2015. Dckt. 56. The court ordered that the Debtor shall file and serve supplemental pleadings on or before May 22, 2015, and Response, if any, shall be filed and served on or before May 29, 2015.

**TRUSTEE'S STATUS REPORT**

The Trustee filed a status report on May 27, 2015. Dckt. 59. The Trustee states that the Debtor has failed to file any supplemental pleadings and the Trustee's objections remain unresolved. The Trustee states that the Debtor has failed to indicate how he can increase the plan payments by $265.00 per month from $3,785.00 to $4,050.00

**DISCUSSION**

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

The Debtor has failed to file any supplemental pleadings in connection with the instant Motion.

The Trustee's objection is well-taken. The Debtors' Schedule J, filed January 7, 2015, lists a $3,785.17 monthly net income, while the Plan provides for a step up in plan payments to $4,050.00 monthly payment beginning month 2 through 59. The Debtors, in neither the Motion nor declaration, explain how they are able to increase the plan payments when their Schedule J reflects only $3,785.17 in monthly disposable income. Furthermore, the Debtors' Schedule J indicates that they do not expect an increase or decrease in the expenses to justify the step up in plan payments. Dckt. 1, Schedule J, Question 24. Taken together, this suggests the plan is not feasible. *See* 11 U.S.C. § 1325(a)(6).

Debtor had the opportunity, when filing this plan, to proactively address these changes. As attorneys who regularly appear in this court know, the court takes seriously statements made under penalty of perjury. Events can change and parties can adjust budgets in response to changing circumstances. But it cannot be assumed that either the court blindly accepts such changes in testimony applied under penalty of perjury or will assemble for a party a version of the facts the could would assume credible if testimony had been so provided.

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

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

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

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

**22. 15-22489-E-13 JACK DUMIN**
**DPC-1 Richard Jare**

**OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK**
**5-13-15 [31]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on May 13, 2015. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

**The court's decision is to sustain the Objection.**

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

1. The plan relies on th Motion to Value Collateral of Clear-Spring Loan

Services, Inc.

2. The plan will complete in 93 months as opposed to the 54 months proposed in the plan in violation of 11 U.S.C. § 1325(d). The cause of the over-extension is due in part as to the claim filed by the Internal Revenue Service on April 17, 2015, Proof of Claim No. 1, which lists the total priority owed as $46,128.82. The Debtor only scheduled the Internal Revenue Service's claim as a Class 5 in the amount of $23,000.00.

The Trustee's objections are well-taken. The Motion to Value Collateral of Clear-Spring Loan Services, Inc. was denied without prejudice on June 2, 2015. Therefore, due to the Motion being denied, it appears that the Debtor cannot afford to make the payments or comply with the plan pursuant to 11 U.S.C. § 1325(a)(6). Therefore, the objection is sustained.

As to the Trustee's second objection, the Debtor's failure to provide for the full priority amount of the Internal Revenue Service in the plan results in the plan completing beyond the 60 months statutory maximum allowed in 11 U.S.C. § 1325(d). Therefore, the objection is sustained,

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

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

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

**23. 10-29291-E-13 MANUEL/TAMARA GARCIA — MOTION TO MODIFY PLAN**
**PGM-3 Peter Macaluso — 5-4-15 [64]**

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

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

**Below is the court's tentative ruling.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 4, 2015. By the court's calculation, 36 days' notice was provided. 35 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

**The court's decision is to grant the Motion to Confirm the Modified Plan.**

Manuel and Tamara Garcia ("Debtors") filed the instant Motion to Modify the Plan on May 4, 2015. Dckt. 64. The Debtors state that the reason for the instant Motion is due to the fact that the Debtors cannot complete the plan as originally confirmed because the Debtors need to provide for the Ecast Settlement's secured proof of claim as a class 3 claim. The Debtors propose that the claim of Ecast Settlement Corporation, Proof of Claim No. 24, be allowed as a Class 4 claim to satisfy the secured claim and allow the case to proceed to discharge.

**TRUSTEE'S REPLY**

David Cusick, the Chapter 13 Trustee, filed a response on May 26, 2015.

Dckt. 72. The Trustee states that he does not oppose the Motion. The Trustee notes that the Debtors' petition was filed on April 12, 20- and started making payments on May 12, 2010, with the 60th payment due and paid on April 20, 2015. According to the Trustee's records, the Debtors have paid in a total of $25,770.00, with the last payment of $280.00 posted on May 8, 2015, after the modified plan was filed, with the payment to be refunded to the Debtor.

