UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

Notice
The court has reorganized the cases, placing all of the Final Rulings in the second part of these Posted Rulings, with the Final Rulings beginning with Item 7.

The court has also reorganized the items for which the tentative rulings are issued, Items 1–6, attempting to first address the items in which short argument is anticipated.

June 12, 2018, at 3:00 p.m.

---

1. **17-27640-E-13** **ROBERT RODNI** **MOTION TO MODIFY PLAN**
WW-2 **Mark Wolff** **5-3-18 [22]**

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 3, 2018. By the court's calculation, 40 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

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

Robert Rodni ("Debtor") seeks confirmation of the Modified Plan because his income and expenses have changed and because he is delinquent under the confirmed Plan. Dckt. 24. The Modified Plan proposes to excuse missed payments, adjust future plan payments, and change the classification of creditors. Dckt. 26. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on May 25, 2018. Dckt. 30. The Chapter 13 Trustee asserts that Debtor must increase the monthly payment by $19 because the ongoing mortgage payment is $1,870.02 based on the proof of claim rather than $1,853.00 as provided for in the Plan. *See* Claim 6-1, filed on December 21, 2017. Wells Fargo Bank. N.A. ("Creditor") filed Proof of Claim 6-1 on December 21, 2017, and indicated on the Mortgage Proof of Claim Attachment the monthly post-petition mortgage payment was $1870.02. As Debtor's Plan now calls for the monthly post-petition payment to be the amount in the proof of claim, the Chapter 13 Trustee will adjust the monthly payment to that amount effective with the December 2017 payment if the Plan is confirmed. Creditor has not filed a Notice of Mortgage Payment Change.

Debtor is adding U.S. Bank to Class 1 with arrears in the amount of $88.62, an arrears dividend of $20.00, and an ongoing payment of $88.62. Dckt. 26. However, U.S. Bank filed claim 1-1 indicating $0.00 arrears, so the Chapter 13 Trustee cannot pay the arrears unless U.S. Bank's claim is amended or successfully objected to. U.S. Bank filed a Notice of Mortgage Payment Change on May 11, 2018, indicating a monthly payment of $93.14 with a $5 increase for plan payments.

DEBTOR'S REPLY

Debtor filed a Reply on June 5, 2018. Dckt. 34. In the Reply, Debtor consents to the increase in payments totaling $24.00 per month, beginning with the May 2018 monthly payment. Debtor states that he has sent a payment of $24.00 to the Chapter 13 Trustee for application to the May 28 payment. Debtor also requests that his Modified Plan be confirmed with an increase in payments of $24.00 commencing with the May 2018 payment.

RULING

Debtor's proposal to increase the plan payments moves Debtor one step closer to achieving a confirmed plan, but the court notes that Debtor proposes the increase only as of May 2018. The Chapter 13 Trustee calculates that an increase of $19 began in December 2017, with an additional $5 increase in May 2018. Debtor has not provided for the $95 in necessary increased payments since December 2017. At the

hearing, **Debtor agreed to increase plan payments by $19 as of the December 2017 payment and then by an additional $5 commencing with the May 2018 payment.**

The Plan is feasible because Debtor consents to the increase in payment.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Modified Chapter 13 Plan filed by Robert Rodni "Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the ~~Motion is granted, and Debtor's Modified Chapter 13 Plan filed on May 3, 2018, as amended~~ **~~to increase plan payments by $19 as of the December 2017 payment and then by an additional $5 commencing with the May 2018 payment~~**~~, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to David Cusick ("the Chapter 13 Trustee") for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.~~

2. **18-21865-E-13 DPC-1** | **RONALD/JULIE EHMKE** **Bruce Dwiggins** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 5-11-18 [14]**

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on May 11, 2018. By the court's calculation, 32 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Debtor, Creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection. At the hearing ----------.

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

David Cusick ("the Chapter 13 Trustee") opposes confirmation of the Plan on the basis that Debtor's treatment of the secured claim of Wells Fargo Dealer Services ("Creditor") is questionable due to Debtor's failure to list Creditor's claim in Class 4 of the Plan.

Creditor asserts a claim of $15,049.62 in this case. Proof of Claim No. 8-1. Debtor's Schedule D estimates the amount of Creditor's claim as $15,176.00 and indicates that it is a loan secured by a lien. The Plan must provide for Creditor's claim as a Class 4 claim because Debtor asserts that 61 payments remain on the loan contract, which indicates the claim will mature after the completion of the Plan.

11 U.S.C. § 1322(a) is the section of the Bankruptcy Code that specifies the mandatory provisions of a plan. It requires only that a debtor adequately fund a plan with future earnings or other future income that is paid over to the Chapter 13 Trustee (11 U.S.C. § 1322(a)(1)), provide for payment in full of priority claims (11 U.S.C. § 1322(a)(2) & (4)), and provide the same treatment for each claim in a particular

class (11 U.S.C. § 1322(a)(3)). Nothing in § 1322(a) compels a debtor to propose a plan that provides for a secured claim, however.

11 U.S.C. § 1322(b) specifies the provisions that a plan may include at the option of the debtor. With reference to secured claims, the debtor may maintain ongoing contract installment payments while curing a pre-petition default (11 U.S.C. § 1322(b)(5)).

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

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

B. Provide for payment in full of the entire claim if the claim is modified or will mature by its terms during the term of the Plan (11 U.S.C. § 1325(a)(5)(B)), or

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

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

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

Notwithstanding the absence of a requirement in 11 U.S.C. § 1322(a) that a plan provide for a secured claim, because Debtor has listed the secured claim of Creditor in Schedule D of Form 106D, the fact that the Plan does not provide for Creditor's secured claim raises the question as to whether the secured claim is unintentionally absent from the Class 4 claim section. Dckt 1, 8. Additionally, as the Chapter 13 Trustee's Objection has pointed out, Debtor has accounted for the installment payment to Creditor on Schedule J. Dckt 1.

At the hearing, Debtor stated that ~~omitting Creditor's claim from Class 4 was an oversight, and Debtor proposed amending the Plan to include Creditor's claim in Class 4 with a monthly installment of $318.00.~~

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 David Cusick ("the Chapter 13 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection is ~~overruled, and Ronald Ehmke and Julie Ehmke's ("Debtor") Chapter 13 Plan filed on March 29, 2018, as amended to include Wells Fargo Dealer Services's claim in Class 4, is confirmed. Counsel for Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.~~

3. 18-21867-E-13 DPC-1 **AMY WOODS Michael Hays** **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 5-11-18 [17]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on May 11, 2018. By the court's calculation, 32 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Debtor, Creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection. At the hearing ~~----------~~.

