UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

June 25, 2019 at 3:00 p.m.

1.	**19-20009-E-13** **RJM-2**	**DUANE/VERONICA STANSFIELD** **Rick Morin**	**OBJECTION TO CLAIM OF STATE FARM BANK, FSB, CLAIM NUMBER 19** **5-17-19 [26]**

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

Local Rule 3007-1 Objection to Claim—Hearing Required.

Sufficient Notice Not Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor, Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on May 17, 2019. By the court's calculation, 39 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). The defaults of the non-responding parties and other parties in interest are entered.

The Objection to Proof of Claim Number 19 of State Farm Bank, FSB is overruled without prejudice.

As stated, supra, 44 days' notice was required and only 39 days' notice was provide. The Objection is overruled without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of State Farm Bank, FSB ("Creditor") filed in this case by Duane Lee Stansfield and Veronica Denise Stansfield, the Chapter 13 debtors, ("Objector") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
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> **IT IS ORDERED** that the Objection to Proof of Claim Number 19 of State Farm Bank, FSB is overruled without prejudice.

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF APPLICANT PROVIDES SUFFICIENT NOTICE

The Objection to Proof of Claim Number 19 of State Farm Bank, FSB is sustained, and the claim is disallowed in its entirety.

Duane Lee Stansfield and Veronica Denise Stansfield, the Chapter 13 debtors ("Objector"), request that the court disallow the claim of creditor, State Farm Bank, FSB ("Creditor"), Proof of Claim No. 19 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be secured in the amount of $14,500.00 and unsecured in the amount of $19,779.83. 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 March 13, 2019. Notice of Bankruptcy Filing and Deadlines, Dckt. 12.

Objector requests that the claim be **disallowed in its entirety**.

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 March 13, 2019. Creditor's Proof of Claim was filed on April 1, 2019. No order granting relief for an untimely-filed proof of claim for Creditor has been issued by the court. Therefore, the claim is untimely.

Federal Rule of Bankruptcy Procedure 3002(a) requires the filing of a Proof of Claim for even a secured claim to be allowed. However, a lien is not void due only to failure to file a

proof of claim.

This concept of a secured claim and a creditor's interest in property is discussed in COLLIER ON BANKRUPTCY as follows:

> Prior to the 2017 amendments, Rule 3002(a) did not require filing of a proof of claim by a creditor asserting a secured claim in a chapter 7, 12 or 13 case. The better practice had been for a secured creditor to file a proof of claim. Although a secured creditor was not required to file a proof of claim under the former rule, courts had held that a proof of claim had to be filed for a secured creditor to have an allowed claim and to participate in distributions under a plan. **Rule 3002(a) was amended in 2017 to "clarify that a creditor, including a secured creditor, must file a proof of claim in order to have an allowed claim."** To avoid implications of the rule amendment that would be inconsistent with section 506(d), Rule 3002(a) states that: "A lien that secures a claim against the debtor is not void due only to the failure of any entity to file a proof of claim."
>
> Notwithstanding a failure to file a claim, the lien of a secured creditor will attach to proceeds of collateral. The trustee dealing with property of the estate must determine the existence of valid liens against the property and may not rely on the absence of a proof of the secured claim. While the schedules filed in a case should reflect all liens on property of the estate, the trustee should not rely totally on the schedules either.
>
> A secured claim is equal to the lesser of the amount of the claim or the value of the collateral. Hence, the undercollateralized lender has a secured claim and an unsecured claim. **Rule 3002(a) clearly requires the unsecured claim to be filed or it will be lost. In effect, therefore, to preserve its rights as an unsecured creditor based on a deficiency, the undersecured creditor must file a proof of claim**, which will usually include the secured as well as the unsecured portion of the claim.
>
> A secured creditor may also be required to file a proof of claim if a motion is made for a determination of the secured value of the claim. Such a motion initiates a contested matter.

9 COLLIER ON BANKRUPTCY P 3002.01 (16th 2019).

Based on the evidence before the court, Creditor's claim asserted in Proof of Claim No. 19 is disallowed as untimely. The disallowance of the unsecured portion of Creditor's claim does not limit or alter Creditor's lien or a secured claim that must be provided for in this 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 Claim of State Farm Bank, FSB ("Creditor") filed in this case by Duane Lee Stansfield and Veronica Denise Stansfield, the Chapter 13 debtors, ("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 19 of State Farm Bank, FSB is sustained, and the claim is disallowed. as untimely. The disallowance of the unsecured portion of Creditor's claim does not limit or alter Creditor's lien or a secured claim that must be provided for in this case.

2. **18-20885-E-13** **ANTHONY/WENDY GIANOLA** **MOTION TO SELL**
PGM-3 **Peter Macaluso** **5-31-19 [96]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 31, 2019. By the court's calculation, 25 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days' notice).

The Motion to Sell Property 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 Sell Property is granted.

The Bankruptcy Code permits Anthony P. Gianola and Wendy E. Gianola, the Chapter 13

debtors ("Movant"), to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movant proposes to sell the real property commonly known as 1405 Alder Creek Court, Lincoln, California ("Property").

The Motion states the following with particularity (FED. R. BANKR. P. 9013):

1. The sale is to a bonafide buyer who is a party in interest. Refer to Declaration of Debtor filed herewith.

2. The property has a pending offer for $530,000.00.

3. The net proceeds of this sale are estimated at $70,296.50.

4. The amount of $15,000.00 from the net proceeds of this sale shall be paid to Debtors directly.

5. Debtor **will file a modified 100 percent plan**.

6. The Trustee must approve of the title company to be used in connection with the sale.

Dispositive information not stated in the Motion includes the following:

1. The proposed buyers are Giovanni Alioto and Leah Alioto. Exhibit B, Dckt. 99.

2. Close of escrow is on or before July 30, 2019. *Id*.

3. The agreement is subject to bankruptcy court approval. *Id*.

4. The proposed buyers shall assume the solar purchase power agreement. *Id*.

5. Debtor values the Property at $440,000.00 as of the date of filing the petition. Schedule A, Dckt. 1.

CHAPTER 13 TRUSTEE'S OPPOSITION

David P. Cusick, the Chapter 13 Trustee ("Trustee") filed an Opposition to the Motion on June 10, 2019. Dckt. 102. Trustee's counsel states he opposes the Motion, but in substance merely notes the following:

1. The Seller's Estimated Closing Statement (Exhibit A, Dckt. 99) notes the net proceeds to the Estate are only $35,700.00, not the $70,296.50 overall balance.

2. Trustee is the disbursing agent, and will perform a check swap with the

title company.

3. A modified plan may be unnecessary.

4. Debtor should notify the court of an updated address.

5. Debtor is $10,175.02 delinquent in plan payments.

DEBTOR'S RESPONSE

Debtor filed a Response on June 17, 2019. Dckt. 105. Debtor's counsel generally concurs with the aforementioned items noted by Trustee.

DISCUSSION

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

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because the net proceeds will go to paying off the secured creditor's claims and will allow Debtor to complete the Chapter 13 Plan via one lump sum 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 Sell Property filed by Anthony P. Gianola and Wendy E. Gianola, Chapter 13 Debtor, ("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 Anthony P. Gianola and Wendy E. Gianola, Chapter 13 Debtors, are authorized to sell pursuant to 11 U.S.C. § 363(b) to Giovanni Alioto and Leah Alioto or nominee ("Buyers"), the Property commonly known as 1405 Alder Creek Court, Lincoln, California ("Property"), on the following terms:
>
> A. The Property shall be sold to Buyers for $530,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit B, Dckt. 99, and as further provided in this Order.
>
> B. The sale proceeds shall first be applied to closing costs, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred to effectuate the sale.

D. Chapter 13 Debtor is authorized to execute any and all documents reasonably necessary to effectuate the sale.

E. Within fourteen days of the close of escrow, the Chapter 13 Debtor shall provide the Chapter 13 Trustee with a copy of the Escrow Closing Statement. Any monies not disbursed to creditors holding claims secured by the property being sold or paying the fees and costs as allowed by this order, shall be disbursed to the Chapter 13 Trustee directly from escrow.

F. After funding the Plan for a 100% dividend for creditors holding general unsecured claims, the Chapter 13 Trustee shall disburse to the Debtor $15,000.00, or such amount not in excess of $15,000.00 that remains, directly from the sale proceeds. No other proceeds of the sale, including any commissions, fees, or other amounts, shall be paid directly or indirectly to the Chapter 13 Debtor.

3. **18-27699-E-13 DBJ-5** | **WALTER ZWALD AND CYNTHIA RAITT-ZWALD** | **MOTION TO CONFIRM PLAN** **5-9-19 [80]**
Douglas Jacobs

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 9, 2019. By the court's calculation, 47 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is denied.

The debtors, Walter Andrew Zwald and Cynthia Raitt-Zwald ("Debtor"), seek confirmation of the Amended Plan, which would be the first confirmed plan in this case.

The Amended Plan provides for payments of $625.00 for months 1 through 12 and $1,687.00 through months 13 through 60; for the sale of Debtor's Colusa County property to provide for the claim of the Internal Revenue Service; and for a 25 percent dividend to unsecured claims. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on June 6, 2019. Dckt. 94. Trustee opposes confirmation on the following grounds:

1. While the court granted the Debtor's amended motion to sell the Colusa County property, Trustee is uncertain if the sale occurred because

Trustee has not received a copy of the Escrow Closing Statement.

2. The Amended Plan provides for the secured and priority claims of the IRS to be paid from sale proceeds of the Colusa County property, where the Order approving the sale only addressed the liens on the property. The Amended Plan does not specify what has been paid if the sale has occurred.

3. The Amended Plan proposes valuing the $113,115.00 secured claim of DSD Financial at $0.00. However, the Debtor's motion to value that secured claim was denied.

DEBTOR'S RESPONSE

On June 13, 2019, Debtor filed a Response to Trustee's Objection to Confirmation. Dckt. 97. Debtor's counsel asserts that DSD, Financial consented to the sale of the Colusa County property because that claim is secured by other property, which will allow the sale to complete. However, Debtor's counsel requests a continuance of 30 days in the event the sale is still pending on the date of the hearing.

Debtor's counsel asserts further the tax claim of the IRS will be paid in full with the sale proceeds.

No declaration of the Debtor or other evidence was filed in support of the assertions of Debtor's counsel.

DISCUSSION

Failure To Provide Evidence

Debtor's counsel filed a Response making several factual assertions. However, no declaration of the Debtor or other evidence was filed to support those assertions.

At a very basic level, every law student is taught that the court relies on properly authenticated, admissible evidence to establish facts in any proceeding–the court cannot and does not merely take counsel at their word. Apart from the practical effect that the court has been given a request for relief without any established factual basis, the Local Rules also affirmatively require that evidence be filed along with every motion and request for relief. LOCAL BANKR. R. 9014-1(d)(3)(D). Failure to comply with the Local Rules is grounds for an appropriate sanction. LOCAL BANKR. R. 1001-1(g).

Plan Feasibility

Trustee's grounds for Opposition all cast doubt as to the feasibility of the Amended Plan.

While the court approved the Debtor's motion to sell on March 25, 2019, that sale has still not gone through. In reviewing the docket, Debtor filed a motion attempting to value the secured claim of DSD Financial at $0.00, which motion was denied because the claim was still secured (by other property of the Debtor). Civil Minutes, Dckt. 92.

Debtor's counsel presented a response that DSD Financial is voluntarily releasing its lien and that all liens and tax claims are to be paid through the sale proceeds. However, as discussed above, no evidence was actually filed by Debtor's counsel to establish these facts.

The Amended Plan based on the evidence presented does not appear to be feasible. 11 U.S.C. § 1325(a)(6). Therefore, the Motion To Confirm the Amended Plan is denied.

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

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

4.	**19-21516-E-13** **DPC-1**	**CHARLENE OJASCASTRO** **Richard Jare**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID P CUSICK** **6-4-19 [37]**

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

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 June 4, 2019. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

A. Debtor is $2,270.00 delinquent in plan payments.

B. Trustee is not certain the "Ensminger Provision" listed in the additional provisions contains the language the court normally requires (or permits under a liberal reading of the confirmation provisions for secured claim).

C. Debtor is married, her spouse is not included in the bankruptcy, and Debtor has not filed a Spousal Waiver for use of the California State exemptions.

DISCUSSION

Trustee's objections are well-taken.

Debtor is $2,270.00 delinquent in plan payments, which represents one month of the plan payment. Before the hearing, another plan payment will be due. According to Trustee, the Plan in § 2.01 calls for payments to be received by 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).

Debtor claims exemptions pursuant to California Code of Civil Procedure section 703.140(b). That section requires that, if a married person is filing individually, the spouses execute a written waiver. Debtor here has not filed a spousal waiver. Because Debtor is not entitled to the claimed exemptions, the Plan does not provide unsecured claims at least as much as they would receive in a Chapter case. 11 U.S.C. § 1325(a)(4).

Trustee additionally opposes the Plan on the grounds it may not comply with the court's "Ensminger Provision" requirements. However, the Trustee does not identify specific concerns. As addressed by the supreme Court in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 1381 n.14 (2010), the court has an obligation to insure that it correctly follows the law.

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 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.

If Debtor had clearly limited the treatment to the adequate protection provision, preserving Creditor's right to relief from the stay, Creditor's objection could easily be overruled. If Creditor believes that Debtor is not pursuing a loan modification, confirmation of the Plan would not bar it from seeking relief from the automatic stay. If Debtor was pursuing a loan modification and Creditor denied it, Creditor could seek relief from the automatic stay. If Creditor believed that any other grounds existed for relief from the automatic stay, then Creditor could seek relief from the automatic stay.

As this court has previously held and numerous creditors have successfully navigated, a debtor may provide adequate protection payments while a creditor is held at bay from foreclosing on property (usually the debtor's home). Congress expressly provides for the court to specify the necessary adequate protection to be afforded a creditor. 11 U.S.C. § 361.

This can be done as part of a confirmed plan. The creditor's debt is not modified by the confirmation, but with the provisions as set forth in the Additional Provisions, the debtor is locked in to diligently prosecuting a loan modification and making substantial adequate protection payments (generally which are in the amount of the anticipated, good faith computed, amount of the modified loan). The creditor's rights are protected, with some specific loan modification request performance grounds in addition to all the other rights to seek relief from the stay, as well as the substantial adequate protection payment (even if there is an equity cushion in the collateral).