The Trustee notes that the final payments to creditors under the plan were not prepared until April 30, 2015 and not mailed until May 7, 2015 and remained outstanding at the date the Motion was filed. The Trustee states that where the modified plan seeks to change the treatment to one creditor to surrender collateral, the Trustee recommends approval of the modified plan.

**DEBTORS' REPLY**

The Debtors filed a reply on June 1, 2015. Dckt. 75. The Debtors state that their plan payments were complete at the time of the plan modification, however, the Debtors sent in an additional payment of $280.00. The Debtors state they are not opposed to the Trustee keeping the additional $280.00 and disbursing the funds to the creditors at the disbursement period.

**DISCUSSION**

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

The facts of this case are unique in the sense that the Debtors have completed the terms of the confirmed plan and are now seeking to provide for the surrender of collateral of Ecast Settlement Corporation so the case may proceed to discharge. Both the Debtors and the Trustee appear to agree that the modified plan is proper since it only seeks to allow for the surrender of the collateral.

The only nuance is the additional $280.00 payment made by the Debtors. However, the Debtors consent in their reply that the Trustee can apply that to the disbursement to creditors.

A review of the modified plan and taking into considerations the extra-ordinary facts of the case, the court finds that the modified Plan complies with 11 U.S.C. §§ 1322, 1325(a) and 1329 and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on May 4, 2015 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the

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

**24. 09-30096-E-13 CAROL DOYLE** **MOTION TO DISMISS CASE**
**Eric Schwab** **4-27-15 [198]**

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

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

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

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Local Rule 9014-1(f)(3) Motion.

Correct Notice Provided. The BNC Certificate accompanying the Order Setting Hearing on Motion to Vacate Dismissal states that the Order and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on May 10, 2015. By the court's calculation, 30 days' notice was provided.

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

**The Motion to Dismiss the Case is xxxxxxxxxxx.**

Carol Doyle ("Debtor") filed a Motion to Dismiss the Case on April 27, 2015. Dckt. 198. The Debtor did not set the Motion for hearing. On April 28, 2015, the court issued an order setting the Motion for hearing at 3:00 p.m. on June 9, 2015. Dckt. 199. The court ordered:

> **IT IS ORDERED** that a hearing on the Debtor's request to dismiss this case shall be conducted in this case at 3:00 p.m. on June 9, 2015, for the court to consider whether the case should be dismissed, dismissed with prejudice, or converted to one under Chapter 7. Responses of any parties in interest shall be filed and served on or before May 19, 2015; and Replies, if any, to such Responses shall be filed and served on or before May 29, 2015.

Dckt.199.

**BACKGROUND**

The Debtor commenced this bankruptcy case on May 20, 2009. The court confirmed Debtor's Chapter 13 Plan on October 2, 2009. Order, Dckt. 26. In 2011 Debtor sought to modify the Chapter 13 Plan. That attempted modification was denied. Order, Dckt. 91. In denying confirmation, the court clearly addressed what appeared to be the lack of good faith by this Debtor in prosecuting this case.

> In addition to extensive discussion at oral argument on the prior motion whereby the Debtor sought to gain control of the $65,000.00, the court provided the Debtor and Counsel with three pages of findings of fact and conclusions of law addressing specific issues and deficiencies of this Debtor. A specific issue addressed was the lack of any plans or attempts to prosecute the existing plan to liquidate property of the estate. Rather, it appears that the Debtor is merely waiting, not engaging a real estate agent, for the plan term to end and then seek an additional 12 month extension in an effort to achieve indirectly what cannot be achieved directly – a Chapter 13 plan which says that the Debtor doesn't have to pay anything for 60 months. Then, hopefully the market has risen enough so the Debtor can exit the bankruptcy with increased monies earned by improperly delaying the payment to creditors.

Civil Minutes, Dckt. 90.