The Objection to Confirmation of Plan is sustained.

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

A. The Plan is not feasible under 11 U.S.C. § 1325(a)(6); and

B. Amy Woods ("Debtor") fails to disclose that she may have a claim against her former employer to comply with11 U.S.C. § 541(a)(5).

The Chapter 13 Trustee's objections are well-taken. Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). The First Meeting of Creditors was held on May 10, 2018. Debtor appeared and reported that she recently lost her job and is currently unemployed. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

Debtor filed the bankruptcy petition on March 29, 2018. She stated that her monthly income was $2,994.00. *See* Schedule I, filed on April 6, 2018. Dckt. 16. On May 10, 2018, Debtor explained at the Meeting of Creditors that she was fired by her employer and that she may have a claim against her employer for wrongful termination.

The Chapter 13 Trustee alleges that Debtor's potential lawsuit may be an asset of the estate that is not disclosed on Schedule A/B. The Chapter 13 Trustee also alleges that the disclosure may be required pursuant to Federal Rule of Bankruptcy Procedure 1007(h), 11 U.S.C. § 541(a)(5), and the reasoning in *Dale v. Maney (In re Dale)*, 505 B.R. 8 (B.A.P. 9th Cir. 2014).

11 U.S.C. § 541(a)(5) states that the following is property of the estate:

> Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date -
>
> (A) by bequest, devise, or inheritance;
>
> (B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or
>
> (C) as a beneficiary of a life insurance policy or of a death benefit plan.

The Chapter 13 Trustee has not clarified how Debtor's potential claim can be considered an "interest in property" under 11 U.S.C. § 541(a)(5). The case relied upon the Chapter 13 Trustee discusses Section 541 in relation to an inheritance received by the debtor, which is covered specifically by subsection (A), but he has not linked a wrongful termination claim to the section.

11 U.S.C. § 541(a)(7) states that property of the estate includes:

> Any interest in property that the estate acquires after the commencement of the case.

A Chapter 13 debtor has a statutory duty to disclose all assets or potential assets to the bankruptcy court, pursuant to 11 U.S.C.§§ 521(1) and 541(a)(7). *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1274–75 (11th Cir. 2010) (holding that a post-petition lawsuit is property of the bankruptcy estate that debtor had a duty to disclose). The duty to disclose does not end once the forms are submitted to the bankruptcy court; rather the debtor must amend financial statements if circumstances change. *Id.* A pending lawsuit seeking monetary compensation qualifies as an asset, and such asset is property of the bankruptcy estate. *Id.*

Congress broadened what constitutes property of the bankruptcy estate, providing in 11 U.S.C. § 1306(a) [emphasis added]:

> § 1306. Property of the estate
>
> (a) Property of the estate includes, in addition to the property specified in section 541 of this title–
>
> > (1) all property of the kind specified in such section that the **debtor acquires after the commencement of the case** but before the case is closed, dismissed, or converted to a case under chapter 7, or 11, or 12 of this title, whichever occurs first; and
> >
> > (2) **earnings from services performed by the debtor after the commencement of the case** but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.

As discussed in *Ambron v. PNC Bank*, a post-petition wrongful termination claim that exists in a Chapter 7 case does not become property of the bankruptcy estate, but that same claim in a Chapter 13 case does become property of the estate due to the provisions of 11 U.S.C. § 1306(a). *See* No. 1:14-CV-402, 2015 U.S. Dist. LEXIS 67986, at *12–14 (W.D. Mich. May 27, 2015) (citing *Kimberlin v. Dollar Gen. Corp.*, 520 F. App'x 312, 315 (6th Cir. 2013)).

Thus, it appears that the bankruptcy estate has claims for the wrongful termination, including loss of post-petition income, which must be administered by Debtor.

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 David Cusick ("the Chapter 13 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

4.	**17-24875-E-13** **PGM-5**	**LINDA VANPELT** **Peter Macaluso**	**OBJECTION TO NOTICE OF MORTGAGE PAYMENT CHANGE** **4-23-18 [132]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor, Debtor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on April 23, 2018. By the court's calculation, 50 days' notice was provided. 28 days' notice is required.

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

The Objection to Notice of Mortgage Payment Change is overruled.

Linda VanPelt ("Debtor") objects to the Notice of Mortgage Payment Change ("NMPC") filed by HSBC Bank USA, National Association as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2007-10, by and through its servicing agent Wells Fargo Bank, N.A., ("Creditor") on March 5, 2018. Debtor argues that while the escrow payment increased $505.74, the overall payment somehow increased $3,928.46.

Debtor also argues that the current escrow payment listed on the Escrow Review Statement is $569.64, not the $846.34 asserted in the NMPC.

Debtor asserts that he is entitled to an award of attorney's fees under California Civil Code § 1717 pursuant to his contract with Creditor. Debtor requests $1,200.00 be awarded for the attorney's fees incurred in bringing this Objection.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on May 25, 2018. Dckt. 144. The Chapter 13 Trustee notes that Creditor filed Claim 5-1 on September 7, 2017, in the amount of $956,617.00, with monthly mortgage payments of $4,834.70 in principal and interest and $846.34 in escrow payments. The Chapter 13 Trustee stresses that Debtor has been proposing adequate protection payments $2,258.32 and has not proposed to pay Creditor at the contract rate.

The Chapter 13 Trustee states that the escrow increase of $505.74 is consistent with the figures in Creditor's Proof of Claim, especially because the Proof of Claim indicated that an interest-only period would end on June 1, 2017, which would result in interest payments of $3,512.46. According to the Chapter 13 Trustee's calculation, the ongoing principal and interest payments alone would need to be $7,132.28, but Creditor appears to have provided a benefit to Debtor by asserting a lower amount owed.

CREDITOR'S RESPONSE

Creditor filed a Response on May 29, 2018. Dckt. 147. Creditor argues that the principal and interest of $4,834.70 has remain fixed and is not at issue here. Instead, Creditor notes that what has changed is the amount of escrow payment.

Justifying the increase in escrow, Creditor argues first that the increase is correct because Debtor has failed to maintain hazard insurance on Debtor's real property. Previously, escrow had been comprised only of property taxes of $846.34 per month. Now, property taxes have increased to $870.42 per month, and Creditor force placed insurance on the property with an annual premium of $2,512.00, which equates to $209.33 per month.

Creditor also argues that Debtor has not been making escrow payments after filing this case, leading to an escrow shortage of $3,267.96 in the next twelve months (factoring in the insurance premium). That shortage requires an additional $272.33 per month to be cured. Therefore, Creditor argues that the increase indicated in the NMPC is correct.

Arguing that the NMPC is calculated correctly, Creditor also argues that Debtor is not entitled to an award of attorney's fees.