This was done instead of the practice for keeping bankruptcy cases open for more than a year without a confirmed plan, without adequate protection payments, because there was a "modification request in process" and such modification could not be forced through a confirmation. This also did not follow the practices of some judges in denying confirmation and dismissing cases because the debtor could not make the then current mortgage payment and arrearage cure, even if the debtor could seek a loan modification in good faith. There was a perception that some loan services and some loan creditors use requirements of such judges to dodge loan modification requests.

Here, the proposed adequate protection payment is $1,840.00 a month, which includes funding for property taxes and insurance. In the Attachment to Proof of Claim No. 6-1, the creditor having the claim subject to the Ensminger provision states that the monthly mortgage payment as provided for in the existing note is $2,460 a month – $1,584.90 principal and interest, with $875.58 for the escrow expenses.

On Schedule A/B Debtor lists the property securing this creditor's claim to be $473,500. However, creditor's claim is "only" ($389,251.61), with an arrearage of "only" ($71,341.42). Proof of Claim No. 6-1.

If this creditor were to reamortize the ($389,251.61) obligation (pre-petition arrearage and all) over 30 years, and charged a 4.5% interest rate, the monthly principal and interest payment would be $1,972.28 (computed using the Microsoft Excel Loan Calculator program). The escrow for property taxes and insurance will be on top of this amount.

It appears that Debtor and Debtor's Counsel have been a bit too aggressive in stating an adequate protection amount, listing an amount significantly lower than what would be conceived to be a modified loan amount. The court uses this simple calculation in evaluating a debtor's good faith in not providing for a secured claim in a plan, but making good faith adequate protection payments.

Here, Debtor is not providing a good faith adequate protection payment, but with the amount proposed significantly less than what a reasonably projected modified loan monthly payment of principal and interest would be (before the property tax and insurance monthly escrow amount).

Given the financial information provided on Schedules I and J, Debtor has only $2,270.00 a month in projected monthly disposable income - well insufficient to make even the adequate protection payment/amount of likely loan modification. Dckt. 1 at 29-32. Additionally, the feasibility of any plan in highly in doubt in light of Debtor stating under penalty of perjury that the federal and state income taxes and Social Security taxes for Debtor's non-debtor spouse from monthly income of $6,000 is only $763 a month. *Id.* at 30; and Amended Schedules, Dckt. 36.

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

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

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

5. **18-25929-E-13 BLG-2** | **JEFFREY YOUNG** **Chad Johnson** | **MOTION TO MODIFY PLAN** **5-20-19 [48]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on May 20, 2019. By the court's calculation, 36 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

The Motion to Confirm the Modified Plan is denied.

The debtor, Jeffrey Young ("Debtor"), seeks confirmation of the Modified Plan to reflect his

change of circumstances, Debtor opting to leave his job (and receiving 100 percent VA benefits) and surrender his vehicle. Dckt. 50. The Modified Plan provides that $1,350.00 be paid through February 2019, that monthly payments of $381.00 be made in months 8-60, and that Debtor will treat the claim of AIS Portfolio Services LP as a Class 3. Dckt. 53. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on June 11, 2019. Dckt. 57. The Chapter 13 Trustee opposes confirmation on the grounds that Debtor is $381.00 delinquent in plan payments, and that the plan payment would need to be increased to $490.00 effective May 2019 in order to complete within 6 months.

DEBTOR'S REPLY

Debtor filed a Reply on June 18, 2019. Dckt. Debtor requests the plan payment be increased to $490.00 in months 8-60 to address Trustee's grounds for opposition.

DISCUSSION

Debtor requests increasing the payment through the order confirming to prevent the Modified Plan from being overextended. However, Debtor did not respond to Trustee's assertion that Debtor is $381.00 delinquent in plan payments. Dckt. 61. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

At the hearing, xxxxxxxxxxxxxx.

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

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

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

6. **19-21530-E-13 BB-2** | **GENEA PEERY** **Bonnie Baker** | **MOTION TO VALUE COLLATERAL OF WELLS FARGO BANK 5-24-19 [36]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Attorney for the Trustee, creditors, and Office of the United States Trustee on May 24, 2019. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

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

The hearing on the Motion to Value Collateral and Secured Claim of Wells Fargo Bank is continued to XXXXXXXXXX.

The Motion to Value filed by Genea Marie Perry ("Debtor") to value the secured claim of Wells Fargo Bank ("Creditor") is accompanied by Debtor's declaration. Declaration, Dckt. 38. Debtor is the owner of the subject real property commonly known as 2605 Holly Street, Anderson, California ("Property"). Debtor seeks to value the Property at a fair market value of $98,000.00 as of the petition filing date.

Debtor offers the Declaration of Kylie Dagg, a licensed real estate appraiser with 15 years' experience, to provide expert testimony that the Property is worth $98,000.00. Declaration, Dckt. 39. This is lower than the value of $101,828.00 stated on Debtor's Amended Schedule A/B. Dckt. 27.

CREDITOR'S OPPOSITION

Creditor filed an Opposition to the Motion on June 10, 2019. Dckt. 47. Creditor asserts the fair market value of the Property is actually between $170,000.00 and $180,000.00, and that Debtor's appraisal was inaccurate because it was performed 10 months before the filing of this case and only considered the exterior of the Property.

Creditor notes further the Proof of Claim, No. 2, filed by creditor Tri Counties Bank's values the Property between $170,000.00 and $180,000.00.

Creditor requests that the court continue the hearing to allow Creditor time to obtain an appraisal.

TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on June 11, 2019. Dckt. 44. Trustee notes the creditor was served at a PO box and therefore may not have been served properly.

APPLICABLE LAW

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

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

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

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

DISCUSSION

Improper Service

The Trustee notes that Debtor's motion does not appear to have been properly served on Creditor. Creditor was served at:

> Wells Fargo Bank
> P. O. Box 31557,
> Billings, MT 59107

Proof of Service, Dckt. 42. While the Proof of Service indicates certified mail was used to serve some parties, it is not specified whether the creditor, a federally insured institution, was provided notice this way. FED. R. BANKR. P. 7004(h).

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

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

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

However, the court notes Creditor filed an Opposition which did not complain of improper service. Creditor having responded and no prejudice to any party appearing, the court waives the defect in service in this instance.

Valuation of Secured Collateral

Creditor disputes the appraisal and valuation of the Debtor, and requests time to obtain an appraisal.

Good cause appearing, the court shall continue the hearing on the Motion to allow Creditor time to obtain an appraisal.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value Collateral and Secured Claim filed by Genea Marie Perry ("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 hearing on the Motion to Value Collateral and Secured Claim of Wells Fargo Bank is continued to **3:00 p.m. on XXXXXXXXXX, 2019**.

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

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 Not Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on March 26, 2019. By the court's calculation, 24 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The hearing on the Motion to Confirm the Plan is continued to 3:00 p.m. on XXXXXXX, 2019.

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

CHAPTER 13 TRUSTEE'S OPPOSITION

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

TRUSTEE'S OBJECTION

Trustee also filed an "Objection" to confirmation of the plan on May 14, 2019. Dckt. 28. In

the Objection, Trustee adds that the plan relies on a motion to value secured claim, which if not granted would render the plan not feasible.

MAY 21, 2019 HEARING

At the May 21, 2019 hearing, the court continued the hearing to June 11, 2019 to conform with objection deadlines set in the Notice of Meeting of Creditors, and to allow Debtor's Motion To Value to be heard.

JUNE 11, 2019 HEARING

At the June 11, 2019 hearing, the court continued the hearing on Trustee's Objection to be heard alongside the Motion to Value Secured Claim on June 25, 2019 at 3:00 p.m. Civil Minutes, Dckt. 49.

DISCUSSION

In Trustee's Objection filed before the May 21, 2019 hearing, it was indicated Debtor's plan relies on a motion to value the secured claim of Wells Fargo Bank. On May 24, 2019 Debtor filed that Motion. Dckt. 36.

A review of the docket shows that the motion was continued to allow the creditor subject to the motion to obtain an appraisal. Therefore, the court shall further continue the hearing on this Motion.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by Genea Marie Peery ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that hearing on the Motion to Confirm the Plan is continued to 3:00 p.m. on **XXXXXXXXXX, 2019.**

8. **19-21530-E-13** **GENEA PEERY** **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P CUSICK**
DPC-1 **Bonnie Baker** **5-14-19 [28]**

The hearing on the Motion to Confirm the Plan is continued to 3:00 p.m. on XXXXXXX, 2019.

9. **15-23635-E-13** **STANLEY/PATRICIA COVELL** **MOTION TO MODIFY PLAN**
DEF-5 **David Foyil** **5-1-19 [87]**

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 Chapter 13 Trustee, creditors, and Office of the United States Trustee on April 29, 2019. By the court's calculation, 57 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 XXXXXXXX.

The debtors, Stanley Covell and Patricia Covell ("Debtors"), seek confirmation of the Modified Plan to cure a delinquency in plan payments under the Confirmed plan caused by reduced

work. Dckt. 89. The Modified Plan provides for $7,367.00 to be paid through March 2019, and payments of $100 in months 46 through 49. Dckt. 90. 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 June 7, 2019. Dckt. 92. Trustee opposes confirmation on the basis that it is unclear why Debtor is seeking the modification at all–no explanation of the reduction in income and no supplemental schedules having been filed.

DEBTOR'S RESPONSE

Debtor filed a Response to Trustee's Opposition on June 18, 2019. Dckt. 95. Debtor states the modification is preventative in nature, as Debtor is not currently delinquent but due to changed financial circumstances will be.

Debtor explains income has been reduced because Debtor's employment is seasonal. Declaration ¶ 2, Dckt. 95. Debtor further explains expenses for medical and taxes have increased. *Id.*, ¶¶ 3-4.

Debtor filed Supplemental Schedules I and J on June 18, 2019. Dckt. 97. The Supplemental Schedules reflect a total disposable monthly income of ($191.51).

DISCUSSION

Debtor has provided a more detailed explanation of the change in financial circumstances through the filing of Supplemental Schedules I and J and Debtor's Declaration.

However, Debtor now indicates having a total disposable monthly income of ($191.51). It is not clear how Debtor intends to make the $100.00 monthly plan payment, and whether the plan is therefore feasible. 11 U.S.C. § 1325(a)(6).

At the hearing, xxxxxxxxxxxxxx.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Modified Chapter 13 Plan filed by Stanley Covell and Patricia Covell ("Debtors") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Confirm the Modified Plan is **XXXXXXXXX**.

10. **19-22037-E-13 DPC-1** | **PETE GARCIA** **Peter Macaluso** | **OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS** **5-14-19 [26]**

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

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 and Debtor's Attorney on May 14, 2019. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

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

The Objection to Claimed Exemptions is overruled.

The Chapter 13 Trustee, David Cusick ("the Chapter 13 Trustee") objects to the debtor, Pete A. Garcia's ("Debtor"), use of the California exemptions without the filing of the spousal waiver

required by California Code of Civil Procedure § 703.140.

DEBTOR'S REPLY

Debtor filed a Reply to Trustee's Objection on June 10, 2019. Dckt. 49. Debtor's counsel represents that Debtor's divorce was finalized February 2019, before filing the petition, and that an amended statement of financial affairs will be filed to reflect that fact.

DISCUSSION

California Code of Civil Procedure § 703.140(a)(3), provides:

> If the petition is filed for an unmarried person, that person may elect to utilize the applicable exemption provisions of this chapter other than subdivision (b), or to utilize the applicable exemptions set forth in subdivision (b), but not both.

Debtor here filed an Amended Statement of Financial Affairs stating under penalty of perjury that he is not married. Therefore, the Trustee's 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 Claimed Exemptions filed by David Cusick ("the Chapter 13 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection is overruled.

11. **18-25141-E-13** **BLAKE HARBIN** **MOTION TO SELL O.S.T.**
BLG-7 **Chad Johnson** **6-12-19 [99]**

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

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

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

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 June 12, 2019. By the court's calculation, 13 days' notice was provided. The court required the documents be filed on or before June 13, 2019. Order, Dckt. 108.

The Motion to Sell Property 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. 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 Sell Property is xxxxx.

The Bankruptcy Code permits Blake Harbin, the Chapter 13 Trustee, ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movant proposes to sell the real property commonly known as 4000 Madeline Court, Vacaville, California ("Property").

The proposed purchaser of the Property is Gerardo G Ramos and Maria Theresa Ramos Duvn, and the terms of the sale are:

A. Sale price is $572,000.00. [FN.1].

FN.1. Debtor filed a Supplement on June 18, 2019 stating (1) the sales price was contingent on an appraisal, which appraisal established the Property's value to be $572,000.00–therefore the new agreed price is $577,000.00; and (2) the realtor commission is reduced to 5.5 percent.

B. $3,500.00 – Initial Deposit.

C. $1,500.00 – Increased Deposit.

D. Property is sold as-is.

TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on June 17, 2019. Dckt. 109. Trustee opposes the Motion on the basis it states the real estate broker's commission is 6 percent and not 5.5. percent as listed in the motion to employ the broker.

Trustee further notes that funds claimed exempt under California's homestead exemption must be reinvested within 6 months to remain exempt.

SERVICER'S NONOPPOSITION

Caliber Home Loans, Inc. as servicer for U.S. Bank National Association, as Trustee for COLT 2017-1 Mortgage Loan Trust filed a statement of nonopposition on June 19, 2019. Dckt. 116.

DISCUSSION

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

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because it will fund Debtor's proposed Modified Plan and pay off several of the claims in this case.

Broker's Commission

Trustee opposes the Motion on the basis that it states the broker's commission to be 6 percent. Debtor subsequently filed a Supplement clarifying the commission is 5.5 percent.

However, no request for approval of any commission was made. The Debtor can seek approval of compensation by subsequent motion pursuant to 11 U.S.C. § 328.

Request for Confirmation of Exempt Proceeds

In the Motion, Debtor requests that the order state:

> That there will be exempt proceeds from the sale pursuant to Debtor's allowed homestead exemption and Debtor must reinvest these proceeds within six months of receipt in order for them to remain exempt (see §704.720(b)).