Under the confirmed Chapter 13 Plan, Debtor committed to paying creditors' claims through the sale or refinance of real property of the bankruptcy estate and plan estate. Plan, Dckt. 5. By May 2012, Debtor began selling some of the real property. This was a short sale. In 2014, Debtor filed a motion to sell real property which would generate net monies after payment of secured claims and costs of sale. Motion, Dckt. 121. When the Trustee objected to the Motion based on Debtor failing to specify that the net proceeds would be paid into the plan, the Debtor requested that the court dismiss the motion. Two months later Debtor filed a new motion to sell the property. Motion, Dckt. 133. The sales price negotiated by the Debtor was reduced to the point that it was represented the sale would generate no net monies after paying secured claims and costs of sale. Once again, Debtor requested that the motion be dismissed, the purported sale again having "fallen through."

In August 2014, Debtor filed yet a third motion to sell the real property.

Again the sales price was reduced, again purporting to show that there were no net monies generated from the sale. Motion, Dckt. 143. The court issued an order granting the Motion and authorizing the sale of the Property. Dckt. 161.

On August 19, 2014, the Chapter 13 Trustee filed a motion for authorization to disburse settlement proceeds held by the Trustee in this case to fund the Debtor's confirmed Chapter 13 Plan which provides for a 100% dividend to creditors holding general unsecured claims. Motion, Dckt. 155. Wells Fargo Bank, N.A. opposed the Motion, asserting that it had a security interest in the settlement monies. The court dismissed this motion without prejudice.

On December 9, 2014, the Trustee filed a new Motion to Distribute the settlement monies. Dckt. 169. The Trustee also filed an Objection to the Wells Fargo Bank, N.A. secured claim. Dckt. 174. These settlement proceeds had been the subject of Debtor's earlier motion to have the monies turned over to her, rather than be used to fund her 100% dividend plan. Motion, Dckt. 50. In denying Debtor's request to have the settlement proceeds turned over to her, the court stated:

> In the present case the Debtor and Estate are holding $65,000.00 cash. The Debtor is operating in here, as well as being the trustee of the trust for which she is the only beneficiary. The Debtor offers no explanation as to the specific purposes for which the money will be expended, how the unidentified repairs will make the property more marketable, or how much of the monies she intends to spend on her own household purposes. Further, the Debtor is in default under her existing contract with the creditors (the confirmed Chapter 13 Plan). She offers no explanation as to why the confirmed Plan is in default and what she intends to do that cures that default.
>
> The Debtor has not shown grounds for the court to order $65,000.00 to be turned over to her revocable trust for her to spend however she chooses. The Debtor can, as with any other property being administered by a trustee or fiduciary in bankruptcy (given the unqualified right to revoke and creditors the right to enforce claims against), seek to expend the monies for specific purposes. The Debtor can engage a real estate agent to market and sell the property. The Debtor can engage contractors to propose repairs, to which the real estate broker can opine as to whether the cost of the repairs results in a greater enhancement in the value of the property.

The court sustained the Trustee's objection to the Wells Fargo Bank, N.A. secured claim for all amounts in excess of $40,863.20. Civil Minutes, Dckt. 192; Order, Dckt. 196. The court ordered that all amounts of the settlement proceeds in excess of the Wells Fargo Bank, N.A. secured claim be disbursed by the Trustee through the confirmed Chapter 13 Plan. Civil Minutes, Dckt. 194; Order, Dckt. 190.

Debtor now requests that the court dismiss the Chapter 13 case. No evidence has been presented to the court that the monies, ordered to be

disbursed, have been disbursed by the Trustee. Additionally, in light of Debtor's conduct in this case, the Chapter 13 Trustee and other parties in interest may not concur that the case should be dismissed, but whether it should be dismissed with prejudice or the case continue (whether under Chapter 13 or Chapter 7) and monies paid to creditors consistent with the 100% dividend plan under which the Debtor has benefitted for the past five years. The court cannot ascertain whether this is a "strategic dismissal," attempting to thwart the 100% dividend plan and divert the settlement proceeds from the plan and creditors, and instead into the Debtor's personal pocket.

**TRUSTEE'S RESPONSE**

David Cusick, the Chapter 13 Trustee, filed a response to the instant Motion on May 19, 2015. Dckt. 201. The Trustee states that the Debtor has not provided any explanation as to the failure under the plan to deliver the 100% payment called for by the plan through sales or refinances.

The Trustee notes that the Debtor lists six different real properties on Schedule A and the plan does not specify which real property was to be sold or refinanced. The Trustee states that the Debtor may want to identify the status of each property to explain why she seeks dismissal of the case.