REVIEW OF NOTICE OF MORTGAGE PAYMENT CHANGE
(Filed March 5, 2018)

The NMPC states that there is no increase to principal and interest and that the only change is to escrow payments. The NMPC indicates on Page 5 that actual property insurance expenses of $2,512.00 were incurred for the period April 2017–March 2018. That amount appears to be the forced place insurance referenced by Creditor. Additionally, the NMPC indicates that there will be an escrow shortage of $3,267.96, leading to an increase in escrow payments of $272.33. Finally, the NMPC also indicates that projected future property taxes will increase.

RULING

On its face, the NMPC indicates that there are three changes to Debtor's escrow payments, comprised of increasing property taxes, insurance payments, and escrow shortage. Debtor has not shown any valid ground why any of those increases is incorrect. Instead, Debtor argues that the NMPC must be incorrect because a prior escrow projection showed a lower amount.

The bulk of the increase in the NMPC appears to be from Creditor force placing insurance on Debtor's property, which itself triggered an escrow shortage. Debtor cannot rely upon a prior projection that anticipated Debtor maintaining insurance on the property when Debtor has not in fact been paying for property insurance.

Conspicuously missing from the Objection, is any declaration from Debtor testifying to how the NMPC must be incorrect because Debtor actually has provided for insurance payments and can prove that the property is insured.

Reviewing the Amended Notice of Mortgage Payment Change relied upon by Debtor (Exhibit A, Dckt. 134), the court sees the following:

A. The total new payment is computed to be $6,186.78.

B. The escrow payment is increased $505.74.

1. There is a $3,267.96 post-petition escrow shortage

2. The escrow shortage arises due to underfunding in the tax payment and insurance payment.

3. The new escrow payment is $1,079.75, plus an additional $272.33 to cure the post-petition arrearage.

C. The principal and interest payment will increase to $4,834.70, from the prior amount of $1,688. This is reported as arising because prior to June 1, 2017, Debtor was only obligated to make an interest-only payment, with the Note now requiring Debtor to make a $4,834.70 principal payment. Response, Dckt. 144.

Debtor acknowledges that the principal and interest payment shall be $4,834.70. It appears that Debtor had forgotten that Debtor was not having to pay principal amounts pre-petition.

The Objection is overruled.

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

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

The Objection to Notice of Mortgage Payment Change filed by Odete Cabral ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection to Notice of Mortgage Payment Change is overruled.

5. **10-50178-E-13** **MARIA DE LA GARZA** **MOTION TO AVOID LIEN OF**
TJW-5 **Timothy Walsh** **AMERICAN EXPRESS BANK, FSB**
5-24-18 [105]

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

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

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

FN.1. Movant has not specified clearly whether the Motion is noticed according to Local Bankruptcy Rule 9014-1(f)(1) or (f)(2). The Notice of Motion states that a hearing will be held for an order avoiding a judicial lien, and the hearing will be based upon submitted pleadings as well as argument at the hearing. Based upon language that any opposition must be presented at the hearing, the court treats the Motion as being noticed according to Local Bankruptcy Rule 9014-1(f)(2). Counsel is reminded that not complying with the Local Bankruptcy Rules is cause, in and of itself, to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(c)(l).

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, and Office of the United States Trustee on May 29, 2018. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion to Avoid Judicial Lien is denied without prejudice.

This Motion requests an order avoiding the judicial lien of American Express Bank FSB ("Creditor") against property of Maria De la Garza ("Debtor") commonly known as 451 Ebbetts Pass Road, Vallejo, California ("Property").

A judgment was entered against Debtor's former spouse in favor of Creditor in the amount of $11,178.08. An abstract of judgment was recorded with Solano County on June 8, 2010, that encumbers the Property.

The court has reviewed the various pleadings submitted by Debtor in this case and does not see a date listed anywhere for when Debtor and her former spouse were divorced. The petition was filed on November 16, 2010, and it indicates that Debtor and her former spouse separated at some point before this case was filed. *See* Dckt. 1. No mention is made of whether the Property was acquired as community property or when it was acquired, but Debtor lists her interest on Schedule A as "fee simple" ownership of the Property. *Id.*

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of $150,000.00 as of the petition date. *Id.* The unavoidable consensual liens that total $346,800.19 as of the commencement of this case are stated on Debtor's Schedule D. *Id.* Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of $100.00 on Schedule C. *Id.*

What is clear from the pleadings is that Creditor's judgment lien was acquired pre-petition, and it named only Debtor's former spouse (Diego Ortiz) as the judgment debtor.

If a debtor does not have an interest in property at the time a creditor's lien attaches to the property, then that debtor cannot avoid the fixing of the lien under 11 U.S.C. § 522(f). *Farrey v. Sanderfoot*, 500 U.S. 291 (1991). The Supreme Court has held that a transfer of property arising from a divorce proceeding creates an interest in property, but a debtor who receives that property subject to a judicial lien cannot avoid its fixing because the property interest and the affixing of the lien arose simultaneously for the new debtor, as opposed to the lien affixing to a pre-existing interest of the debtor. *Id.* at 300 (stating that because the debtor "took the interest and the lien together, . . . [he] never possessed his new fee simple interest before the lien 'fixed,' [and] § 522(f)(1) is not available to avoid the lien.").

The Supreme Court decision in *Farrey* comes into play because Debtor has not shown that the lien was placed on an interest of Debtor's in property. Rather, the evidence presented by Debtor shows that the lien was placed on Debtor's former spouse's interest in the Property. No evidence has been presented that Debtor had an interest in the Property at the time Creditor's lien attached to it, which would indicate that Debtor may not be able to avoid the fixing of Creditor's lien.

The Motion is denied without prejudice.

Cognizant that Debtor may refile this Motion with additional information to support a claim for relief, the court notes that the Supreme Court's temporal focus on 11 U.S.C. § 522(f) has been scrutinized. Collier on Bankruptcy has gone so far as to comment that "[t]he Court's analysis arguably is based on a flawed analogy." 4 COLLIER ON BANKRUPTCY ¶ 522.11[4] (Alan N. Resnick & Henry H. Sommer eds. 16th ed.). *Farrey*'s effect of viewing property transactions and lien affixing as happening at the same time has spread throughout the circuits, with the possible outcome that "debtors might be unable to avoid liens on otherwise exempt property whenever the lien on the property involved attached by the virtue of an after-acquired property provision." *Id.* (noting that the temporal focus has "generated a significant following");

see Marine Midland Bank v. Scarpino (In re Scarpino), 113 F.3d 338 (2d Cir. 1997); *Owen v. Owen*, 961 F.2d 170 (11th Cir. 1992), *cert. denied*, 506 U.S. 1022 (1993).