Motion, Dckt. 99 at 6:1-3.

No basis is given for this requested relief. In essence (though maybe not intentional), Debtor is asking the court to confirm the validity of Debtor's claimed exemption and the amount of any liens on

the Property. This relief is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Sell Property filed by Blake Harbin, the Chapter 13 Trustee, ("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 Blake Harbin, the Chapter 13 Trustee, ("Movant"), is authorized to sell pursuant to 11 U.S.C. § 363(b) to Gerardo G Ramos and Maria Theresa Ramos Duvn or nominee ("Buyer"), the Property commonly known as 4000 Madeline Court, Vacaville, California ("Property"), on the following terms:
>
> A. The Property shall be sold to Buyer for $577,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 102, and as further provided in this Order.
>
> B. The sale proceeds shall first be applied to closing costs, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred to effectuate the sale.
>
> C. Chapter 13 Debtor is authorized to execute any and all documents reasonably necessary to effectuate the sale.
>
> D. No proceeds of the sale, including any commissions, fees, or other amounts, shall be paid directly or indirectly to the Chapter 13 Debtor. Within fourteen days of the close of escrow, the Chapter 13 Debtor shall provide the Chapter 13 Trustee with a copy of the Escrow Closing Statement. Any monies not disbursed to creditors holding claims secured by the property being sold or paying the fees and costs as allowed by this order, shall be disbursed to the Chapter 13 Trustee directly from escrow.
>
> No other further relief is granted.

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

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 Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 19, 2019. By the court's calculation, 63 days' notice was provided. 35 days' notice is required. Fed. R. Bankr. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); Local Bankr. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

The Motion to Confirm the Modified Plan is xxxxxxxxxxxx.

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

CHAPTER 13 TRUSTEE'S OPPOSITION

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

CREDITOR'S OPPOSITION

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

PRIOR HEARINGS

At the May 21 and June 11, 2019 hearings the court noted that Debtor had pending motions which were determinative of the outcome of this Motion and continued the hearing. Dckts. 90, 95.

DISCUSSION

A review of the docket shows that Debtor has filed a Motion To Sell his residence set for hearing the same day as this Objection.

At the hearing, xxxxxxxxxxxxxx.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Modified Chapter 13 Plan filed by Blake Harbin ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Confirm the Modified Plan is XXXXXXXXXX.

13.	**18-27157-E-13 GTB-2**	**LATOYA KAMILAH SMITH George Burke**	**OBJECTION TO CLAIM OF LOBEL FINANCIAL, CLAIM NUMBER 1 5-10-19 [50]**

APPEARANCE OF GEORGE BURKE, COUNSEL FOR DEBTOR REQUIRED FOR HEARING TO ADDRESS PROSECUTION OF AVOIDANCE OF UNPERFECTED LIEN

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 3007-1 Objection to Claim—No Opposition Filed.

Sufficient Not Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor, Debtor, and Chapter 13 Trustee on May 10, 2019. By the court's calculation, 46 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 One of Lobel Financial is overruled without prejudice.

Latoya Kamilah E Smith, Chapter 13 Debtor, ("Objector" or "Debtor") requests that the court disallow the claim of Lobel Financial ("Creditor"), Proof of Claim No.1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be secured in the amount of $11,453.33.

The Objection states the following with particularity (FED. R. BANKR. P. 9013):

1. On November 30, 2018 Creditor filed the Claim in the amount of $11,453.33.

2. Creditor did not state the basis for perfection in part 9 of the Claim.

3. Creditor did not provide evidence of perfection in the attachments to Claim other than a hearsay statement from "Collateral Management Services" listing a perfection date of 9/26/2018.

4. Even if perfected on that date, the delay in (alleged) perfection renders Lobel's claim subordinate to unsecured creditors.

5. The Claim improperly includes unmatured interest because, to reach its claimed balance due of $11,453.33, Creditor subtracted the payments made by Debtor from the "Total Payments" amount which necessarily includes unmatured interest through the 54-month term of the loan.

6. Debtor made 34 months' payments before the filing of the petition. Pursuant to the amortization schedule provided by Debtor's counsel, not accounting for late fees, the balance due after 34 months should be $ 6,870.65.

7. Even if payments are not credited, as of the filing date of the Petition (November 14, 2018) the principal balance should be $ 7,959.10.

Objection, Dckt. 50.

APPLICABLE LAW

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial evidence to overcome the prima facie validity of a proof of claim, and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006)(Emphasis added). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and requires financial information and factual arguments. *In re Austin,* 583 B.R. 480, 483 (B.A.P. 8th Cir. 2018). Notwithstanding the prima facie validity of a proof of claim, the ultimate burden of persuasion is always on the claimant. *In re Holm*, 931 F.2d at p. 623.

DISCUSSION

Lien Perfection &
Subordination to Unsecured Claims

Debtor asserts in the Objection that Creditor's lien was not perfected, and if it was perfected should be subordinated due to delay.

Federal Rule of Bankruptcy Procedure 3001(d) requires evidence of perfection to be filed in support of a proof of claim asserting a security interest.

Attached the Claim is a printout of the electronic lien and title information for the vehicle. The information states the perfection date was September 26, 2018. This is evidence that the lien was perfected.

Debtor argues that this evidence is hearsay. However, Debtor has not shown authority for the proposition that the Federal Rules of Evidence are applied to the documentation attached to a proof of claim.

The documentation provided with a proof of claim is to insure that a debtor, trustee, and respective counsel are aware of the basis for the asserted lien/security interest. Then, subject to the certifications made pursuant to Federal Rule of Bankruptcy Procedure 9011, a debtor or trustee could proceed with an objection to the extent that the claim or lien is in *bona fide* dispute.

What Creditor has chosen to do is present a very ephemeral documentation for the lien asserted on Debtor's vehicle. It appears to be an internal document for Creditor in which information about the lien is maintained in the Creditor's records.

To counter this ephemeral evidence the Debtor has provided the court with the following evidence – Nothing. There is no declaration from Debtor stating that there is no lien on the vehicle. Debtor has not provided a copy of the title certificate showing no lien.

Lien Avoidance and Subordination

For Debtor's assertion that the Claim should be subordinated, Debtor relies on *Bank of Am. Nat. Tr. & Sav. Ass'n v. Sampsell*, 114 F.2d 211 (9th Cir. 1940), an eighty year old case which pre-dates the Bankruptcy Code and the avoiding power provisions of 11 U.S.C. § 544 et. seq and the provisions of 11 U.S.C. § 551 that preserves all avoided liens for the benefit of the bankruptcy estate (not the debtor).

The statutory provision upon which the decision in *Sampsell* was based, California Vehicle Code § 195, was repealed in 1961. Current law applicable to the lien at issue is found in California Vehicle Code § 6300, which provides:

> § 6300. Recording of security interest
>
> Except as provided in Sections 5905, 5907, and 5908, **no security interest in any vehicle registered** under this code, irrespective of whether the registration was effected prior or subsequent to the creation of the security interest, **is perfected until the secured party or his or her successor or assignee has deposited, either physically or by electronic transmission pursuant to Section 1801.1**, with the department, at its office in Sacramento, or at any other office as may be designated by the director, a properly endorsed certificate of ownership to the vehicle subject to the security interest showing the secured party as legal owner if the vehicle is then registered under this code, or, if the vehicle is not so registered, an application in usual form for an original registration, together with an application for registration of the secured party as legal owner, and upon payment of the fees as provided in this code.

Current law, for the last fifty years has addressed the registration with the Department of Motor Vehicle as "perfecting" the lien. Current law continues in California Vehicle Code § 6301 that when perfected, the lien

in the vehicle is subject to the provisions of the Commercial Code in determining the liens and interests of competing parties.

Even under the ruling in *Sampsell* using the word "void," the holding recognized that the lien, even if not recorded, was enforceable against the borrower (the debtor in this case) and any other creditors after the lien is subsequently recorded. The decision in Sampsell was to allow the bankruptcy trustee to take the vehicle free and clear of the lender's unrecorded lien and sell the vehicle for the bankruptcy estates.

In modern bankruptcy law, 11 U.S.C. § 544(b) allows the trustee, or here the Chapter 13 Debtor, to avoid an unperfected lien (even though it is still enforceable against the debtor). However, when avoided, that unperfected lien is preserved for the bankruptcy estate as provided in 11 U.S.C. § 551. This lien, which remains enforceable against the debtor is senior to all other interests in the vehicle, including any exemption.

Thus, if there is such an unperfected lien in the vehicle, the Chapter 13 Debtor exercising the powers of a trustee for the benefit of the bankruptcy estate, needs to pursue the avoiding of that lien and recover 100% of the value of the vehicle for the benefit of the estate and the creditors thereof.

Subordination

If Debtor believes that the lien should be subordinated, the vehicle sold, and the monies paid to other creditors, Debtor may seek relief, in a separate motion, for subordination of the claim as provided in 11 U.S.C. § 506(c).

There is no legal support for the proposition that Creditor's Claim should be subordinated to every other claim in this case in this Objection to Claim, and such relief is denied without prejudice.

Determination of Claim

Debtor asserts the Proof of Claim attachment lists as a starting amount due the "total of payments" amount of $22,498.56. Debtor argues that because that amount includes the amount paid over the life of the loan, it includes interest which has yet to mature.

In reviewing the Sales Agreement attached to the Claim and filed as Exhibit 1, the court cannot determine whether Debtor's arguments are correct. The document is blurred making reading it difficult.

It appears from the Attachment to Proof of Claim No. 1-1 the amount financed under the Sales Agreement was $13,933.24. Debtor was to make one payment of $500.00 and then fifty-three (53) monthly payments of $416.64 each, with the first due on June 26, 2016, and the final payment (if all payments were timely made) on October 26, 2020. The interest rate for this financing is 22.95%.

Debtor's counsel argues further that it "appears" that 34 payments have been made. However, it is not explained where this is clearly shown in the Claim Attachment.

Debtor's counsel filed as Exhibit 3 an Amortization Schedule which he uses to argue the amounts owing should be $6,870.65 after 34 months of payments or $7,959.10 after 30 months. Exhibit 3, Dckt. 52. However, the Exhibit is really just an extension of Debtor's counsel's legal argument and has no evidentiary basis.

There is a person who knows exactly how many payments were made, when they were made, and the total amount paid to this Creditor – The Debtor. Counsel for Debtor has at his disposal one of the two best witnesses as to this obligation -The Debtor. However, The Debtor is missing in action, with no testimony not only about the lien, but the payments made.

The Attachment to Proof of Claim 1-1 that has the payments reference by Debtor's counsel is anything but clear. It has abbreviations and code for which no key is provided. It includes:

PY
L2
L4
WA
WC-M
WA-M
CG
NF
Debit/Fee (amounts for unstated reasons)
PYMT
REFNO
#DBT
#PP
EFF
#CC

Proof of Claim No. 1-1, Attachment. While the court could guess at some, most are undecipherable.

Four figure Debit/Fee and PYMT amounts appear, without explanation.

If Debtor had provided evidence of the payments made and provided a spreadsheet/loan calculation based on actual payments, and if the amount was different than stated on Proof of Claim No. 1-1 (which is *prima facie* evidence of the claim), the court may have been able to rule on the dollar amount of the claim. But, no evidence was provided by Debtor.

RULING

The court overrules the Objection without prejudice. While questions exist as to what is owed Creditor, Debtor has not presented evidence for the court to compute a different amount. The court overrules the Objection without prejudice. Presumably, Debtor and Debtor's counsel would not have filed the Objection as to the dollar amount unless they have knowledge of evidence and a legal basis for such – the certifications made by both pursuant to Federal Rule of Bankruptcy Procedure 9011 in filing the Objection. If the court were to deny the Objection with prejudice, Debtor and Debtor's counsel (who are fiduciaries to the bankruptcy and plan estates) would be making a gift to Creditor. While the estate would have claims against each for having squandered monies of the estate, such gift and then Debtor and Counsel paying for the gift is a poor substitute for getting the ruling correct.

Debtor and Debtor's Counsel have, given the certifications arising under Federal Rule of Bankruptcy Procedure 9011, have affirmatively stated that there is an avoidable unperfected lien that they must now prosecute. As discussed above, the avoided lien is preserved for the benefit of the bankruptcy

estate, not the Debtor, and the value of the vehicle will help fund the Plan.

At the hearing, **xxxxxxxxxxxxxx.**

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

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

The Objection to Claim of Lobel Financial ("Creditor"), filed in this case by Latoya Kamilah E Smith, 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 of Creditor is overruled without prejudice.

14. **18-26952-E-13 SLE-3** | **ANTHONY/CANDIE SANDOVAL** **Steele Lanphier** | **MOTION TO SET ASIDE DISMISSAL OF CASE 6-10-19 [42]**

DEBTOR DISMISSED:
06/03/2019
JOINT DEBTOR DISMISSED:
06/03/2019

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 motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on June 10, 2019. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

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

The Motion to Vacate is xxxxxxxxxx.

The debtors, Anthony Adrian Sandoval and Candie Robin Sandoval ("Debtor"), filed the instant case on November 2, 2019. Dckt. 1.

On February 27, 2019, the Chapter 13 Trustee, David Cusick ("Trustee"), filed a Motion to Dismiss the Case due to Debtor's failure to file a new Chapter 13 Plan after the court denied Debtor's Motion to Confirm the original plan. Dckt. 34. On April 25, 2019, a hearing on the Motion to Dismiss was held, and the Motion was granted. Dckt. 38. The ruling was final because Debtor did not file any

opposition.

On June 10, 2019, Debtor filed this instant Motion to Vacate. Dckt. 42. Debtor's counsel asserts, supported by his Declaration (Dckt. 44), that the failure to oppose the Trustee's motion to dismiss the case was due to a calendaring error.

Debtor seeks to have the order dismissing the case vacated, per Federal Rule of Civil Procedure 60(b).

TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on June 11, 2019 [FN.1.]. Dckt. 46. Trustee opposes the Motion on the grounds that no new plan has been filed yet.

FN.1. The Opposition does not appear to have been signed. However, the court has considered the arguments as they are relevant to the determination of the Motion in light of this Motion have been set for hearing using the shortened time period provided in L.B.R. 9014-1(f)(2).