**WELLS FARGO BANK, N.A.'S OBJECTION**

Wells Fargo Bank, N.A. ("Creditor") filed an objection to the instant Motion on May 19, 2015. Dckt. 203.

Creditor objects to dismissal on the grounds that due to the Debtor's prior conduct the case should be continued and the excess proceeds not disbursed by the Trustee be paid to creditors consistent with Debtor's plan. The Creditor argues that the case has been unreasonably delayed and Creditor was required to litigate over the short sale for three years to obtain approval for disbursement of the settlement funds.

**DEBTOR'S STATEMENT IN SUPPORT OF DISMISSAL**

The Debtor filed a statement in support of dismissal on May 19, 2015. Dckt. 207. The Debtor states that during the court of the plan, the Debtor's equity in her real property assets declined and prevented the Debtor from marketing the properties. By 2014, the Debtor states all of her real property had been foreclosed or short sold.

The Debtor states the only significant funds received by the Trustee were generated from settlement negotiated for $65,000.00 with a former commercial tenant of the Debtor who defaulted on the rent and damaged the Debtor's property. The court authorized the Trustee to disperse the settlement funds to creditors of the estate. No funds were ever received by the Debtor.

The Debtor asserts that the Trustee has received $70,374.93 and the Trustee has disbursed $70,359.59. The Debtor argues that her resources have depleted. Debtor is an 81-year-old who is in poor heath. The Debtor's income is from social security and pension distributions. The Debtor states her expenses are subsidized with family contributions. The Debtor states she is now judgment proof and does not want to participate in any further bankruptcy proceedings.

**DEBTOR'S SUPPLEMENTAL DECLARATION**

The Debtor filed a supplemental declaration on June 2, 2015. Dckt. 211. The Debtor filed the supplemental declaration in response to the Trustee's inquiry about the real property. The Debtor states the following:

1. The real property commonly known as 601 Main Street, Susanville, California was foreclosed on by the City of Susanville in December 2010, following an order granting the City relief from the automatic stay on July 8, 2010.

2. The commercial real property commonly known as 611 Main Street, Susanville, California, was sold in a short sale in May 2012 after the court authorized the sale on May 18, 2012. The Debtor states she received no funds from the sale.

3. The Debtor's former residence at 7642 north Avenue, Kings beach, California was sold in a short sale in August 2014 following the court authorizing the sale on August 21, 2014. The Debtor states she received no funds from the sale.

4. The membership for the Marriott timeshare in Hawaii was cancelled in 2013 for unpaid annual dues.

5. The lot located at 30 North Roop Street, Susanville, California is pending a tax sale by Lassen County for delinquent property taxes. The property is an unused parking lot which is deteriorated to the point that it requires complete repaving. The Debtor states that the estimated cost would be around $40,000.00 to $50,000.00. The Debtor states the prior attempts to sell did not lead to any offers.

6. The Cabin located at Silver Lake is a 25 year U.S. Forest Service lease within the Eagle Lake District of the Plumas National Forest. The property is currently inaccessible due to pine trees down during a winter storm. The Debtor is unsure whether those will be removed and there is a pending dispute brought by the national Forest Homeowners Association over a sharp leasehold fee increase pursuant to the Cabin User Fee Fairness Act. The Debtor states she owes at least $3,000.00 in unpaid fees.

**RULING**

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson),* 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

> [O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter,

> whichever is in the best interests of creditors and the estate, for cause....

11 U.S.C. § 1307(c). The court engages in a "totality-of circumstances" test, weighing facts on a case by case basis in determining whether cause exists, and if so, whether conversion or dismissal is proper. *In re Love*, 957 F.2d 1350 (7th Cir. 1992). Bad faith is one of the enumerated "for cause" grounds under 11 U.S.C. § 1307. *Nady v. DeFrantz (In re DeFrantz)*, 454 B.R. 108, 113 FN.4, (B.A.P. 9th Cir. 2011), citing *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1224 (9th Cir. 1999).

At the hearing, xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

Cause [does not] exist to dismiss this case pursuant to 11 U.S.C. § 1307(b).

The motion is [granted/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 Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is xxxxxxxxxxx.

**25. 15-23397-E-13 JASON/SANDRA PERKINS**
**EJS-1 Eric Schwab**

**MOTION TO AVOID LIEN OF VACAVILLE CHRISTIAN SCHOOLS**
**5-8-15 [13]**

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

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

**Below is the court's tentative ruling.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor, Creditor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on May 8, 2015. By the court's calculation, 32 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). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered.