While Collier on Bankruptcy argues strongly that the temporal analysis is not relevant and that fixing actually is about whether a lien has attached to property in which a debtor has interest, the court notes that the Ninth Circuit has followed the Supreme Court's *Farrey* decision. *See, e.g.*, *Van Deusen v. Keys (In re Keys)*, 479 F. App'x 67, 68 (9th Cir. 2012) (citing *Farrey*, 500 U.S. 291) ("A debtor may avoid a lien under section 522(f)(1) unless it arose before or at the same time as the debtor acquired the property interest at issue.").

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 Maria De la Garza ("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.

6. **17-25985-E-13** **DANIEL MARTINEZ** **MOTION TO CONFIRM PLAN**
MRL-4 **Mikalah Liviakis** **4-17-18 [92]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 17, 2018. By the court's calculation, 56 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

The Motion to Confirm the Amended Plan is denied.

Daniel Martinez ("Debtor") seeks confirmation of the Amended Plan filed April 17, 2018, stating he has a steady income of $4,000.00, which will provide for the adjusted monthly payments, and Debtor has updated Schedules I and J. Dckt. 94. The Amended Plan calls for payments of $2,450.00 for one month; $500.00 for eleven months; and $880.00 for forty-eight months; with 0.00% dividend to general unsecured claims. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CREDITOR'S FIRST OPPOSITION

Wells Fargo Bank, N.A., ("Creditor") holding a secured claim filed an Opposition on May 8, 2018. Dckt. 102.

The objecting creditor holds a deed of trust secured by Debtor's residence. Creditor has filed a timely proof of claim in which it asserts $32,623.53 in pre-petition arrearages. Claim 5-1. The Plan does

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

Creditor argues that Debtor's Plan was not filed in good faith and is an improper modification of a claim secured only by a security interest in real property that is Debtor's principal residence. Creditor states that the currently monthly payment due is $543.73. Creditor objects to the proposed modification of the Plan and argues that Debtor has proposed lower monthly payments than due. Creditor argues that Debtor is unable to modify a claim secured by real property that is Debtor's principal residence. 11 U.S.C. § 1322(b)(2). The anti-modification provision applies to any loan secured only by real property that Debtor uses as a principal residence. *In re Wages*, 508 B.R. 161, 168 (B.A.P. 9th Cir. 2014).

Creditor has filed a Proof of Claim indicating a secured claim in the amount of $333,307.98, secured by a mortgage deed of trust against the property commonly known as 600 5th Ave., Sacramento, California. Claim 5-1. Debtor's Schedules indicate that this is Debtor's primary residence. This modification violates 11 U.S.C. § 1322(b)(2), which prohibits the modification of an obligation secured only by Debtor's residence.

CREDITOR'S SECOND OPPOSITION

Creditor filed a second Opposition through difference counsel for another secured claim it asserts in this case on May 23, 2018. Dckt. 105.

The objecting creditor holds a deed of trust secured by Debtor's residence. Creditor has filed a timely proof of claim in which it asserts $3,224.12 in pre-petition arrearages. Claim 3-2. The Plan does not propose to cure those arrearages. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments because it does not provide for the surrender of the collateral for this claim. *See* 11 U.S.C. §§ 1322(b)(2) & (5), 1325(a)(5)(B). The Plan cannot be confirmed because it fails to provide for the full payment of arrearages.

Creditor argues that Debtor's Plan was not filed in good faith and is an improper modification of a claim secured only by a security interest in real property that is Debtor's principal residence. Creditor states that its claim is secured in the amount of $36,528.24. Claim 3-2. Creditor objects to the Plan modification which reflects a monthly dividend of $64.38. Dckt. 96. Creditor argues that Debtor is unable to modify a claim secured by real property that is Debtor's principal residence. 11 U.S.C. § 1322(b)(2). The anti-modification provision applies to any loan secured only by real property that Debtor uses as a principal residence. *In re Wages*, 508 B.R. 161, 168 (B.A.P. 9th Cir. 2014).

Creditor has filed a Proof of Claim indicating a secured claim, secured by a mortgage deed of trust against the property commonly known as 600 5th Ave., Sacramento, California. Claim 3-2. Debtor's Schedules indicate that this is Debtor's primary residence. This modification violates 11 U.S.C. § 1322(b)(2), which prohibits the modification of an obligation secured only by Debtor's residence.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on May 25, 2018. Dckt.108.

The Chapter 13 Trustee asserts that Debtor is $2,500.00 delinquent in plan payments, which represents multiple months of the $500.00 plan payment ($2,450.00 due for month 1, $500.00 per month for 11 months, and $880.00 per month for 48 months). Dckt. 96. The Chapter 13 Trustee asserts that Debtor has paid $2,450.00 into the Plan to date and $4,450.00 is the total amount due to date. According to the Chapter 13 Trustee, the Plan in § 2.01 calls for payments to be received by the Chapter 13 Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

The Chapter 13 Trustee asserts that Debtor may have intended to list the first and second mortgages held by Creditor, which are treated as Class 2 claims in the Plan, as Class 4 claims. Dckt. 108. Class 2 claims subject to Section 3.08(c) of the Chapter 13 Plan are paid by the Chapter 13 Trustee as a monthly dividend. Class 2 claims, are secured by Debtor's principal residence, and, except as permitted by 11 U.S.C. § 1322(c), may not be modified as to the rights of a holder of a secured claim. Debtor lists the claims secured by his primary residence in Section 3.08 of the Plan as Class 2 claims. Dckt. 96. Debtor states that the sale of real property, commonly known as 600 5th Avenue, Sacramento, California, will allow Debtor to pay in full the Class 2 Claims. Dckt. 92. As stated in the Chapter 13 Trustee's Opposition, Debtor cannot pay said claims directly from the proceeds of the sale of his real property unless the claims are treated as Class 4. Dckt. 108.

The Chapter 13 Trustee asserts that Debtor's non-standard payment provision in Section 2.02 of the Plan (Other Payments) indicates that the payments for months 2 through 12 are subject to the sale of Debtor's real property. Dckt. 96. Section 7 of Debtor's Plan indicates the monthly payment plan amounts. Section 2.01 provides that monthly payments are due "each month after the order for relief under chapter 13." *Id.* Debtor lists a payment of $5,500 in "net proceeds that he receives from the sale of his real property" under section 2.02 of the Plan. Section 2.02 provides for *additional payments* derived from the sale of property. Also, Section 2.02 of Debtor's plan is inconsistent with statements in page 2, lines 5–8 of Debtor's Motion to Confirm Plan, which indicate a good faith proposal by Debtor to make monthly payments. Dckt. 92.