APPLICABLE LAW

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

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

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

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

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

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

DISCUSSION

As an initial policy matter, the finality of judgments is an important legal and social interest. The standard for determining whether a Rule 60(b)(1) motion is filed within a reasonable time is a case-by-case analysis. The analysis considers "the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties." *Gravatt v. Paul Revere Life Ins. Co.*, 101 F. App'x 194, 196 (9th Cir. 2004) (citations omitted); *Sallie Mae Servicing, LP v. Williams (In re Williams)*, 287 B.R. 787, 793 (B.A.P. 9th Cir. 2002) (citation omitted).

The case was dismissed after Debtor's counsel failed to propose a new Chapter 13 Plan. Debtor's counsel has provided testimony the dismissal went unopposed because of a calendaring error. Declaration, Dckt. 44.

Since dismissal, Debtor's has filed, served, and set for hearing an Amended Plan. Dckts. 48, 52. That confirmation motion appears to comply with the requirements of the Federal Bankruptcy Rules (9013) and is supported by evidence.

Prosecution of the Case by Debtor, and the
Cost and Expense Imposed by Dismissal and Motion to Vacate

Debtor commenced the bankruptcy case on November 2, 2019. Debtor filed a proposed Chapter 13 Plan and Schedules on November 30, 2018.

Confirmation of the Debtor's proposed Chapter 13 Plan was denied on January 15, 2019. Civil Minutes, Dckt. 30. The grounds for denying confirmation was that Debtor has over median income, but was only proposing a thirty-six (36) month Plan. *Id.* When the Trustee filed the opposition to the motion to confirm the thirty-six month plan, Debtor filed no reply. No appearance was made by Debtor or counsel for Debtor at the January 15, 2019 hearing on Debtor's Motion to Confirm. *Id.*

More than a month later on February 27, 2019, the Chapter 13 Trustee filed a Motion to Dismiss for failure of Debtor to file an amended plan and prosecute this case. Motion, Dckt. 34.

The hearing on the Motion to Dismiss was conducted to April 24, 2019. No opposition was

presented by Debtor (with written opposition required as provided in L.B.R. 9014-1(f)(1)), nor did Debtor or Debtor's counsel appear at the April 24, 2019. Civil Minutes, Dckt. 38.

From the denial of confirmation due to the improperly short plan term to the hearing on the Motion to Dismiss, ninety-nine days passed without any action being taken by Debtor or Debtor's counsel.

For some reason, the court's order dismissing the case was not entered until June 3, 2019, forty (40) more days later.

Then, a week after the order dismissing the case was entered, one hundred thirty-nine (139) days after the Motion to Dismiss was filed, Debtor came out of the shadows and filed the present Motion to Vacate the Order Dismissing this Case.

The Motion to Vacate merely asserts that:

- Debtor's counsel failed to timely submit a new Plan (over the months that followed the denial of the motion to confirm a plan that had a facially improper term and would necessarily draw the opposition of the Chapter 13 Trustee, unless it were to be "slipped by" the Chapter 13 Trustee).

- There were a series of non-specified "mis-steps" by Counsel.

- There was a calendaring error, and the Chapter 13 Trustee's Motion to Dismiss was not put on Counsel's calendar.

- This case just "slipped through the cracks" and Debtor are innocent and should be given mercy.

- Debtor will propose a plan that will provide more for creditors then they would receive in a Chapter 7 liquidation.

The failure in the prosecution of this case was not merely a one item event. Rather, no new plan was prepared and filed. No motion to confirm an amended plan was prepared and filed. No opposition to the Trustee's Motion to Dismiss was filed. No appearance was made at the hearing on the Motion to Dismiss. Nothing was done in the one month delay in the court entering the order dismissing this case. It is not merely a, one-time missed calendar entry.

Review of Proposed Plan

The Amended Plan states that it will now be a 60 month Plan. The first month of the Plan is not identified, and the plan payments to be made by Debtor are to be $1,860.00 through May 2019, and then $305.00 per month thereafter for an unstated number of months. At $305.00 a month, the $1,860.00 would constitute payments for six months, leaving $305.00 to be paid for forty-four (54) months.

On Schedule I Debtor states under penalty of perjury that Debtor's monthly wage income is $7,399.27. Dckt. 24 at 22. After withholding for taxes, life insurance, and SEIU dues, Debtor states

having monthly take-home income of $5,887.61.

On Schedule J Debtor lists monthly expenses for a family unit of three persons (the two debtors and a teenage child) of ($5,582.00) a month. *Id.* at 24-25. Debtor's expenses include:

- Electricity/Gas.....($300)
- Phone/Internet/Cable.....($650)
- Transportation.....($750)
- Vehicle Insurance.....($300)

Some of these expenses seem high for a debtor driven to having to seek this bankruptcy relief, especially $750.00 for vehicle fuel and maintenance. On Schedule A/B Debtor lists owning one vehicle, a 2002 Isuzu Rodeo. Dckt. 25 at 4. There are no other vehicles or vehicle related expenses identified to warrant $750 a month transportation payment.

On the whole, Debtor's expenses do not appear that they could be, in their totality, unreasonable. But it does appear that some dollar amounts have been stuck in categories as placeholder amounts.

One item of note is that Debtor has one vehicle, a 20 year old SUV. On Schedule A/B this vehicle is listed as having 180,000 miles on it. Dckt. 24 at 10. As drafted the Debtor will drive this vehicle for another five years, pushing it up over 230,000 miles.

Reviewing Schedule E/F Debtor's general unsecured claims include a significant dollar amount of what appear to be medical related debts. *Id.* at 13-19. There are a number of credit card obligations, as well as a $4,100.00 obligation to a jewelry store.

Looking at the proofs of claim filed in this case, it appears that Debtor has suffered from some bad borrowing choices. Proof of Claim No. 6-1 has been filed by LendingClub Corporation in the amount of $9,878.24. Looking at the supporting documentation, this is stated to have been a loan made in April 2014. No copies of the loan documents are attached. From the ledger, it appears that the original principal amount of the obligation was $15,000 (but the court cannot tell if it was $15,000 cash to the Debtor or whether that includes fees, costs, and expenses of the lender added into the principal balance).

The attachment shows that Debtor was only able to make the payments through July 2016, and has not made any payments since. This information reports that Debtor has paid $10,399.65 on the obligation, with the principal balance reduced to $9,878.24 (reduced by $5,121.76).

The Proof of Claim, in addition to not including the loan documents, has left blank the required information disclosing the interest rate on this loan. This lack of information by the creditor is of concern to the court.

Likelihood of Success

Debtor's declaration in support of the Motion to Confirm concerns the court. Dckt. 50. While counsel seeks to "fall on his sword" and take the "blame" (and financial responsibility) for Debtor not prosecuting this case. Debtor's declaration shows little personal knowledge and involvement in attempting to restructure their finances. Rather, Debtor provides legal conclusions and merely parrots Bankruptcy Code provisions, demonstrating a lack of knowledge of what they purport to be committing to do through the Chapter 13 Plan.

In many respects, the Declaration and Debtor's conduct appears to be an extension of doing "whatever," without regard to the financial consequences (such as taking out high interest rate loans) to just get through the day.

RULING

A serious question exists as to whether Debtor is actively participating in and prosecuting this bankruptcy case. From what is presented, there does not appear to be a likelihood of success in prosecuting this case. Though counsel wants to shoulder the blame, it appears that this may well be a disassociated debtor who does not like, and cannot (emotionally) accept the reality of their finances.

At the hearing, **xxxxxxxxxx**

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Vacate filed by the debtors, Anthony Adrian Sandoval and Candie Robin Sandoval ("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 **xxxxxxxxxx**.

15. **19-21262-E-13 SDW-1** **CHARLES CASTILLE AND JUANITA LEE-CASTILLE** **MOTION TO CONFIRM PLAN**
Selwyn Whitehead **5-10-19 [28]**

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 Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 10, 2019. By the court's calculation, 46 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is XXXXXX.

The Chapter 13 Debtors, Charles Castille and Juanita Lee-Castille ("Debtor"), seek confirmation of the First Amended Plan. The Amended Plan provides for payments of $1,209.00 for 2 months, $1,920.00 for the remaining 58 months, and a 0 percent dividend to unsecured claims, which total $90,693.21. Dckt. 24. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on May 29, 2019. Dckt. 35. Trustee opposes confirmation on the grounds that the plan terms are inconsistent–the plan providing for monthly payments of $1,499.89 to the Class 2B claim of the IRS, but in the first two months only requiring an overall plan payment of $1,209.00.

Trustee also notes the plan does not provide for the remaining $2,000.00 in attorney's fees.

Trustee recommends adding language in the Order Confirming the Amended Plan commencing payments of $370.00 towards attorney's fees in month three, and commencing payments to

the IRS in month two, of the plan.

DISCUSSION

Trustee suggests addressing his grounds for opposition in the Order Confirming.

At the hearing, xxxxxxxxxxxxxx.

~~The Amended Plan does comply with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is confirmed.~~

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

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

~~The Motion to Confirm the Amended Chapter 13 Plan filed by Charles Castille and Juanita Lee-Castille ("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 May 6, 2019, 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.~~

16. 19-22077-E-13 DPC-1 | **DARIN DOWD** **Susan Turner** | **CONTINUED AMENDED OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK** **5-15-19 [33]**

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)(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 15, 2019. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is XXXXXXXXXX.

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

A. The debtor, Darin Wayne Dowd ("Debtor"), failed to appear of the First Meeting of Creditors on May 9, 2019. The Meeting was continued to June 20, 2019.

B. Debtor's plan relies on a motion to value the secured claim of creditor Elite Acceptance.

C. The first plan payment of $668.00 will come due prior to the hearing date.

In the original Objection filed, Trustee asserted Debtor had not provided various 11 U.S.C. § 521 documents. Dckt. 21. In the Amended Objection filed May 15, 2019, Trustee states these documents

have now been provided.

DEBTOR'S REPLY

Debtor filed a Reply to the Objection on May 16, 2019. Dckt. 37. Debtor states he will appear at the continued Meeting of Creditors, that the 521 documents have been provided to Trustee, that there are no anticipated issues with making the first plan payment, and Debtor notes that a Motion To Value has been set for hearing May 21, 2019.

JUNE 11, 2019 HEARING

At the June 11, 2019 hearing the court continued the hearing on the Motion to allow Debtor to prosecute the filed motion to value secured claim and appear at the continued Meeting of Creditors. Civil Minutes, Dckt. 52.

DISCUSSION

A review of the docket shows that the court has granted the motion to value the secured claim of Elite Acceptance.

At the hearing, xxxxxxxxxxxxxx.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by The Chapter 13 Trustee, David Cusick ("Trustee"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of Plan is **XXXXXXXXXXX**.

17. **19-22077-E-13 SJT-2** **DARIN DOWD** **Susan Turner** **MOTION TO VALUE COLLATERAL OF ELITE ACCEPTANCE** **5-23-19 [39]**

Final Ruling: No appearance at the June 25, 2019. hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditor, and Office of the United States Trustee on May 22, 2019. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Motion to Value Collateral and Secured Claim of Elite Acceptance ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $5,575.00.

The Motion filed by the debtor, Darin Dowd ("Debtor"), to value the secured claim of Elite Acceptance ("Creditor") is accompanied by Debtor's declaration. Declaration, Dckt. 41. Debtor is the owner of a 2008 Toyota Prius ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $5,575.00 [FN.1.] 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).

FN.1. Debtor's Schedule A/B states the value of the Vehicle is $5,557.00. For the purposes of the Motion (and because this different amount is very slight), the court sticks with the amount stated and requested that the secured claim be valued at in the Motion.

TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response on June 7, 2019 indicating non-opposition. Dckt. 49.

DISCUSSION

The lien on the Vehicle's title secures a purchase-money loan incurred more than 910 days prior to filing of the petition, that represents a debt owed to Creditor with a current balance of approximately $6,363.00. Schedule D, Dckt. 1; Declaration ¶ 5, Dckt. 41.

Therefore, Creditor's claim secured by a lien on the Vehicle's title is under-collateralized. Creditor's secured claim is determined to be in the amount of $5,575.00, the value of the collateral. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value Collateral and Secured Claim filed by the debtor, Darin Dowd ("Debtor"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of Elite Acceptance ("Creditor") secured by an asset described as 2008 Toyota Prius ("Vehicle") is determined to be a secured claim in the amount of $5,575.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is $5,575.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

18. **19-22653-E-13** **REECE/RODINA VENTURA** **MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION TO CONFIRM TERMINATION OR ABSENCE OF STAY**
CLH-3 **Peter Macaluso** **6-6-19 [61]**

BENJAMIN VILLANUEVA VS.

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 Not Required.

Sufficient Notice Not Provided. No Proof of Service or other evidence has been filed showing to the court the service was made on any party in interest.

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

The Motion for Relief from the Automatic Stay is denied without prejudice

Insufficient Service

As discussed, *supra*, no evidence was provided to demonstrate proper service. Therefore, the Motion is denied without prejudice.

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 Relief from the Automatic Stay filed by Benjamin Villanueva and Adele Bon Gaunia ("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 is denied without prejudice.

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF APPLICANT PROVIDES SUFFICIENT NOTICE

The Motion for Relief from the Automatic Stay is:

(1) Denied with respect to the request for a determination that termination of the stay as to the Debtor pursuant to 11 U.S.C. § 362(c)(3) allows creditors to have claims against the bankruptcy estate adjudicated in state court without relief from the stay;

(2) Granted retroactively, subject to conditions to allow Movant Villanueva to have the post-judgment attorney's fees and costs determined in the state court in which the stated court pre-petition judgment was issued; and

(3) Denied without prejudice as to Movant Gaunia's request to proceed with state court litigation to have her claim in this bankruptcy case determined.

Benjamin Villanueva and Adele Bon Gaunia ("Movant") seek either confirmation no stay exists, or in the alternative that relief from stay be granted, with respect to state court litigation.

Movant explains this is the debtors, Reece Ventura and Rodina Cordero Ventura's ("Debtor"), second filing within a year, and that the stay was terminated as to Debtor after 30 days because the court denied Debtor's Motion to extend the stay on May 29, 2019.