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

This Motion requests an order avoiding the judicial lien of Vacaville Christian Schools ("Creditor") against property of Jason and Sandra Perkins("Debtors") commonly known as 6547 Rogers Lane, Vacaville, California (the "Property").

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

A. The Debtors; residential real property is subject to a judgment lien recorded by judgment creditor Vacaville Christian Schools.

B. The Debtors' bankruptcy schedules list the fair market value of the property, all liens against the property, and a claim of exemption for the property pursuant to C.C.P. 703.140(b)(5).

C. The Debtors now seek to avoid the judicial lien to the extent that it impairs the exemption of their residential real property, pursuant to 11 U.S.C. § 522(f).

The Motion does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not state with particularity the grounds upon which the requested relief is based. The motion merely states that the necessary information is located in the Debtors' petition. This is not sufficient.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the *United States Supreme Court in Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin

to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

*Weatherford*, 434 B.R. at 649-650; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.,* 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

*Martinez v. Trainor*, 556 F.2d 818, 819-820 (7th Cir. 1977).

Not pleading with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities – buried between extensive citations, quotations, legal arguments and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try and float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

Therefore, because the Motion fails to comply with Fed. R. Bankr. P. 9013, 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 Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) 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.

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

**ALTERNATIVE RULING**

This Motion requests an order avoiding the judicial lien of Vacaville Christian Schools ("Creditor") against property of Jason and Sandra Perkins("Debtors") commonly known as 6547 Rogers Lane, Vacaville, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $38,302.97. An abstract of judgment was recorded with Solano County on July 10, 2014, which encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $575,00.00 as of the date of the petition. The unavoidable consensual liens total $715,806.97 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code §703.140(b)(1) in the amount of $1.00 on Schedule C. FN.1.

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FN.1. The court notes that there is a discrepancy in the exemption sought by the Debtor. The Debtor, in the instant Motion, claims an exemption pursuant to Cal. Civ. Proc. Code §703.140(b)(5). However, in Schedule C, the exemption stated is pursuant to Cal. Civ. Proc. Code §703.140(b)(1).

---

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

**ISSUANCE OF A COURT DRAFTED ORDER**

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

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the judgment lien of Vacaville Christian Schools, California Superior Court for Solano County Case No. FCS042358, recorded on July 10, 2014, Document No. 201400051823, with the Solano County Recorder, against the real property commonly known as 6547 Rogers Lane, Vacaville, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

**26. 13-23599-E-13 IVAN MONTELONGO**
**PGM-8 Peter Macaluso**

**CONTINUED MOTION TO APPROVE LOAN MODIFICATION**
**2-6-15 [131]**

**Final Ruling: No appearance at the March 10, 2015 hearing is required.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 6, 2015. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

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

**The Motion to Approve Loan Modification is granted.**

The Motion to Approve Loan Modification filed by Ivan Montelongo ("Debtor") seeks court approval for Debtor to incur post-petition credit. Ocwen Loan Servicing, LLC ("Creditor"), whose claim the plan provides for in Class 4, has agreed to a loan modification which will reduce Debtor's mortgage payment to $1,105.85 at 2% interest. The term of the loan will be 259 months. The modified principal amount will include all amounts and arrearages that will be past due as of the modification effective date. The new principal balance

is $265,623.65, of which $77,600.00 shall be deferred and no interest or monthly payments will be made on that amount.

The Motion is supported by the Declaration of Debtor. 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 OBJECTION**

David Cusick, the Chapter 13 Trustee, filed an objection to the instant Motion on February 23, 2015. Dckt. 136. The Trustee states that he does not object to the terms of the modification. However, the Trustee is not certain if the loan modification agreement is being offered by the party who is the owner or holder of the existing note or, if not, what authority the Creditor has in entering into such modification.

Debtor's counsel filed a secured claim on December 10, 2013, Proof of Claim No. 12-1 for mortgage arrears in the amount of $51,014.23. Debtor's claim indicates Debtor was and is indebted to US Bank, N.A. Debtor filed no attachments to the proof of claim.

There is no evidence showing that Creditor is the actual creditor or has the authority to enter into the loan modification. Neither the creditor nor Debtor have testified that money was borrowed from, a promissory note was signed naming, or that a promissory note was assigned or transferred to Creditor.