11 U.S.C. §§ 1322(a)(1), 1325(a) provides that a plan shall specify how it will be funded and requires a timely, regular monthly payment — a plan that is also required to verify how that debtor has the ability to make the regular monthly payments required by the plan. *See In re Keller*, 329 B.R. 697, 700 (Bankr. E.D. Cal. 2005); *see also In re Gavia*, 24 B.R. 573, 575 (B.A.P. 9th Cir. 1982) ("[W]e construe [section 1322(b)(8)] as permitting a plan to *supplement payments* from future income.") (emphasis added). If Debtor is proposing a lump sum payment rather than monthly payments required by the Plan, this modification needs to be expressly proposed for the creditors and Chapter 13 Trustee to review the impact or benefit of Debtor's additional income. *In re Keller*, 329 B.R. at 701.

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

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

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

FINAL RULINGS

7.	**18-22010-E-13** **DPC-2**	**JERRY/CAROLINE CHAVEZ** **Jeffrey Ogilvie**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **5-15-18 [15]**

Final Ruling: No appearance at the June 12, 2018 hearing is required.

Local Rule 9014-1(f)(2) Objection—No Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on May 15, 2018. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Debtor, Creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection. At the hearing ----------.

The Objection to Confirmation of Plan is sustained.

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

A. The Plan fails the Chapter 7 liquidation analysis.

B. The Plan is not Jerry Chavez and Caroline Chavez's ("Debtor") best effort.

The Chapter 13 Trustee's objections are well-taken. The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtor's plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). Debtor has claimed a homestead exemption of $175,000.00 under California Code of Civil Procedure § 704.730. *See* Schedule C, filed on April 3, 2018. Dckt 1. However, Debtor fails to provide any evidence that they are entitled to claim this exemption. The Chapter 13 Trustee filed an Objection to Debtor's Claim of Exemptions on May 15, 2018, and that hearing is scheduled for 3:00 p.m. on June 26, 2018.

The Chapter 13 Trustee states that Debtor would be entitled to exempt $100,000.00 of the equity in their real property under C.C.P. § 704.730. That would leave $54,283.00 non-exempt, and Debtor is proposing a 0% dividend to unsecured claims and proposing to pay priority unsecured creditors $16,131.00.

The Plan fails the Chapter 7 liquidation analysis also because Debtor fails to disclose that they may have a possible insurance claim on Schedule B or claim it as exempt on Schedule C. Question No. 33 of Schedule B requires Debtor to disclose "Claims against third parties, whether or not you have filed a lawsuit or made a demand for payment." *See* Schedule B, Dckt. 1.

The Chapter 13 Trustee alleges that the Plan violates 11 U.S.C. § 1325(b)(1), which provides:

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

The Plan proposes to pay $3,207.00 for sixty months with a 0% dividend to unsecured creditors. Debtor's 2017 income tax returns reflect that Debtor received a refund of $2,459 from the Internal Revenue Service and $499 from the Franchise Tax Board, however Debtor is not proposing to pay that disposable income into the Plan.

DEBTOR'S REPLY

Debtor filed a Reply on May 24, 2018, Dckt. 23. Debtor promises to file an amended plan and submit verification of the homestead exemption.

RULING

Unfortunately for Debtor, a promise to file a new plan and evidence of the homestead exemption amount is not evidence that cures the Objection. The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The Objection is sustained, and the Plan is not confirmed.

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

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

8. **18-20415-E-13** **KARINA HANGARTNER** **MOTION TO CONFIRM PLAN**
DJC-1 **Diana Cavanaugh** **4-30-18 [31]**

Final Ruling: No appearance at the June 12, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 30, 2018. By the court's calculation, 43 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Karina Hangartner ("Debtor") has provided evidence in support of confirmation. David Cusick ("the Chapter 13 Trustee") filed a Non-Opposition on May 9, 2018. Dckt. 38. The Amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Amended Chapter 13 Plan filed by Karina Hangartner ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Debtor's Amended Chapter 13 Plan filed on April 30, 2018, is confirmed. Debtor's Counsel shall

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

9.	**17-20220-E-7** **HLG-7**	**WILLIAM/FAYE THOMAS** **Kristy Hernandez**	**OBJECTION TO CLAIM OF ROBERT S. PUTNAM, CLAIM NUMBER 12** **4-26-18 [99]**

Final Ruling: No appearance at the June 12, 2018 hearing is required.

Local Rule 3007-1 Objection to Claim—No Hearing Required.

Sufficient Notice Not Provided. No Proof of Service was filed for this Objection to Claim. 44 days' notice is required. FED. R. BANKR. P. 3007(a) (requiring thirty days' notice); LOCAL BANKR. R. 3007-1(b)(1) (requiring fourteen days' notice for written opposition).

The Objection to Claim has not been set properly for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Objection to Proof of Claim Number 12-1 of Robert Putnam is continued to 10:30 a.m. on June 24, 2018, the case having been converted to one under Chapter 7 and the Chapter 7 Trustee having been substituted in place of the former Chapter 13 Debtor.

William Thomas, Jr., and Faye Thomas, Chapter 13 Debtor, ("Objector") requests that the court disallow the claim of Robert Putnam ("Creditor"), Proof of Claim No. 12-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $118,156.92. Objector asserts that the Claim has not been timely filed. *See* FED. R. BANKR. P. 3002(c). The deadline for filing proofs of claim in this case is May 17, 2017. Notice of Bankruptcy Filing and Deadlines, Dckt. 9.

Additionally, Objector asserts that no debt is owed to Creditor for attorney services provided in state court because Creditor represented Affiliated Professional Services, Inc. ("APS"), not William Thomas, Jr., individually.

NO PROOF OF SERVICE PROVIDED

Unfortunately for Objector, no Proof of Service was filed with this Objection. The court does not have evidence that the necessary parties have been served with notice of the Objection. Nevertheless, both Creditor and David Cusick ("the Chapter 13 Trustee") have responded, indicating that the parties received notice with sufficient time to respond. Given the parties' responses, the court deems the notice provided to be sufficient.

CREDITOR'S RESPONSE AND AMENDMENT

Creditor filed a Response on May 2, 2018. Dckt. 107. Creditor argues that any proceeds recovered from the APS lawsuit would have been part of the bankruptcy estate in this case. As a result, Creditor stresses that any settlement in state court should have been approved in this court first.

Creditor "points the finger" at multiple attorneys, arguing that they colluded and committed fraud by knowing of this bankruptcy case and by choosing to settle the APS lawsuit anyway. Creditor also raises a point that he has raised before—that APS was the alter-ego of William Thomas, Jr., which would support Creditor's assertion that he has a claim in this case for legal service's provided on Objector's behalf.