After the stay terminated as to Debtor, Movant refiled a fee application in state court litigation against Debtor to render a judgement regarding fees incurred. Movant argues this was not an attempt to enforce judgement against the Debtor, but was merely an attempt to finalize the amount owed by Debtor.

The two persons constituting the Movant have claims in two different states of resolution. Movant Benjamin Villanueva ("Movant Villanueva") has already obtained a judgment against Debtor and other non-debtor entities. Motion, p. 1:21-22; Dckt. 61.

However, for Movant Adela Bon Gaunia ("Movant Gaunia") is stated to merely be "litigating a wage theft claim against Debtors and other entities at the time of filing [the bankruptcy case]." *Id.*, p. 1:22-24. The Motion does not state the status of the state court litigation as part of the grounds (Fed. R. Bankr. P. 9013) for the relief requested.

Movant has provided exhibits in support of the Motion. The exhibits are not authenticated, either by a declaration or certified copies of documents asserted to be filed in non-bankruptcy judicial proceedings. *See* Federal Rules of Evidence 901, *et. seq*.

Exhibit 1 is a copy of a document stated to be Movant Villanueva's judgment against Debtor. Dckt. 63. On Schedule E/F Debtor lists Movant Villanueva's claim as being based on a judgment. Dckt. 1 at 28. The $125,000.00 amount of the judgment is consistent with the amount shown by Debtor on Schedule E/F.

Exhibit 5 appears to be a copy of Movant Gaunia's stated court complaint. *Id.* at 24. If so, it was filed October 5, 2016. If Movant Gaunia has been diligently prosecuting the state court action, the court would anticipate being provided with admissible, properly authenticated evidence thereof in support of the request the court allow Movant Gaunia's bankruptcy claim be determined, a core matter for the bankruptcy court, in the state court rather than under the express procedure established by Congress.

DISCUSSION

Violation of Stay

While the failure to serve the Motion in this Contested Matter is dispositive, the court cannot help but comment on arguments made by Movant which are significantly deficient, as a manner of bankruptcy law. Movant argues in the Motion as follows:

> Under the Majority view, the assets of the estate are still protected by the stay, therefore, the Creditor cannot seek to enforce their debts, seek liens or possession of assets the estate, and Creditors are not doing so. The litigation being pursued seeks to resolve the disputes regarding , in one instance the attorneys fees owed by Debtors on the debt of Villanueva and, in the other instance, resolve the dispute regarding the debt asserted by the Creditor Gaunia. Thus, **the stay does not enjoin the pursuit of the state court litigation to final judgment**.

Motion ¶ 20, Dckt. 61(emphasis added).

The plain language of the Bankruptcy Code provides:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—
>
> (1) the commencement or continuation, including the

> issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or **to recover a claim against the debtor that arose before the commencement of the case under this title**;. . . .

11 U.S.C. § 362(a)(1)(emphasis added).

The automatic stay arising by operation of federal law is broad and works to allow for the efficient administration of the bankruptcy estate, protection of the debtor and creditors, [FN. 1.] determination of claims, and create one central federal locus for adjudication of bankruptcy and non-bankruptcy related to matters. The automatic stay created upon the commencement of the case is stated in 11 U.S.C. § 362(a) as follows:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of–
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or **to recover a claim against the debtor that arose before the commencement of the case under this title**;

In this first paragraph there is the stay of the action against the debtor. This is the section that Movant cites to, stating that it is now "merely" continuing with the action against the Debtor. However, Congress has also created another stay that is separate from continuing with litigation, it is a stay to "recover a claim against the debtor." The language is not, "recover on a claim against the debtor." As shown below, there is the stay on enforcement both as to the debtor and separately as to the bankruptcy estate.

In the "to recover a claim" against the debtor goes to the claim process under the Bankruptcy Code - a core proceeding. *Stern v. Marshall*, 564 U.S. 462 (2011). It appears that what Movant seeks to do is preempt the Bankruptcy Code, move the claim determination process, and bind the fiduciary of the bankruptcy estate with a claim determination in state court. While it may be that a bankruptcy judge properly exercising the power to abstain would modify the automatic stay to allow such claim that is part of multi-party (debtor and non-debtors) litigation to proceed in state court, it requires an affirmative order (which Movant requests in this Contested Matter).

> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

There are two stays of enforcement of a judgment. Movant does not purport to be trying to enforce any judgment against property of the bankruptcy estate.

> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

This provides for a stay protection for property of the bankruptcy estate, separate and apart from the stay for the Debtor. Again, Movant states that no attempt is being made to against property of the bankruptcy estate.

> (4) any act to create, perfect, or enforce any lien against property of the estate;

Another separate stay protecting property of the bankruptcy estate, separate and apart from the stay that springs to life for the debtor upon the commencement of a bankruptcy case.

> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

This provision is a unique protection for property of the debtor, not property of the bankruptcy estate.

> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

Here, there is a stay protecting property of the debtor, not the estate, from enforcement.

> (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

While phrased with the name “debtor,” this complements the stay protecting property of the bankruptcy estate which includes claims against third parties of the debtor arising prior to the commencement of the bankruptcy case. 11 U.S.C. § 541(a).

> (8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

FN. 1. The protections of the automatic stay flowing to creditors is addressed in the Legislative History of the Bankruptcy Code:

> The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all

creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that.

H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) pp. 340-344.

While Movant contends that the state court action is only "against the Debtor," that contention is belied in the following argument advanced by Movant:

> 9. After termination of the stay, Creditor Villanueva refiled the fee application in his state court case so as to render a judgment regarding the fees incurred. (Creditors request the court take judicial notice of the Motion for Attorneys Fees filed with the State Court.) The motion does not attempt to enforce the judgment other than to finalize the amount of the debt**. Further, the Creditor Gaunia intends to pursue her complaint to the resolve her claims against the Debtors**, their corporate entities and other third parties.
> . . .
> 12. Creditors believe that, to the extent the automatic stay applies, relief from stay is necessary and requests that the court enter such relief. **Creditor agrees** that as to the Debtor, the **litigation is to finalize the claims**, and Creditor will not seek to **enforce the judgment** or settlement other than **through the bankruptcy process**.

Motion ¶¶ 9, 12; Dckt. 61(emphasis added).

On its face the Motion states that Movant intends to use the state court litigation to resolve Movant's claim in this bankruptcy case. The claim and claim objection process are core matters arising under the Bankruptcy Code. While the stay may have terminated as to the Debtor, it has not terminated as to the estate and the fiduciary exercising the rights, powers, and duties of a trustee to properly administer the bankruptcy estate.

REQUESTED RELIEF FROM THE STAY

Though the automatic stay applies, Congress expressly provides in 28 U.S.C. § 1334(c)(2) the federal judge in a bankruptcy case can abstain when appropriate to allow nonbankruptcy proceedings to be the forum in which a claim is determined, with the obligation as determined in that forum brought back to the bankruptcy case as the creditor's claim.

As discussed by the court in *In re Castlerock Properties*, 781 F.2d 159 (9th Cir. 1985), there are factors to be considered in allowing the determination of a claim proceed in state court. The Ninth Circuit Court also addressed modifying the automatic stay when the Bankruptcy Case was interposed in an effort to thwart the state court proceedings. The opinion in *In re Tucson Estates*, Inc., 912 F.2d 1162 (9th Cir. 1990), held that "cause" existed to modify the stay to allow state court litigation to proceed when the parties were moving

toward concluding that action and the debtor was attempting to use the bankruptcy case to avoid the entry of an adverse judgment.

> Where a bankruptcy court may abstain from deciding issues in favor of an imminent state court trial involving the same issues, cause may exist for lifting the stay as to the state court trial. See *In re Castlerock Properties*, 781 F.2d 159, 163 (9th Cir. 1986).
> ...
> In deciding to lift the stay partially, the bankruptcy court made specific factual findings that provide a fully developed record and strongly support lifting the stay of the litigation entirely to allow the entry of judgment. (Execution of any judgment, of course, is another matter.) The bankruptcy court found that the debtor and officers waited until six years after the commencement of the state court litigation and until they had lost a very important summary judgment motion, to file for bankruptcy. The delay suggests that the filing's purpose was to avoid an unfavorable state court judgment ...

In the Motion, Movant Villanueva asserts that the state court action is a multi-party action which includes non-debtors on the same asserted obligation. Relief from the stay is requested to have the state court render a judgment for attorney's fees that are part of Movant's claim in this case. The attorney's fees and costs relate to the state court action in which Movant has obtained a judgment.

Proper grounds have been shown for modifying the automatic stay for the state court to determine the attorney's fees that have been occurred and are part of the judgment of Movant Villanueva in this case.

The court further concludes that it is in everyone's interest for the court to make the relief retroactive to avoid making Movant Villanueva having to go through the cost and expense of having to refile the motion for attorney's fees and the supporting evidence in light of the original filing being void as being in violation of the stay. [FN. 2.]

FN. 2. An act taken in violation of the automatic stay is void, not merely voidable.

> In fact, the automatic stay provision is so central to the functioning of the bankruptcy system that this circuit regards judgments obtained in violation of the provision as void rather than merely voidable on the motion of the debtor. See [*In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992)]. Courts regularly void state court default judgments against debtors when the judgments are obtained in violation of the automatic stay provision, even where the debtor filed for bankruptcy in the midst of the state court proceedings. See, e.g., *In re Fillion*, 181 F.3d 859, 861 (7th Cir. 1999); In re Graves, 33 F.3d 242, 247 (3d Cir. 1994).

Far Out Productions, Inc. v. Oskar et al., 247 F.3d 986, 995 (9th Cir. 2001).

> Our decision today clarifies this area of the law by making clear that

violations of the automatic stay are void, not voidable. See *In re Williams,* 124 Bankr. 311, 316-18 (Bankr. C.D. Cal. 1991) (recognizing that the Ninth Circuit adheres to the rule that violations of the automatic stay are void and criticizing the BAP decision in this case)...

The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his [or her] creditors. *It stops all collection efforts, all harassment, and all foreclosure actions.* It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

Schwartz v. United States of America (In re Schwartz),954 F.2d 569, 571 (9th Cir. 1992) (Emphasis in original).

As a condition of granting retroactive relief, Movant Villanueva must agree to setting a future date by which opposition, if any, may be filed by Debtor. The filing of the state court motion being void, no opposition was required.

At the hearing, Movant Villanueva agreed that to extend the time for Debtor to respond to the motion for attorneys fees until **xxxxxxxxxxx, 2019**, and that the hearing on the motion would not occur before **xxxxxxxxx, 2019**.

Movant Gaunia's Request for Relief From Stay

The court has not been presented with sufficient evidence to determine that it is proper to abstain and allow Movant Gaunia to litigate her claim in this bankruptcy case in the state court.

The Ninth Circuit Court of Appeals listed some of the factors to be considered in determining whether the federal court should abstain and allow a claim to be determined in state court in *In re Tucson Estates, Inc.*, 912 F.2d 1162 (9th Cir. 1990). A chart of these factors is:

Tucson Estates Factors	Application to Present Case
(1) The effect or lack thereof on the efficient administration of the estate if a Court recommends abstention	
(2) The extent to which state law issues predominate over bankruptcy issues	
(3) The difficulty or unsettled nature of the applicable law	

(4) The presence of a related proceeding commenced in state court or other nonbankruptcy court	
(5) The jurisdictional basis, if any, other than 28 U.S.C. § 1334	
(6) The degree of relatedness or remoteness of the proceeding to the main bankruptcy case	
(7) The substance rather than form of an asserted "core" proceeding	
(8) The feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court	
(9) The burden of [the bankruptcy court's] docket	
(10) The likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties	
(11) The existence of a right to a jury trial	
(12) The presence in the proceeding of nondebtor parties	

The court has not been presented with credible, admissible, properly authenticated evidence to conduct the necessary analysis for the requested relief.

The requested relief by Movant Gaunia is denied without prejudice.

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 Relief from the Automatic Stay filed by Benjamin Villanueva and Adele Bon Gaunia ("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 requesting a determination that the termination of the stay as to Reece and Rodina Ventura, the debtors ("Debtor") pursuant to 11 U.S.C. § 362(c)(3) also terminates the stay as to the bankruptcy estate and court, whereby Movant may adjudicate and

have allowed their bankruptcy claims in state court is denied. The automatic stay remains in full force and effect as to the bankruptcy case and the determination of claims (obligations asserted to be owed by Debtor to Movant, 11 U.S.C. § 502) to be adjudicated with the fiduciary of the bankruptcy estate (here the Debtor, no trustee being appointed to administer the bankruptcy estate, which includes the rights, interests, and defenses to claims), and actions taken in violation of the automatic stay are void.

IT IS FURTHER ORDERED that the automatic stay is modified to allow Movant Benjamin Villanueva ("Movant Villanueva") to prosecute and obtain a final order thereon (including any appeals) the request for post-judgment attorney's fees and costs that are asserted to be recoverable as part of the judgment ("Villanueva Judgment") in *Villanueva v. RML Children's Home, Inc., et. al.*, California Superior Court for the County of Sacramento Case No. 34-2015-00187237, pursuant to the Motion a copy of which was filed as Exhibit 3 (Dckt. 63) filed in support of this Motion for Relief.

IT IS FURTHER ORDERED that the above relief modifying the automatic stay is limited to the determination of the attorney's fees and costs that are included in the Villanueva Judgment, and not the enforcement thereof against any property of the bankruptcy estate or property included in or as part of performance of a bankruptcy plan (including earnings of Debtor).

IT IS FURTHER ORDERED that the above relief is made retroactive to the filing of the Motion for Attorney's Fees and Cost, subject to and conditioned on Movant Villanueva having stipulated on the record to Defendant having until and including **xxxxxxxxxxx, 2019**, to file pleadings in opposition, and the hearing on the Motion for Attorney's Fees and Costs shall be conducted until after **xxxxxxxxxxx, 2019.** If the opposition, if any, are not permitted to be filed as provided above and stipulated to by Movant Villanueva (whether due to conduct of Movant Villanueva, the state court, or other cause) then the retroactive authorization is ineffective and the Motion for Attorney's Fees and Costs and all supporting pleadings filed in violation of the automatic stay are void as a matter of federal law. 11 U.S.C. § 362(a); *Far Out Productions, Inc. v. Oskar et al.*, 247 F.3d 986, 995 (9th Cir. 2001).