**DEBTOR'S RESPONSE**

The Debtor filed a response to the Trustee's objections on March 3, 2015. Dckt. 142. The Debtor requested a 90 day continuance to further investigate who the true holder of the loan is and whether Creditor has the authority to enter into loan modification agreements.

**MARCH 10, 2015 HEARING**

At the hearing, the court continued the hearing to 3:00 p.m. on June 9, 2015, to allow Debtor to conduct such discovery as appropriate to document who the creditor is with whom Debtor is asking the court to approve a loan modification. Dckt. 146.

**DEBTOR'S SUPPLEMENTAL REPLY**

The Debtor filed a supplemental reply on May 20, 2015. Dckt. 156. Debtor states that they have commenced discovery and requested a continuance as discovery is not due until the end of month.

**U.S. BANK, N.A.'S REPLY**

U.S. Bank, National Association, as Trustee for C-BASS Trust 2006-CB9, C-BASS Mortgage Loan Asset-Backed Certificates, Series 2006-CB9 ("Creditor") filed a response to the instant Motion on May 29, 2015. Dckt. 161.

Creditor asserts that Ocwen Loan Servicing, LLC is the loan servicer for the Creditor and authorized and empowered to enter into and execute a loan

modification agreement with the Debtors pursuant to the Pooling and Servicing Agreement.

After reviewing the history of the Debtor's loan, the Creditor argues that the Pooling and Servicing Agreement authorizes the servicer, Ocwen, the power to modify any term of any mortgage loan held by the Trust, subject to limitations that the Creditor summarily says are not presently at issue. The Creditor also states that the limited power of attorney entered into between the Creditor acknowledged that Ocwen Loan Servicing, LLC is servicing the mortgage loans held by the Trust pursuant to the Pooling and Servicing Agreement, and acknowledged those powers granted. Dckt. 163, Exhibits C and F.

The Creditor has attached a copy of a loan modification that now lists the Servicer as "Ocwen Loan Servicing, LLC, as attorney-in-fact for Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans, Inc., Mortgage Asset-Backed Pass-Through Certificates, Series 2007-QS9." Dckt. 163, Exhibit G. However, the dates for the signatures of the Debtors are still January 12, 2015, the same as the original loan modification that just listed "Ocwen Loan Servicing, LLC" as the Servicer.

**DEBTOR'S STATUS REPORT**

The Debtor filed a status report on June 1, 2015. Dckt. 170. The Debtor states that the Debtor has propounded discovery on Ocwen Loan Servicing, LLC on April 20, 2015, but Ocwen Loan Servicing, LLC has failed to respond. The first set of discovery was due on May 22, 2015. On May 23, 2015, the Debtors state that they sent a safe harbor letter, giving an extension to respond until May 29, 2015.

On May 29, 2015, the Creditor filed a response. The Debtors state that Ocwen Loan Servicing, LLC has failed to responds to the discovery request, even with the extension.

Debtors set a hearing for a Motion to Compel Discovery from Ocwen Loan Servicing, LLC for June 30, 2015.

**DEBTORS' REPLY**

The Debtors filed a reply on June 2, 2015. Dckt. 171. The Debtors state that Ocwen Loan Servicing, LLC has failed to respond to discovery. Instead, the Debtors state that the information sought from the discovery request was filed as a response by the Creditor.

The Debtors request that the Motion be granted and that the court resolve the issue over discovery at the hearing on the Motion to Compel.

**DISCUSSION**

The instant Motion and identifying the proper creditor should not be this difficult. The only reason for the continuance on the instant Motion is the failure of the parties to properly identify the holder of the note and to provide evidence that Ocwen Loan Servicing, LLC has the authority to enter into a modification on behalf of the holder.

As the court has stated numerous times in connection with loan servicers, if these parties wish to act on behalf of the actual creditor, the servicer must indicate they are acting as such and provide evidence that they are authorized to do so. Instead, these servicers, most notably Ocwen Loan Servicing, LLC, continue to represent that they are modifying the loans on their own behalf which leaves this court questioning if the ever had the authority in the first place. The court continues to be baffled why, after years of these conversations, why Ocwen Loan Servicing, LLC does not either indicate they are acting pursuant to a power of attorney or under a Pooling and Servicing Agreement. Instead, simple Motions to Approve Loan Modification become unnecessarily long and drawn out proceedings.