Creditor does not address the untimeliness of his claim.

On May 23, 2018, Creditor filed an Amendment, removing a request that this bankruptcy case be dismissed and replacing it with a request that the Objection be overruled. Dckt. 133.

CHAPTER 13 TRUSTEE'S RESPONSE

The Chapter 13 Trustee filed a Response on May 17, 2018. Dckt. 130. The Chapter 13 Trustee notes that this case may be converted to Chapter 7, possibly making this matter moot. Additionally, he notes that Creditor has not complied with the local rules for a countermotion to dismiss this case.

OBJECTOR'S REPLY

Objector filed a Reply on May 29, 2018. Dckt. 145. Objector presents a handful of California cases for various propositions about an attorney not being able to collect on a contingency fee when the attorney's client does not recover funds from the lawsuit.

Objector relies upon the following cases:

A. *Kroff v. Larson*, 167 Cal. App. 3d 857, 861 (Cal. Ct. App. 1985)

1. When an attorney's lien is tied to the client's contingent recovery of money or property, the attorney cannot enforce the lien until the contingency occurs.

2. Accordingly, the lien is rendered unenforceable when the occurrence of the contingency is conclusively foreclosed.

B. *Fracasse v. Brent*, 6 Cal. 3d 784, 792 (Cal. 1972)

1. An attorney discharged by a client has a quantum meruit cause of action for the reasonable value of services rendered to the date of discharge, but such cause of action does not accrue until the occurrence of the stated contingency, *i.e.* recovery by the client either by settlement or judgment.

C. *Lemmer v. Charney*, 195 Cal. App. 4th 99, 105 (Cal. Ct. App. 2011)

1. The law does not recognize a tort cause of action for damages by an attorney for the client's decision to abandon a lawsuit because that would constrain the client to keep his lawsuit alive just for his attorney's profit, despite his own fears and desire to abandon the case.

2. A third party cannot be held liable for encouraging the client to walk away from a lawsuit.

D. *Hall v. Orloff*, 49 Cal. App. 745, 749 (Cal. Ct. App. 1920)

1. A client's lawsuit is his own. He may drop it when he will.

2. Even an express agreement to pay damages for dropping it without his lawyer's consent would be against public policy and void.

CREDITOR'S SUR-REPLY

Creditor filed a Sur-Reply on June 4, 2018. Dckt. 149. Creditor takes issue with Objector's use of *Hall* for the provision that Objector could abandon the APS lawsuit because the lawsuit was not Objector's individually, it was APS's, and therefore, it was property of the bankruptcy estate according to Creditor. Creditor also presents additional case law that a debtor's legal claims are property of the bankruptcy estate. *See, e.g.*, *Smith v. Arthur Andersen, L.L.P.*, 421 F.3d 989, 1002 (9th Cir. 2005).

DISCUSSION

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of a proof of claim, and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright*

v. Holm (In re Holm), 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

The deadline for filing a proof of claim in this matter was May 17, 2017. Creditor's Proof of Claim was filed on May 30, 2017. No order granting relief for an untimely-filed proof of claim for Creditor has been issued by the court.

This is not the first time that Objector has raised an objection to Creditor's claim—it is the third time. The first time was in July 2017, which was withdrawn by Objector. *See* Dckt. 78. The second time was in December 2017. Dckt. 82. At the January 30, 2018 hearing, the parties agreed to dismissal of the objection without prejudice to allow the parties to address the various issues that have been raised by Creditor over the prior year. Dckt. 91. With the filing of the present Objection, it appears that the parties have not been able to resolve their dispute.

Additionally, at the January 30, 2018 hearing, the court discussed how Creditor was not listed on the Verification of Master Address List and was not sent the Notice of Bankruptcy or a copy of the Chapter 13 plan. *Id.*

On May 24, 2018, Debtor converted this case to one under Chapter 7. Dckt. 135. Hank Spacone has been appointed as the Interim Chapter 7 Trustee. Appointment, Dckt. 136. All property of the bankruptcy estate, including 100% of the shares of stock in APS, are under the exclusive control of the Chapter 7 Trustee. Schedule B, Dckt. 1 at 15; 11 U.S.C. §§ 541, 506.

At the June 5, 2018 hearing, the court continued a hearing on a motion to approve the state court settlement in the APS lawsuit to 10:30 a.m. on June 24, 2018. The court continued the hearing to allow the newly appointed Chapter 7 Trustee time to review the matters in this case.

While a "party in interest" able to object to a claim for purposes of 11 U.S.C. § 502 includes the debtor in the case, the primary and initial right to object to a claim resides in the Chapter 7 Trustee. Congress provides in 11 U.S.C. § 704(a)(5):

> § 704. Duties of trustee
>
> (a) The trustee shall–
>
> (5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper; . . . .

While a debtor is a party in interest, and may be allowed to prosecute an objection to claim, it must be shown that the debtor has "standing," that there is actually a "claim or controversy" to be adjudicated.

> [c] Objection by Debtor
>
> The debtor may be a party in interest with standing to object to a proof of claim. Particularly in chapter 12 and chapter 13 cases, the success of the debtor's plan may

> depend upon the debtor's being able to argue successfully that the debt asserted as a priority claim or a secured claim, which must often be paid in full, is excessive or invalid. Typically, the trustee in such cases does not view it as his or her role to object to particular claims except, perhaps, if they have been tardily filed.
>
> **In a chapter 7 case**, or a chapter 11 case in which the debtor is not in possession, **the debtor usually has no pecuniary interest that would justify objecting to a claim unless there could be a surplus after all claims are paid.** An individual debtor, however, in such a case may sometimes **have an interest in objecting to particular claims**. For example, the debtor may wish to object to an excessive dischargeable claim whose holder would **receive distributions that otherwise would be made to the holder of a nondischargeable claim**. To the extent that a nondischargeable claim is satisfied in some measure by a distribution, it is in the debtor's interest to maximize the distribution, thereby relieving the debtor from some or all of the claim of that creditor which would survive the bankruptcy case. The debtor also has an interest if there is any chance that a disallowance will yield a solvent estate that would provide a return to the debtor. The same reasoning applies to equity holders of the debtor. Thus, a debtor may be afforded standing, in certain instances, to object to claims.

4 COLLIER ON BANKRUPTCY ¶ 502.02 (Alan N. Resnick & Henry H. Sommer eds. 16th ed.).

Here, Debtor has elected to convert the case to one under Chapter 7, whereby Debtor's standing based on how the claim affected the Plan and distributions under the Plan have evaporated.