IT IS FURTHER ORDER that the requested relief from the automatic stay by Adela Bon Gaunia ("Movant Gaunia") to proceed with state court litigation to adjudicate the obligation owed to her by Debtor (her bankruptcy claim) is denied without prejudice.

19.	**19-22653-E-13** **CLH-6**	**REECE/RODINA VENTURA** **Peter Macaluso** **O.S.T.**	**MOTION TO CONVERT CASE FROM CHAPTER 13 TO CHAPTER 11 AND/OR MOTION TO APPOINT TRUSTEE** **6-20-19 [92]**

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 motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

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

Sufficient Notice Provided. The court issued an Order shortening time and setting the hearing for June 25, 2019, so long as notice is provided via facsimilli no later than June 20, 2019. Order, Dckt. 98. Movant's Proof of Service indicates Debtor's counsel, the Chapter 13 Trustee, and the office of the U.S. Trustee via facsimilli on June 20, 2019. Dckt. 100.

The Motion to Convert 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. 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 Convert the Chapter 13 Bankruptcy Case to a Case under Chapter 11 and/or appoint a trustee is XXXXXXXXXX.

This Motion to Convert the Chapter 13 bankruptcy case of the debtors, Reece Ventura and Rodina Cordero Ventura ("Debtor"), has been filed by creditors Benjamin Villanueva and Adela Bon Gaunia ("Movant").

Movant asserts that the case should be dismissed or converted based on the following grounds:

A. Debtor is over the debt limit. At a May 21, 2019, Status Conference the court noted this fact and gave Debtor until June 15, 2019, to dismiss or convert the case before the court issued its order to show cause why the case should not be dismissed. Debtor's only action thus far is a Motion

To Reconsider set for hearing July 2, 2019.

B. Debtor is wasting assets of the Estate by closing its two care home businesses. On Debtor's Schedules Debtor has not accurately stated income received from or the value of the businesses. Debtor is not seeking to transfer the businesses to family members.

C. Appointment of a trustee is necessary to prevent destruction of listed and unlisted assets, and misuse of funds of the Estate.

D. Debtors have also intentionally failed to list assets of the Estate, including inheritance from Rodina Ventura's mother Rebecca Alda Cordero.

The Motion is supported by the Declarations of Cyndi Hill, Movant's counsel, and Regina May Cordero Burnley, Debtor's step-sister. Dckts. 95, 96. The Hill Declaration presents evidence that Debtors is closing Debtor's care home businesses.

The Cordero Burnley Declaration introduces evidence that Debtor Rodina Ventura has avoided bring the will of her mother to probate to keep those assets, valued at as much as $500,000.00 out of her bankruptcy case. Dckt. 96.

DISCUSSION

While the court has been presented with factual grounds in the Motion, Movant does not provide in the Motion or elsewhere any authority or legal basis for converting the case to Chapter 11 and appointing a trustee. The legal argument has been left entirely to the court.

At the hearing, xxxxxxxxxxxxxx.

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

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

The Motion to Convert the Chapter 13 case filed by creditors Benjamin Villanueva and Adela Bon Gaunia ("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 Convert is **XXXXXXXXXXX**.

20. **18-27755-E-13 PGM-1** **MARK/RENEE EVANS** **Peter Macaluso** **MOTION TO CONFIRM PLAN 5-13-19 [71]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 13, 2019. 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 Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

The Motion to Confirm the Plan is denied.

The Chapter 13 debtors, Mark Williams Evans and Renee Evans ("Debtor"), seek confirmation of the First Amended Chapter 13 Plan. The Plan provides for monthly payments of $300.00 for 36 months, and a 1 percent dividend on unsecured claims totaling $466,483.00. Dckt. 73. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on June 10, 2019. Dckt. 81. Trustee asserts the Plan will complete in 83 months because the Plan provides for 1 percent to unsecured claims, and Proof of Claim, No. 14 filed by Gazelle Schreiber c/o Fry Law Corporation on June 10, 2019 indicates an unsecured claim totaling $1,000.000.00.

Trustee further opposes confirmation on the basis that the Plan provides for $4,000.00 to be paid to Debtor's counsel, but does not specify any payments. Trustee is uncertain Debtor can afford payments to Debtor's counsel.

DISCUSSION

Prior Findings of the Court as to Debtor's Good Faith

This is Debtor's first Amended Plan. At the March 29, 2019, hearing on Trustee's Objection to the first Chapter 13 Plan, the court reviewed the three Schedules I and J filed in the case and statements made under penalty of perjury. The court espoused concerns, stated as follows:

> **Consideration of Good Faith and Differing Statements Made Under Penalty of Perjury**
>
> The Debtor has evolved through three Schedules J in this case, with the court creating the chart below showing the unexplained differences (Debtor failing or unwilling to provide testimony explaining such).

Expense	Original Schedule J Filed 12/14/2018 Dckt. 1 at 51-52	First Amended and Supplemental Schedule J Filed 2/15/2019 Dckt. 29 at 14-15	Second Amended and Supplemental Schedule J Filed 3/19/2019 Dckt. 46 at 6-7
Rent/Mortgage	$1,418.25	$1,418.25	$1,418.25
Home Maintenance	$100.00	$18.00	$100.00
Electricity/Nat Gas	$397.00	$397.00	$397.00
Water/Sewer/Garbage	$128.14	$128.14	$128.14
Phone/Internet/Cable	$320.00	$320.00	$320.00
Food/Housekeeping Supplies	$900.00	$500.00	$900.00
Clothing/Laundry	$250.00	$15.00	$150.00
Personal Care Products	$280.00	$25.00	$150.00
Medical/Dental Expense	$100.00	$25.00	$300.00
Transportation	$500.00	$250.00	$400.00
Entertainment	$142.55	$42.55	$108.00
Charitable/Religious Contributions	$1,000.00	$0.00	$0.00
Vehicle Insurance	$350.00	$350.00	$350.00
DMV Reg	$50.00	$50.00	$50.00
Car Pmt 1	$275.81	$275.81	$275.81

Car Pmt 2	$439.80	$439.80	$439.80
Total Expenses	**$6,651.55**	**$4,254.55**	**$5,487.00**
		(No explanation is provided for this - 36% reduction in expenses from that previously stated under penalty of perjury to be actual and necessary.)	(No explanation is provided for this 29% increase in expenses from that previously stated under penalty of perjury to be actual and necessary.)

Based on original Schedule I (understating income) and original Schedule J (with the highest expenses), Debtor states in the original plan that they were able to only scrape together $300 a month to fund a plan. Dckt. 4. With this very small monthly plan payment Debtor could only provide a 0.60% (six tenths of one percent) dividend to creditors holding general unsecured claims.

Debtor has then yo-yoed through two additional Schedules I and J, but each time managing to keep the monthly net income on each Schedule J at exactly $300.00. Dckt. 1 at 52, Dckt. 29 at 15, and Dckt. 46 at 7.

Based on the evidence presented, **the court determines that the expenses are merely made up numbers which these two debtors, with the assistance of their counsel, are willing to misstate under penalty of perjury so long as "they all WIN!" These changes are not minor, but gross (both in amount and willingness to make such misstatements under penalty of perjury). Originally, to get to the magic $300 a month number, Debtor stated under penalty of perjury that they made $1,000 a month charitable or religious contributions.**

Then, when it appeared that they needed to reduce expenses, their religious or charitable contribution of $1,000 a month went out the window. Debtor's "reasonable and necessary" home maintenance, food and housekeeping supplies, clothing, laundry, personal care products/services, medical and dental expenses, transportation, and entertainment expenses were slashed in the First Amended and Supplemental Schedule J. Dckt. 29.

But then when the Trustee identified that Debtor's income was higher, the "reasonable and necessary expenses" were pumped back up by Debtor and Debtor's counsel. Dckt. 46. These include:

Home Maintenance Expense..... 455.55% increase
Food/Housekeeping Supplies..... 80.00%

increase
Clothing/Laundry..... 900.00%
increase
Personal Care Products/Services..... 600.00%
increase
Medical/Dental Expenses..... 1,100.00%
increase
Transportation..... 60.00%
increase
Entertainment..... 153.82%
increase

Debtor provides no testimony as to how Debtor could be so grossly wrong as to their actual, necessary, and reasonable expenses. Debtor provides no explanation even though represented by knowledgeable bankruptcy counsel, who is well aware that when such gross changes are made it is necessary for the person giving grossly conflicting statements under penalty of perjury to provide evidence as why their latest statements under penalty of perjury are correct and the prior statements are the wrong ones.

As noted above, Debtor has provided these grossly conflicting statements under penalty of perjury with the assistance of counsel. Additionally, the court has addressed with Debtor's counsel a number of times that the schedules cannot be both amended (dating back to the filing of the case) and supplemental (dating only from a post-petition date). Given that Debtor's counsel is continuing to repeatedly do this, the court concludes that it is intentional and being done for some perceived (improper) advantage for Counsel's clients.

Debtor is required to have not only filed the bankruptcy case in good faith, but propose the plan and then prosecute the plan in good faith. *See* 11 U.S.C. § 1325(a)(3) and (7), and Fed. R. Bankr. P. 9011 as two examples of such good faith, truthful requirements in these federal court proceedings.

The Debtor's unexplained stating of expenses, evaporating expenses, reducing expenses, and then increasing expenses to always come to $300.00 a month in net monthly income is not in good faith, is not truthful, and is not accurate.

It appears that Debtor's loose association with the truth may well have rendered them unbelievable witnesses in any further federal court bankruptcy proceeding - this case or subsequent cases. It may be that the Chapter 13 Trustee and U.S. Trustee, in addition to other steps they may think appropriate, will seek the dismissal of this bankruptcy case with prejudice (rendering all of Debtor's obligation in this case non-dischargeable in this and any future bankruptcy case).

Civil Minutes, Dckt. 62(emphasis added).

Review of May 2019 Supplemental Schedules I and J

Since the hearing on the Trustee's prior Objection to Confirmation, Debtor filed another Supplemental I and J. Before reviewing the Schedules at length, it is important to note at outset that Debtor has once again ended up at the magic number of $300.00 for disposable income.

Using the same table the court used before for Schedules J filed in this case and adding the new scheduled amounts, Debtor states the following expenses under penalty of perjury:

Expense	**Original Schedule J File d 12/14/2018 Dckt. 1 at 51-52**	**First Amended and Supplemental Schedule J Filed 2/15/2019 Dckt. 29 at 14-15**	**Second Amended and Supplemental Schedule J Filed 3/19/2019 Dckt. 46 at 6-7**	**Third and Supplemental Schedule J Filed 5/17/2019 Dckt. 77 at 7-8**
Rent/Mortgage	$1,418.25	$1,418.25	$1,418.25	$1,418.25
Home Maintenance	$100.00	$18.00	$100.00	$100.00
Electricity/Nat Gas	$397.00	$397.00	$397.00	$397.00
Water/Sewer/Garbage	$128.14	$128.14	$128.14	$128.14
Phone/Internet/Cable	$320.00	$320.00	$320.00	$320.00
Food/Housekeeping Supplies	**$900.00**	**$500.00**	**$900.00**	**$900.00**
Clothing/Laundry	**$250.00**	**$15.00**	**$150.00**	**$150.00**
Personal Care Products	**$280.00**	**$25.00**	**$150.00**	**$150.00**
Medical/Dental Expense	**$100.00**	**$25.00**	**$300.00**	**$493.30**
Transportation	**$500.00**	**$250.00**	**$400.00**	**$400.00**
Entertainment	**$142.55**	**$42.55**	**$108.00**	**$108.00**
Charitable/Religious Contributions	**$1,000.00**	**$0.00**	**$0.00**	**$0.00**
Vehicle Insurance	$350.00	$350.00	$350.00	$350.00
Post-Petition Tax Payments for Travel				**$399.42**
DMV Reg	$50.00	$50.00	$50.00	$50.00
Car Pmt 1	$275.81	$275.81	$275.81	$275.81

Car Pmt 2	$439.80	$439.80	$439.80	$439.80
"Per Day: gas $35 + tolls $6 + Maint/tires $25"				**$1,400.00**
"meals - 3 meals per shift"				**$945.00**
Total Expenses	**$6,651.55**	**$4,254.55**	**$5,487.00**	**$8,424.72**
		(No explanation is provided for this -36% reduction in expenses from that previously stated under penalty of perjury to be actual and necessary.)	(No explanation is provided for this 29% increase in expenses from that previously stated under penalty of perjury to be actual and necessary.)	

While Debtor's expenses (stated under penalty of perjury) have been increased dramatically over the past two months since the Third Amended/Supplemental Schedules were filed, so too has Debtor's income. Debtor's most recent Schedule I states gross wages of $3,466.67 and overtime pay of $6,546.32 for a total gross of $10,012.99. Dckt. 77. This is an increase of $3,042.83 (43 percent increase) from the next most recent Schedule I (Dckt. 61), and an increase of $4,746.82 (90 percent increase)from the original Schedule I. Dckt. 1.

In support of the Third Supplemental Schedule I and J Debtor filed a Declaration explaining some of the changes to income and expenses (this is not an explanation of changes of income and expense in the entire case, but only some (not all) of the changed expenses from the Third and Fourth filed Schedule J; there is also no explanation for past misstatements). Declaration, Dckt. 78. Debtor explains the following:

1. Income and expenses have changed because Debtor now has a regular position which requires me to drive to, or take lodging in Oakland, California. *Id.*, ¶ 2.

2. "The new job provides a $20.00 per hour plus travel and meals and provides payment which they do not take taxes out in order for me to sleep five days a week in Oakland, which I try not to do and do drive back in forth five days a week." *Id.*, ¶ 2(third paragraph, labeled duplicatively).

3. Debtor was originally on worker's compensation prior to filing the case. *Id.,* ¶ 3.

4. Debtor increased medical/dental expenses from $300.00 to $493.30 because "the new job does not provide as good of health coverage, high co-pays, and prescriptions." *Id.,* ¶ 4.

While bemoaning the poor health care provided by Debtor's employer, the Debtor provides no evidence of such extraordinary medical expenses that actually exist. [FN. 1.]