However, reviewing the instant Motion, the response of the Creditor has provided the information as well as the evidence that should have been provided from the time the modification was proposed. The Creditor has provided the agreements and power of attorney that grant Ocwen Loan Servicing, LLC the authority to enter into loan modification on behalf of the Creditor. While the Creditor's response does not excuse Ocwen Loan Servicing, LLC from answering the discovery requests of the Debtors, for purposes of this Motion, the information provided by the Creditor satisfies the court that Ocwen Loan Servicing, LLC had the authority to enter into the loan modification.

This post-petition financing is consistent with the Chapter 13 Plan in this case and Debtor's ability to fund that Plan. The terms of the modification allow for a reduction in monthly payment and the new principal balance includes any arrearage. There being no objection from the Trustee or other parties in interest after the Creditor has provided evidence that Ocwen Loan Servicing, LLC is authorized to enter into such modification, and the motion complying with the provisions of 11 U.S.C. § 364(d), the Motion to Approve the Loan Modification is granted. FN.1.

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FN.1. Neither U.S. Bank, N.A. nor Owen Loan Servicing, LLC, U.S. Bank, N.A.'s chosen agent, should take the approval of this modification as approving the failure to comply with discovery. The court shall address with both Ocwen Loan Servicing, LLC and U.S. Bank, N.A., the principal who is responsible (liable) for the misconduct of its agent in acting for U.S. Bank, N.A. in this bankruptcy case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve the Loan Modification filed by Ivan Montelongo 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 court authorizes Ruben and Ivan Montelongo ("Debtor") to amend the terms of the loan with Ocwen Loan Servicing, LLC, as attorney-in-fact for U.S. Bank, National Association, as Trustee for C-BASS Trust 2006-CB9, C-

BASS Mortgage Loan Asset-Backed Certificates, Series 2006-CB9, which is secured by the real property commonly known as 4843 Skyway Drive, Fair Oaks, California, on such terms as stated in the Modification Agreement filed as Exhibit A in support of the Motion, Dckt. 134.

**27. 13-23599-E-13 IVAN MONTELONGO** **CONTINUED MOTION TO MODIFY PLAN**
**PGM-7 Peter Macaluso** **2-6-15 [124]**

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

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

**Below is the court's tentative ruling.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on February 6, 2015. By the court's calculation, 46 days' notice was provided. 35 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

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

Ivan Montelongo ("Debtor") filed the instant Motion to Confirm the Modified Plan on February 6, 2015. Dckt. 124.

**TRUSTEE'S OBJECTIONS**

David Cusick, the Chapter 13 Trustee, filed an objection to the instant Motion on March 2, 2015. Dckt. 139. The Trustee objects on the following grounds:

1. The Debtor is delinquent $140.00 under the terms of the proposed modified plan. According to the proposed plan, payments of $46,570.00 have become due. The Debtor has paid a total of $46,430.00 to the Trustee. It appears the Debtor cannot make the payments required under 11 U.S.C. § 1325(a)(6).

2. Debtor's proposed modified plan is contingent upon court approval of Debtor's loan modification. The Debtor filed a Motion for Order Approving Loan Modification (Dckt. 131) which was heard on March 10, 2015. The Trustee filed an objection to that motion due to the uncertainty of whether the loan modification agreement was being offered by the party who is the actual owner or holder of the existing note, or what authority the party offering the loan modification has to offer the loan modification.

3. Debtor's declaration provides no explanation for the various adjustments in expenses between prior Schedule J and current supplemental Schedule J (Dckt. 127, Exhibit 3). The Trustee provides the following chart highlighting the changes.

| | August 14, 2014 | February 6, 2015 | Difference |
|---|---|---|---|
| Mortgage | $0.00 | $1,105.85 | +$1,105.85 |
| Electricity/Heat | $147.00 | $190.00 | +$40.00 |
| Water/Sewer/Garbage | $100.00 | $45.00 | -$55.00 |
| Telephone/Cell/Cable | $0.00 | $51.00 | +$51.00 |
| Food | $200.00 | $300.00 | +$100.00 |
| Medical/Dental | $0.00 | $160.00 | +$160.00 |
| Transportation | $200.00 | $150.00 | -$50.00 |
| Entertainment | $7.22 | $50.00 | +$42.78 |

The Trustee notes that while the mortgage adjustment is undoubtedly due to Debtor's proposed reclassification of the mortgage and arrears from Class 1 to Class 4 and the pending loan modification, the balance of the adjustments remain unexplained. Debtor's budget appears to be very tight for a family of two.