The Chapter 7 Trustee being appointed only recently, the court continues the hearing to allow the Chapter 7 Trustee time to conduct an initial investigation. This coincides with his review of the proposed settlement that is at the heart of the claim that Debtor, as the Chapter 13 debtor, initiated the claim objection that has now been handed to the Chapter 7 Trustee.

The hearing on the Objection is continued to 10:30 a.m. on June 24, 2018.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Robert Putnam ("Creditor") filed in this case by William Thomas, Jr., and Faye Thomas, Chapter 13 Debtor, ("Objector") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Objection to Proof of Claim Number 12-1 of Robert Putnam is continued to 10:30 a.m. on June 24, 2018.

10. 17-20220-E-7 RSP-1 | **WILLIAM/FAYE THOMAS** **Kristy Hernandez** | **MOTION FOR EXAMINATION AND FOR PRODUCTION OF DOCUMENTS 4-19-18 [96]**

Final Ruling: No appearance at the June 12, 2018 hearing is required.

Local Rule 9014-1(f)(2) Motion—No Hearing Required. FN.1.

FN.1. Movant has not specified clearly whether the Motion is noticed according to Local Bankruptcy Rule 9014-1(f)(1) or (f)(2). The Notice of Motion states that Movant will request an order at the hearing. Based upon language that there will be discussion at the hearing, the court treats the Motion as being noticed according to Local Bankruptcy Rule 9014-1(f)(2). Counsel is reminded that not complying with the Local Bankruptcy Rules is cause, in and of itself, to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(c)(l).

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, former Chapter 13 Trustee, and Office of the United States Trustee on April 19, 2018. By the court's calculation, 54 days' notice was provided. 14 days' notice is required.

The Motion to Compel was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The hearing on the Motion to Compel is continued to 10:30 a.m. on June 14, 2018.

Robert Putnam, a creditor with an unsecured claim, ("Movant") requests that the court order William Thomas, Jr., ("Co-Debtor") to appear at a 2004 Examination and to produce documents ten days before the examination.

DEBTOR'S OBJECTION

William Thomas, Jr., and Faye Thomas ("Debtor") filed an Objection on May 29, 2018. Dckt. 143. Debtor asserts that the Motion may become moot because of a pending motion to approve state court settlement and because of an objection to Movant's claim. Envisioning that the court will grant the motion and sustain the objection, Debtor argues that this Motion would then be an "improper harassment" by Movant. *Id.* at 3:4.

APPLICABLE LAW

The Federal Rules of Civil Procedure are incorporated into bankruptcy proceedings in large part. This is true with respect to the discovery provisions (whether in an adversary proceeding or contested matter). Here, Federal Rule of Civil Procedure 37 and incorporating Federal Rule of Bankruptcy Procedure 7037 are cited in the motion as the basis for the relief requested.

Federal Rule of Civil Procedure 37(a) establishes the procedure for obtaining an order from the court to compel a party to respond to discovery. When requested and the court issues such an order, the requesting party is entitled to recover the costs and expenses in prosecution of such a motion. FED. R. CIV. P. 37(a)(5).

"Meet and Confer" Requirement

Federal Rule of Civil Procedure 37(a)(1) requires that the motion to compel discovery "include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make . . . discovery in an effort to obtain it without court action." FN.2.

FN.2. Both the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure are mentioned several times in the court's ruling. A Federal Rule of Civil Procedure will be referred to as "Rule," and a Federal Rule of Bankruptcy Procedure will be referred to as "Bankruptcy Rule."

The certification requirement of Rule 37(a)(1) was described in *Shuffle Master, Inc. v. Progressive Games, Inc.* as comprising two elements:

> [T]wo components are necessary to constitute a facially valid motion to compel. First is the actual *certification* document. The certification must accurately and specifically convey to the court who, where, how, and when the respective parties attempted to personally resolve the discovery dispute. Second is the *performance*, which also has two elements. The moving party performs, according to the federal rule, by certifying that he or she has (1) in good faith (2) conferred or attempted to confer. Each of these two subcomponents must be manifested by the facts of a particular case in order for a certification to have efficacy and for the discovery motion to be considered.

170 F.R.D. 166, 170 (D. Nev. 1996); *see also Triad Commer. Captive Co. v. Carmel (In re GTI Capital Holdings, LLC)*, No. AZ-09-1053-JuMKD, 2009 Bankr. LEXIS 4539, at *26–27 (B.A.P. 9th Cir. Aug. 20, 2009); *Sanchez v. Wash. Mutual Bank (In re Sanchez)*, No. 06-2251-D, 2008 Bankr. LEXIS 4239, at *2–3 (Bankr. E.D. Cal. Sept. 8, 2008). The court went further, stating that "a moving party must include more than a cursory recitation that counsel have been 'unable to resolve the matter.'" *Shuffle Master, Inc.*, 170 F.R.D. at 171; *see also Triad Commer. Captive Co.*, 2009 Bankr. LEXIS 4539, at *27; *Sanchez*, 2008 Bankr. LEXIS 4239, at *3.

Rule 37 also requires that the moving party must have conferred in good faith or attempted to confer with the opposing party regarding the discovery dispute. *Shuffle Master, Inc.*, 170 F.R.D. at 171. The court in *Shuffle Master* noted that good faith "cannot be shown merely through the perfunctory parroting of statutory language . . . to secure court intervention; rather it mandates a genuine attempt to resolve the discovery dispute through non-judicial means." *Id.*; *see also Sanchez*, 2008 Bankr. LEXIS 4239, at *3–4. The movant must show good faith and the party need actually attempt a meeting or conference. *Shuffle Master, Inc.*, 170 F.R.D. at 171. Courts have found that "conferment" requirement entails "two-way communication, communication which is necessary to genuinely discuss any discovery issues and to avoid judicial recourse." *Compass Bank v. Shamgochian*, 287 F.R.D. 397, 398–99 (S.D. Tex. 2012).

The "meet and confer" requirement is not satisfied by mailing a letter from one party's counsel to another party's counsel. *See Leimbach v. Lane (In re Lane)*, 302 B.R. 75, 78–79 (Bankr. D. Idaho 2003). The requirement of filing "a certificate cannot be satisfied by including with the motion copies of correspondence that discuss the discovery at issue. . . . The Court is unwilling to decipher letters between counsel to conclude that the requirement has been met." *Ross v. Citifinancial, Inc.*, 203 F.R.D. 239, 240 (S.D. Miss. 2001).

DISCUSSION

The court first considers whether Movant has satisfied the "meet and confer" requirement of Rule 37(a). Movant does not provide any information about his attempts to meet and confer with Co-Debtor. The court's prior civil minutes related to Co-Debtor's objection to Movant's claim indicate that the parties want to discuss the dispute outside of court, but no party has provided information about how those discussions, if they happened, have proceeded.