FN. 1. When seeing the reference to the poor medical insurance, the court was curious about who was Debtor's employer. While the co-debtor's employer is an easily recognizable name, the debtor, Mr. Evan, lists a very generic sounding name for an employer at an out of state address. This caused the court to run an internet search for that employer. Running the name, the Google search engine did not return any such entity with such a name. Running the address given by Debtor, no such entity was listed at that address.

Conducting a search at the California Secretary of State website, returned an entity named Medical Allied Career Center, Inc., which is located in Santa Fe Springs, California.

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5. Debtor increased post-petition tax expenses from $300.00 to $399.42 because taxes for travel income are not deducted. *Id.*.

6. Debtor increased expenses for travel and meals from $0.00 to $2,345.00 because Debtor "travels back and forth daily from Oakland for shifts and can be required to sleep in City." *Id.*.

Travel Expenses

Debtor's overall monthly transportation expenses are now $2,199.42 ($400 for "transportation," $1,400.00 for travel expenses related to Debtor's work, and $399.42 from taxes on extra income Debtor receives as a credit towards travel expenses).

It is unclear why the $400.00 per month transportation expense has remained unchanged in light of Debtor now specifying elsewhere work related travel expenses. Further, while some explanation has been provided as to the work related travel expense, the detail is nowhere near enough to instill confidence.

The court is told the breakdown, per day, of travel expenses is $35 for gas, $6 for tolls, and $25 for maintenance and tires ($1,400.00 over roughly 21 work days a month). As discussed below, these amounts stated to be necessary expenses are far from reasonable.

Debtor's residence is stated to be 8151 Big Sky Dr., Antelope, California, which is roughly 90 miles from Oakland. Dckt. 1. Debtor's Schedule A/B lists three vehicles–two Honda Civic (2015 and 2017) and one Honda CRV (2016). *Id.* at 14. The mpg for each vehicle on the highway is estimated to be

39 (2017 Civic), 38 (2015 Civic), and 31 (2016 CRV). [FN.2.]

FN.2. https://www.kbb.com/honda/civic/2017/; https://www.kbb.com/honda/civic/2015/; and https://www.kbb.com/honda/cr-v/2016/.

Providing the most conservative of estimates (and certainly less than the necessary expense), traveling 200 miles a day for work with an mpg of 31 (if Debtor uses Debtor's *least* fuel efficient vehicle), Debtor would use 6.45 gallons of gas each work day. To get to the $35.00 daily amount stated by Debtor under penalty of perjury, Debtor would be paying roughly $5.42 per gallon.

This expense stated under penalty of perjury is not credible. The court takes judicial notice of the fact that the average price for a gallon of gas in California as of 2019 is well below $5.00. [FN3.]

FN.3. While gas prices fluctuate, the general cost of gas is to an extent "generally known," such that the court knows the average price is not $100, or $50, or $5. Federal Rule of Evidence 201 governs (and allows) judicial notice of certain adjudicative facts. That rule specifies the court may judicially notice a fact that is not subject to reasonable dispute because it (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. FED. R. EVID. 201(b).

One treatise describes the two categories of facts not subject to reasonable dispute as follows:

> The first category of adjudicative facts subject to judicial notice are facts which are "generally known within the territorial jurisdiction of the trial court." **This category requires that the fact to be noticed be of general notoriety in the geographical area of the court, but not of the United States as a whole**. It is also not necessary that the fact be universally known within the territorial jurisdiction, since such a requirement would seem to eliminate the category, no fact being so well known by every inhabitant within the jurisdiction as to be truly "universal."
>
> **This category is also limited to facts presently generally known within the jurisdiction**. Obviously, as time passes, the character of a jurisdiction in terms of its occupations, etc., will change. Accordingly, what a court might properly take judicial note of in the year 1800 might not be a proper subject of judicial notice in the year 2000.
>
> The combined result of these limitations is that many facts judicially noticed in this category may not seem obvious to an observer from another place and another time. Stated differently, facts judicially noted in this subsection of the Rule may often appear somewhat parochial. Since the standard is somewhat less objective than the standard in the second subcategory, this subcategory may be viewed as more subjective.

> Facts judicially noticed which fit within this subcategory are of breathtaking variety. The following are examples of that variety: bingo was largely a senior citizen pastime; major hijacking gangs had preyed on interstate and international commerce at Kennedy Airport; credit cards play vital role in modern American society; newspaper was New Jersey's only statewide newspaper, as well as its largest; incubation period of measles; British authorities in Hong Kong had not undertaken any persecution of persons because of race, religion, or political opinion; method for canning baked beans in New England; most establishments that sell beer also sell tobacco products; escape of ammonia gas from refrigeration coils ordinarily does not happen if coil is properly manufactured and installed; calendars have long been affixed to walls by means of a punched hole at the top of the calendar; the Ohio River is navigable.
>
> The following are some examples of similar facts which have been judicially noticed by state courts: passenger trains and freight trains are customarily separated; specific locations deemed valuable sources of gold; Texas cattle fever is a contagious disease; Connecticut River not navigable at specific location; proper season for the planting of cotton seed; existence of the Great Depression.
>
> . . .

60 AM. JUR. PROOF OF FACTS 3d 175 (Originally published in 2001)(emphasis added).

For the maintenance and tires expense, the $35 per day amount equates to approximately $6,300.00 a year, or $18,900.00 for the proposed 36 month plan term. This is not reasonable or credible. Debtor's vehicles are all fresh off the lot. There should not need to be a maintenance expense that over a few years exceeds the value of the vehicle itself.

If there is such a high maintenance expense, then it is unreasonable for the Debtor to keep these vehicles where they can merely be surrendered through the Chapter 13 Plan.

However, this is not likely the case. The numbers provided here, as with prior expenses provided to the court, were intentionally and arbitrarily inflated to achieve the "magic number" for disposable income.

Food Expenses

The monthly expense for food for Debtor's three person household is now stated to be $1,845.00 ($900 for food/housekeeping supplies and $945 for work related meals). As with the transportation expense, it is unclear why the overall food expense was not adjusted once Debtor decided to separately specify work related meals.

For the work related meals, Debtor is spending $15.00 per meal ($945 over 21 days, 3 meals per day). This meal expense is extravagant for someone seeking the extraordinary relief of a Chapter 13 case.

Further, while Debtor adds on three meals a day extra expense, he does not reduce the "normal" household food budget for the food he is not buying from the household budget (the left pocket) but is buying the food with his "extra" money (from his right pocket).

Going through an average work day (assuming Debtor is **forced** to eat out, **forced** to not have breakfast at home before leaving, and not prepare lunches, which would likely be healthier and more cost effective for someone struggling with their fiances), Debtor could spend $4.89 for a breakfast Crunchwrap combo, $6.75 for a footlong oven roasted chicken sandwich, $6.98 for a "Mac, fry, pie, and a coke," and would have spent only $18.62. Debtor could even go a little more lavish on the dinner option, getting an 8 ounce top sirloin steak meal for $19.99 (plus $6.00 for taxes and tip), and still would spend only $37.86, a full $8 (168.00 over 21 days) less than the currently stated *necessary* daily meal expense. [FN.4].

FN.4. https://www.tacobell.com/food/breakfast,;
https://www.fastfoodmenuprices.com/subway-prices/; and
https://www.fastfoodmenuprices.com/mcdonalds-prices/;
http://www.menu-prices.net/black-angus-steakhouse/.

As with the travel expenses, the $1,845.00 a month food expense is demonstrably an arbitrary, inflated number used to get to Debtor's bottom-line disposable income of $300.00.

Medical/Dental Expense

Debtor increased medical/dental expenses from $300.00 to $493.30 because "the new job does not provide as good of health coverage, high co-pays, and prescriptions." Declaration ¶ 4, Dckt. 78.

The court is not told why a $500.00 a month insurance plan is necessary or reasonable, or what specifically is unacceptable about the $300.00 plan. The jump to a $500.00 expense is particularly unusual when reviewing all four Schedules J–the original Schedule J providing for a $100.00 expense and the first Amended/Supplemental Schedule J only $50.00.

Again, it appears Debtor is merely looking for every nook and cranny to bury income with expenses to generate Debtor's desired monthly disposable income.

Prior Unexplained Changes in Expenses

As discussed, Debtor's Declaration only explains changes from the Third to Fourth filed Schedule J. Various expenses which have changed without explanation include:

Removal of $1,000.00 monthly charitable contribution

Clothing/laundry expense changing from $250, to $15, to $150

Entertainment changing from $142, to $42, to $108

Personal Care expense changing from $280 , to $25, to $150

Food expense changing from $900, to $500, to $1,845

Conclusion

Trustee has two objections to the Amended Plan: (1) the plan understates Creditor Gazelle Schreiber c/o Fry Law Corporation's unsecured claim and thus will be overextended, and (2) the plan does not provide for payment of attorney's fees. These objections are grounds enough to deny confirmation. *See* 11 U.S.C. §§ 1322(d), 1325(a)(6).

The Trustee has not raised any concerns about whether the plan is Debtor's best efforts and whether the plan has generally been proposed in good faith. 11 U.S.C. § 1325(a)(3).

However, the court is not under the same Memory Charm [FN.5.] and has not forgotten the prior proceedings in this case. Though neither the Chapter 13 Trustee, the U.S. Trustee, nor any creditor has raised the issue, the court has an independent duty to make certain that the requirements for confirmation have been met. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 1381 n.14, 176 L. Ed. 2d 158, 173 n.14 (2010); *see also Varela v. Dynamic Brokers, Inc. (In re Dynamic Brokers, Inc.*), 293 B.R. 489, 499 (B.A.P. 9th Cir. 2003) (citing *Everett v. Perez (In re Perez)*, 30 F.3d 1209, 1213 (9th Cir. 1994)).

FN.5. In the *Harry Potter* book series, a "Memory Charm" regularly appears as a spell which obliviates specific memories of the castee. The spell first appears in *Harry Potter and the Chamber of Secrets*, used by the character Gilderoy Lockhart who wipes memories of talented wizards and witches to take credit for their heroic deeds. Lockhart attempts to wipe the memory of Harry Potter and Ron Weasley using the latter's broken wand, resulting in the spell backfiring on Lockhart and wiping his own memory. Rowling, J. K., *Harry Potter And the Chamber of Secrets*, New York :Scholastic, Inc., 2000.

As the court has discussed at length above, the information provided by Debtor stated under penalty of perjury is not truthful or accurate. Expenses have been regularly inflated, deflated, and manufactured out of whole cloth in order for Debtor to pay creditors what Debtor wants to pay in this case–$300 a month.

That Debtor can, in good faith, file Schedules four times, with income and expenses shifting by thousands of dollars at a time, and still end up with a $300 monthly disposable income is beyond absurd.

Debtor's counsel is a well known, knowledgeable bankruptcy attorney who regularly appears before this court. At the prior hearing, the court stressed very conspicuously the need for Debtor to provide accurate, credible information. Notwithstanding this, Debtor's counsel filed Debtor's Amended Plan, Supplemental Schedules I and J, and Declaration–all documents subject to Debtor's counsel's Federal Rule of Bankruptcy Procedure 9011 certifications as an officer of the court.

There has not been a good faith attempt to prosecute a Chapter 13 case. Debtor is orchestrating a Chapter 13 plan that ignores the requirements of the Bankruptcy Code, and Debtor's

counsel is going along for the ride.

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

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

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

FINAL RULINGS

21. **19-23292-E-13 PLC-2** | **THOMAS PEARSON** | **Peter Cianchetta** | **MOTION TO VALUE COLLATERAL OF PNC BANK N.A.** | **5-28-19 [8]**

WITHDRAWN BY M.P.

Final Ruling: No appearance at the June 25, 2019 hearing is required.

The Motion to Value Secured Portion of Claim of PNC Bank N.A. is dismissed without prejudice.

The debtor, Thomas Pearson ("Debtor"), having filed a "Withdrawal of Motion", which the court construes to be an Ex Parte Motion to Dismiss the pending Motion on June 12, 2019 (Dckt. 31); no prejudice to the responding party appearing by the dismissal of the Motion; and the dismissal being consistent with the oppositions filed by the Chapter 13 Trustee, David Cusick ("the Chapter 13 Trustee") and Deutsche Bank Trust Company Americas ("Creditor"); the Ex Parte Motion is granted, Debtor's Motion is dismissed without prejudice, and the court removes this Motion from the calendar.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value Secured Portion of Claim of PNC Bank N.A. filed by Thomas Pearson (" Debtor") having been presented to the court, Debtor having requested that the Motion itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, Dckt. 31, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Value Secured Portion of Claim of PNC Bank N.A. is dismissed without prejudice.

22. **19-21997-E-13 DPC-1** | **SALLIE ROSS-FILGO AND JODY FILGO** **Mark Shmorgan** | **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P CUSICK** **5-7-19 [28]**

WITHDRAWN BY M.P.

Final Ruling: No appearance at the June 25, 2019 hearing is required.

The Chapter 13 Trustee, David Cusick (the "Trustee"), having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Objection to Confirmation was dismissed without prejudice, the matter is removed from the calendar, and the Chapter 13 Plan filed on March 31, 2019, is confirmed.**

Counsel for Sallie Ann Ross-Filgo and Jody Lyn Filgo ("Debtor") shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Trustee for approval as to form, and if so approved, the Trustee will submit the proposed order to the court.

23. **19-22179-E-13 JMC-2** | **KATHERINE REINECK** **Joseph Canning** | **MOTION TO CONFIRM PLAN** **5-6-19 [20]**

DEBTOR DISMISSED: 05/07/2019

Final Ruling: No appearance at the June 25, 2019 hearing is required.

The case having previously been dismissed, the Motion is dismissed 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 Motion to Confirm Plan 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 Motion is dismissed as moot, the case having been dismissed, and the plan is not confirmed.

24. **18-25569-E-13 MJD-5** | **GRACE WOODRING** **Matthew DeCaminada** | **MOTION FOR COMPENSATION BY THE LAW OFFICE OF STUTZ LAW OFFICE, P.C. FOR MATTHEW DECAMINADA, DEBTORS ATTORNEY(S)** **5-16-19 [82]**

Final Ruling: No appearance at the June 25, 2019 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 16, 2019. By the court's calculation, 40 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Allowance of Professional Fees is granted.