4. The Trustee is uncertain of the treatment of the Internal Revenue Service in Class 2 of Debtor's proposed plan. Debtor classifies the Internal Revenue Service as Class 2B reduced based on value of collateral. The Trustee is unable to locate a motion to value regarding this creditor. Internal Revenue Service filed a claim for $83,054.80 on April 26, 2013 (Claim #2-1) claiming a secured portion in the amount of $6,559.64, an unsecured priority portion of

$57,742.89 and an unsecured portion of $18,752.27. The creditor filed an amended claim on November 13, 2013 for $17,874.10, claiming a secured portion in the amount of $6,559.64, an unsecured priority portion of $9,249.66, and an unsecured portion of $2,064.80. Debtor classifies the Internal Revenue Service as Class 2B and indicates the value of the creditor's interest in its collateral is $5,860.64. The Trustee is unable to determine if Debtor plans to value this creditor, or whether a classification of Class 2A would be more appropriate.

**DEBTOR'S RESPONSE**

The Debtor filed a reply to the Trustee's objection on March 17, 2015. Dckt. 147. The Debtor replies as follows:

1. Debtor will be current on or before the hearing.

2. Debtor's loan modification has been continued for Ocwen Loan Servicing to show the ability to offer such a loan modification.

3. Absent the medical/dental which was deferred for the first two years of the plan, all other expenses increased and are reasonable for the cost of living. The Debtor is being frugal.

4. The Internal Revenue Service's proof of claim dictates where no Motion to Value Collateral has been filed, and as such, should be provided for as a Class 2A claim. This could be remedied in the Order to Modify.

**MARCH 24, 2015 HEARING**

At the hearing, continued the hearing to 3:00 p.m. on June 9, 2015 to be heard in conjunction with Debtor's Motion to Approve Loan Modification. Dckt. 151. The court further ordered that the Debtor shall file and serve a supplemental declaration on or before May 19, 2015 providing a detailed explanation for the reduction in expenses in Debtor's supplemental Schedule J.

**TRUSTEE'S SUPPLEMENTAL DECLARATION**

The Trustee filed a supplement to the Trustee's response on May 27, 2015. Dckt. 158. The Trustee states that the Debtor has filed a supplemental reply in connection with the continued Motion to Approve Loan Modification, which indicated that the Debtor requests a 60 day continuance to continue discovery. Dckt. 156. The Trustee states that he is unable to locate a supplement from the Debtor in connection with the instant Motion. However, the Trustee states that he does not oppose the court continuing the instant Motion with the Motion to Approve Loan Modification, especially in light of the fact that the Debtor is current under the modified plan.

**MARCH 24, 2015 HEARING**

At the hearing, the continued the matter to 3:00 p.m. on June 9, 2015 to be heard in conjunction with Debtor's Motion to Approve Loan Modification. The court further ordered that the Debtor shall file and serve a supplemental declaration on or before May 19, 2015 providing a detailed explanation for the reduction in expenses in Debtor's supplemental Schedule J.

**TRUSTEE'S SUPPLEMENT**

The Trustee filed a supplement to his objection on May 27, 2015. Dckt. 158. The Trustee states that the Debtor has not filed a supplement addressing the changes in expenses on Debtor's Supplemental Schedule J, as required by the order continuing the hearing.

**DISCUSSION**

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

The Trustee's objections are well-taken.

As to the expenses reduction, while they appear to be relatively reasonable, the Debtor's response does not provide explanation to justify the changes nor address the concerns that the budget may be unreasonably low for two people. Also, the Debtor is correct that the treatment of the Internal Revenue Service could be corrected in the Order Confirming.

However, the Debtor has failed to file a supplemental declaration describing the reduction in expenses, even after the court ordered that the Debtor provide such information on or before May 19, 2015.

Because the Debtor has failed to provide a reasonable explanation as to the reduction in expenses, the court and the Trustee cannot determine whether the Supplemental Schedule J is an accurate reflection of the Debtor's financial reality. This is cause to deny confirmation.

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

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

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