It may well be that Movant has not satisfied the first portion of a valid request for an order compelling discovery—if the court was ruling on the Motion at the June 12, 2018 hearing. However, the court continues the hearing to 10:30 a.m. on June 24, 2018, to be heard in conjunction with related matters.

Additionally, the Chapter 7 Trustee is now the party prosecuting the Motion to Approve Compromise and Objection to Claim, which may well moot this discovery base don his decisions. Further, the Chapter 7 Trustee may want to participate in the discovery, which will be productive only after he has gotten up to speed on the case and these disputes, as well as having obtained counsel, if necessary.

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 Compel filed by Robert Putnam, a creditor with an unsecured claim, ("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 hearing on the Motion to Compel is continued to 10:30 a.m. on June 24, 2018.

11. **18-22284-E-13** **SALLY ALLEN** **CONTINUED MOTION TO EXTEND**
FF-2 **Gary Fraley** **AUTOMATIC STAY**
5-9-18 [28]

Final Ruling: No appearance at the June 12, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on May 9, 2018. By the court's calculation, 8 days' notice was provided. The court set the hearing for 3:00 p.m. on May 15, 2018. Dckt. 35.

The Motion to Extend the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion.

The court set this Matter for final hearing on June 12, 2018. No oppositions were filed for the final hearing. Upon review of the Motion and supporting pleadings, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion. The defaults of the non-responding parties in interest are entered.

The Motion to Extend the Automatic Stay is granted.

Sally Allen ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(a) extended beyond thirty days in this case. This is Debtor's second bankruptcy petition pending in the past year. Debtor's prior bankruptcy case (No. 17-25371) was dismissed on March 21, 2018, after Debtor became delinquent with plan payments. *See* Order, Bankr. E.D. Cal. No. 17-25371, Dckt. 62, March 21, 2018. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to Debtor thirty days after filing of the petition.

MAY 15, 2018 HEARING

At the hearing, the court granted the Motion and extended the automatic stay on an interim basis through 11:59 p.m. on June 23, 2018, with a final hearing to be conducted at 3:00 p.m. on June 12, 2018. Dckt. 38, 39.

DISCUSSION

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed because she was not earning from her two jobs. Now, Debtor states that one of those

jobs has changed and that she is earning "significantly more" in income so that she can afford plan payments. Dckt. 30.

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). As this court has noted in other cases, Congress expressly provides in 11 U.S.C. § 362(c)(3)(A) that the automatic stay **terminates as to Debtor**, and nothing more. In 11 U.S.C. § 362(c)(4), Congress expressly provides that the automatic stay **never goes into effect in the bankruptcy case** when the conditions of that section are met. Congress clearly knows the difference between a debtor, the bankruptcy estate (for which there are separate express provisions under 11 U.S.C. § 362(a) to protect property of the bankruptcy estate) and the bankruptcy case. While terminated as to Debtor, the plain language of 11 U.S.C. § 362(c)(3) is limited to the automatic stay as to only Debtor. The subsequently filed case is presumed to be filed in bad faith if one or more of Debtor's cases was pending within the year preceding filing of the instant case. *Id.* § 362(c)(3)(C)(i)(I). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* § 362(c)(3)(C).

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); *see also* Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209–10 (2008). An important indicator of good faith is a realistic prospect of success in the second case, contrary to the failure of the first case. *See, e.g.*, *In re Jackola*, No. 11-01278, 2011 Bankr. LEXIS 2443, at *6 (Bankr. D. Haw. June 22, 2011) (citing *In re Elliott-Cook*, 357 B.R. 811, 815–16 (Bankr. N.D. Cal. 2006)). Courts consider many factors—including those used to determine good faith under §§ 1307(c) and 1325(a)—but the two basic issues to determine good faith under § 362(c)(3) are:

A. Why was the previous plan filed?

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

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

A review of the docket shows that Debtor and her counsel appeared at the Meeting of Creditors on May 31, 2018. Debtor has sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay.

The Motion is granted, and the automatic stay is extended for all purposes and parties, on an interim basis through and including 11:59 p.m. on June 23, 2018, unless terminated by operation of law or further order of this court.

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

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

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

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

12. 18-20895-E-13 PGM-1 | **CYNTHIA BAKER** **Peter Macaluso** | **OBJECTION TO CLAIM OF CAVALRY SPV I, LLC, CLAIM NUMBER 1-1** **4-23-18 [27]**

Final Ruling: No appearance at the June 12, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor, Debtor, Chapter 13 Trustee, and Office of the United States Trustee on April 23, 2018. By the court's calculation, 50 days' notice was provided. 44 days' notice is required. FED. R. BANKR. P. 3007(a) (requiring thirty days' notice); LOCAL BANKR. R. 3007-1(b)(1) (requiring fourteen days' notice for written opposition).

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

The Objection to Proof of Claim Number 1-1 of Cavalry SPV I, LLC is sustained, and the claim is disallowed in its entirety.

Cynthia Baker, the Chapter 13 Debtor, ("Objector"), requests that the court disallow the claim of Cavalry SPV I, LLC ("Creditor"), Proof of Claim No. 1-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $2,896.27. Objector asserts that the Statute of Limitations on the collection of contract claims in California is four years from the date the balance was due under the contract or four years from the date the last payment was made under the contract. Objector

states that according to the Proof of Claim, the last transaction date and charge off date was April 30, 2008. The date of last payment on the Statement of Account Information attached to the Proof of Claim states October 5, 2007.

DISCUSSION

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

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

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

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

> Except as provided in section 524 of this title, if **applicable nonbankruptcy law**, an order entered in a nonbankruptcy proceeding, or an agreement **fixes a period for commencing or continuing a civil action** in a court other than a bankruptcy court **on a claim against the debtor**, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then **such period does not expire until the later of--**
>
> > (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
> >
> > **(2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.**

A review of Proof of Claim No. 1-1 lists the charge off date as April 30, 2008. The court takes judicial notice that a creditor does not "charge off" an account if payments are being made or further credit

is being extended. (This basic fundamental point of credit transactions is commonly known by both creditors and consumers alike.)

No payment or other transaction occurred after October 5, 2007. Thus, the four-year statute of limitations expired on October 5, 2011.

This bankruptcy case was filed on February 16, 2018—2,326 days after the statute of limitations expired. There was no period of time for 11 U.S.C. § 108 to preserve and extend for Creditor.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Cavalry SPV I, LLC ("Creditor") filed in this case by Cynthia Baker, the Chapter 13 Debtor, ("Objector") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Proof of Claim Number 1-1 of Cavalry SPV I, LLC sustained, and the claim is disallowed in its entirety.