Stutz Law Office, P.C., the Attorney ("Applicant") for Grace Woodring, Chapter 13 Debtor ("Client"), makes what the court has construed to be a First and Final Request for the Allowance of Fees in this case. [FN.1.]

FN.1. The Motion is drafted as one requesting "substantial and unanticipated fees" pursuant to Local Bankruptcy Rule 2016(c)(3).

The Order approving substitution of counsel in this case was issued on March 12, 2019. Dckt. 43. To date, no attorney's fees have been paid in this case. *See* Dckts. 3, 84. The Confirmed Plan (Dckt. 61) provided for fees to be sought by subsequent motion, and the Order Confirming the Amended Plan did not provide otherwise. Order, Dckt. 88. There being no flat fee provided for and no fees paid, this is

really an application for First and Final fees pursuant to 11 U.S.C. §§ 329 and 330, FED. R. BANKR. P. 2002, 2016, and 2017.

Fees are requested for the period March 10, 2019, through May 15, 2019. Applicant filed a Substitution of Attorney on March 11, 2019, and the court issued and Order approving the substitution March 12, 2019. Dckts. 42, 43.

Applicant requests fees in the amount of $4,000.00.

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the attorney exercise reasonable billing judgment?

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

Lodestar Analysis

For bankruptcy cases in the Ninth Circuit, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis cab be appropriate, however. *See id.* (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

Reasonable Billing Judgment

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

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

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

Applicant's services on behalf of the Estate include general case administration and Client consultation, as well as prosecution of various motions, including motions to dismiss the case, value secured claims, and confirm the Amended Plan.

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Nonopposition on June 11, 2019. Dckt. 89. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

General Case Administration: Applicant spent 6.20 hours in this category. Applicant met with Client, reviewed documents and corresponded with relevant parties.

Efforts to Assess and Recover Property of the Estate: Applicant spent 2.50 hours in this category. Applicant prepared, filed and served notice on an objection to post-petition mortgage fees and charges.

Motion to Cramdown: Applicant spent 4.20 hours on the motion to cramdown the Debtor's vehicle.

Motion to Confirm: Applicant spent 3.00 hours on the first amended Chapter 13 plan and motion to confirm said plan.

Motion to Dismiss: Applicant spent 1.20 hours on the Chapter 13 Trustee's motion to dismiss.

Motion for Fees: Applicant spent 1.6 hours on this Application.

Client Communications: Applicant spent 0.20 hours for client communications via electronic mail, telephone, and in person appointments.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Matthew DeCaminada	18.90	$213.00 FN.2.	$4,027.50
Total Fees for Period of Application			$4,027.50
Total Fees Requested			$4,000.00

FN.2. The Motion does not clearly state, but the billing records reflect, that there are multiple billing rates used by Applicant: $175 and $275. Exhibit A, Dckt. 85. For brevity, the court references the blended rate of $213.00.

FEES ALLOWED

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $4,000.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 13 Trustee from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

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

Fees $4,000.00

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 Stutz Law Office, P.C. ("Applicant"), Attorney for Grace Woodring, Chapter 13 Debtor, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

Matthew J. DeCaminada, Professional employed by the Chapter 13 Debtor,

Fees in the amount of $4,000.00,

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

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

25. 19-22537-E-13 DPC-1 — JERRY JORS, Steele Lanphier — OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK, 6-3-19 [17]

Final Ruling: No appearance at the June 25, 2019 hearing is required.

Local Rule 9014-1(f)(2) Objection—Hearing Not Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on June 3, 2019. By the court's calculation, 22 days' notice was provided. 42 days' notice is required. FED. R. BANKR. P. 2002(b); LOCAL BANKR. R. 3015-1(d)(1).

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.

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

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

Subsequent to the filing of this Objection, the debtor, Jerry William Jors ("Debtor") filed an Amended Plan and corresponding Motion to Confirm on June 11, 2019. Dckts. 21, 25. Filing a new plan is a de facto withdrawal of the pending plan. 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 Confirmation the Chapter 13 Plan filed by the Chapter 13 Trustee, David Cusick ("Trustee"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is sustained, and the proposed Chapter 13 Plan is not confirmed.

26. 19-21920-E-13 DJC-1 — SUZANNE FLEMONS — Diana Cavanugh — MOTION TO CONFIRM PLAN — 5-21-19 [26]

WITHDRAWN BY M.P.

Final Ruling: No appearance at the June 25, 2019 hearing is required.

The debtor, Suzanne Felmons ("Debtor"), having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Motion to Confirm Chapter 13 Plan was dismissed without prejudice, and the matter is removed from the calendar.**

27. **18-27506-E-13** **CHRISTA HYLEN** **MOTION TO MODIFY PLAN**
PLC-2 **Peter Cianchetta** **5-17-19 [53]**

Final Ruling: No appearance at the June 25, 2019 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on May 17, 2019. By the court's calculation, 39 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 Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Modified Plan is granted.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The debtor, Christa Lynne Hylen ("Debtor"), has filed evidence in support of confirmation. The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response indicating non-opposition on June 13, 2019. Dckt. 73. The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Modified Chapter 13 Plan filed by debtor, Christa Lynne Hylen ("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 17, 2019, 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.

28. 18-27506-E-13 DPC-3 | **CHRISTA HYLEN** | **Peter Cianchetta** | **CONTINUED MOTION TO DISMISS CASE** **4-29-19 [49]**

Final Ruling: No appearance at the June 25, 2019 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on April 29, 2019. By the court's calculation, 30 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). Debtor filed opposition. If it appears at the hearing that disputed, material, factual issues remain to be resolved, then a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

The Motion to Dismiss is denied without prejudice.

The Chapter 13 Trustee, David Cusick ("Trustee"), seeks dismissal of the case on the basis that the debtor, Christa Lynne Hylen ("Debtor"), is $1,566.00 delinquent in plan payments.

DEBTOR'S REPLY

Debtor filed a Reply on May 22, 2019. Dckt. 62. Debtor states a modified plan was filed and set for confirmation hearing June 25, 2019.

FILING OF MODIFIED PLAN

Debtor filed a Modified Plan and Motion to Confirm on May 17, 2019. Dckt. 53. The court has reviewed the Motion to Confirm the Modified Plan and the Declaration in support filed by Debtor. Dckt. 60. The Motion appears to comply with Federal Rule of Bankruptcy Procedure 9013 (stating grounds with particularity), and the Declaration appears to provide testimony as to facts to support confirmation based upon Debtor's personal knowledge. FED. R. EVID. 601, 602.

MAY 29, 2019 HEARING

At the May 29, 2019 hearing the Trustee noted concerns with Debtor's Modified Plan and requested a continuance. The court continued the hearing to June 25, 2019. Civil Minutes, Dckt. 64.

DISCUSSION

Debtor's Motion To Confirm Modified Plan has been granted. Debtor appearing to be actively prosecuting this case, the Motion to Dismiss 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 Dismiss the Chapter 13 case filed by the Chapter 13 Trustee, David Cusick ("Trustee"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is denied without prejudice.

29. **19-21331-E-13** **GARY VASQUEZ** **MOTION TO CONFIRM PLAN**
DEF-2 **Bonnie Baker** **4-1-19 [23]**

Final Ruling: No appearance at the June 25, 2019 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on April 1, 2019. By the court's calculation, 85 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy 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 Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Gary Joseph Vasquez ("Debtor") has provided evidence in support of confirmation. Declaration, Dckt. 26. David Cusick ("the Chapter 13 Trustee") filed a Non-Opposition on June 11, 2019. Dckt. 33. The 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 Chapter 13 Plan filed by Gary Joseph Vasquez ("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 Chapter 13 Plan filed on April 1, 2019, 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.

30. **19-22037-E-13** **PETE GARCIA** **MOTION FOR DENIAL OF DISCHARGE**
DPC-3 **Peter Macaluso** **OF DEBTOR UNDER 11 U.S.C. SECTION 727(A)**
5-22-19 [34]

Final Ruling: No appearance at the June 25, 2019 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on May 22, 2019. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Motion for Denial of Discharge is granted.

David Cusick, the Chapter 13 Trustee ("Objector"), filed the instant Motion for Denial of Debtor's Discharge on May 22, 2019. Dckt. 34.

Objector argues that the debtor, Pere A. Garcia ("Debtor"), is not entitled to a discharge in the instant bankruptcy case because Debtor previously received a discharge in a Chapter 7 case.

Debtor filed a Chapter 7 bankruptcy case on September 1, 2015. Case No. 15-26933. Debtor received a discharge on January 24, 2018. Case No. 15-26933, Dckt. 165.

The instant case was filed under Chapter 13 on April 2, 2019.

11 U.S.C. § 727(a)(8) provides that a court shall not grant a discharge if a debtor has received a discharge in a case filed under chapter 7 or 11 within eight years before the filing date of the instant case. 11 U.S.C. § 727(a)(8).

Here, Debtor received a discharge under 11 U.S.C. § 727 on January 24, 2018, which is less than eight years preceding the date of the filing of the instant case. Case No. 15-26933, Dckt. 165. Therefore, pursuant to 11 U.S.C. § 727(a)(8), Debtor is not eligible for a discharge in the instant case.

Therefore, the Motion is granted. Upon successful completion of the instant case (Case No. 19-22037), 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 Motion for Denial of Discharge filed by David Cusick, the Chapter 13 Trustee, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion for Denial of Discharge is granted, and upon successful completion of the instant case, Case No. 19-22037, the case shall be closed without the entry of a discharge.

31. **18-23379-E-13 GW-6** | **WILLIAM BATTILANA, II** | **Gerald White** | **OBJECTION TO CLAIM OF PHH MORTGAGE CORPORATION, CLAIM NUMBER 11** | **5-6-19 [160]**

Final Ruling: No appearance at the June 25, 2019 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 13Trustee, creditors, and Office of the United States Trustee on May 6, 2019. 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 11 of PHH Mortgage Corporation is sustained, and the claim is disallowed in its entirety.

William Battilana, the Chapter 13 Debtor ("Objector"), requests that the court disallow the claim of creditor PHH Mortgage Corporation ("Creditor"), Proof of Claim No. 11 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be secured in the amount of $181,898.92.

Objector asserts that Creditor has been paid in full on its claim through the Sale of Debtor's residence, pursuant to Debtor's Chapter 13 Plan. A copy of the Final Master Statement from Fidelity National Company shows Creditor was paid a total of $187,2010.21. Exhibit B, Dckt. 163 at p. 14.

CREDITOR'S NOTICE OF WITHDRAWAL

On June 4, 2019, Creditor filed a Notice of Withdrawal seeking to withdraw its Claim on the basis that it has been paid in full.

DISCUSSION

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial evidence to overcome the prima facie validity of a proof of claim, and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and requires financial information and factual arguments. *In re Austin,* 583 B.R. 480, 483 (B.A.P. 8th Cir. 2018). Notwithstanding the prima facie validity of a proof of claim, the ultimate burden of persuasion is always on the claimant. *In re Holm*, 931 F.2d at p. 623.

Creditor filed a Notice of Withdrawal of Proof of Claim on June 4, 2019. Dckt. However, once a party has objected to a proof of claim, the creditor asserting the claim may not withdraw the claim except on order of the court. FED. R. BANKR. P. 3006.

The court construes the Notice of Withdrawal here to be a statement of non-opposition.

Based on the evidence before the court and Creditor's Claim having been paid in full, the Objection to the Proof of Claim is sustained and Creditor's claim is disallowed in its entirety.

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 PHH Mortgage Corporation ("Creditor"), filed in this case by William Battilana, 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 11 of Creditor is sustained, and the claim is disallowed in its entirety.

32. **19-22292-E-13 DPC-2** | **BICH TRAN** **Mary Ellen Terranella** | **MOTION FOR DENIAL OF DISCHARGE OF DEBTOR UNDER 11 U.S.C. SECTION 727(A)** **5-21-19 [17]**

Final Ruling: No appearance at the June 25, 2019 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on May 21, 2019. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The Motion for Denial of Discharge is granted.

The Chapter 13 Trustee, David Cusick ("Trustee"), filed the instant Motion for Denial of Debtor's Discharge on May 21, 2019. Dckt. 17.

Objector argues that the debtor, Bich Thi-Ngoc Tran ("Debtor"), is not entitled to a discharge in the instant bankruptcy case because Debtor previously received a discharge in a Chapter 7 case.

Debtor filed a Chapter 7 bankruptcy case on August 8, 2017. Case No. 17-25258. Debtor received a discharge on November 20, 2017. Case No. 17-25258, Dckt. 26.

The instant case was filed under Chapter 13 on April 12, 2019.

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, Debtor received a discharge under 11 U.S.C. § 727 on November 20, 2017, which is

less than eight years preceding the date of the filing of the instant case. Case No. 17-25258, Dckt. 26. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), Debtor is not eligible for a discharge in the instant case.

Therefore, the Motion is granted. Upon successful completion of the instant case (Case No. 19-22292), 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 Motion for Denial of Discharge filed by The Chapter 13 Trustee, David Cusick ("Trustee"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion for Denial of Discharge is granted, and upon successful completion of the instant case, Case No. 19-22292, the case shall be closed without the entry of a discharge.

33. **19-22165-E-13** **ROBERT SKIFF** **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P CUSICK**
DPC-1 **W. Steven Shumway** **5-21-19 [26]**

Final Ruling: No appearance at the June 25, 2019 Hearing is required.

- - - - - - - - - - -

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 21, 2019. By the court's calculation, 21 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.

The Objection to Confirmation of Plan is sustained.

The Chapter 13 Trustee, David Cusick ("Trustee"), opposes confirmation of the Plan on the basis that the Debtor failed to appear and be examined at the First Meeting of Creditors held on May 16, 2019. The Meeting was continued to June 20, 2019. Trustee requests the Court continue this Objection to Confirmation to June 25, at 3:00 p.m., following the Continued First Meeting of Creditors set for June 20, 2019.

JUNE 11, 2019 HEARING

At the June 11, 2019 hearing the court continued the hearing to allow Debtor to appear at the continued Meeting of Creditors. Civil Minutes, Dckt. 34.

DISCUSSION

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. Attempting to confirm a plan while failing to appear and be questioned by Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

The court by a final ruling for the June 19, 2019, hearing on the Motion to Dismiss that this case be dismissed. Debtor did not file an opposition to the Motion to Dismiss.

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

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