

**UNITED STATES BANKRUPTCY COURT**

Eastern District of California

**Honorable Ronald H. Sargis**

Chief Bankruptcy Judge

Sacramento, California

**July 19, 2016 at 3:00 p.m.**

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1.     **15-25102-E-13     LARRY/ROSEMARY CALKINS     MOTION TO DISGORGE FEES**  
         **DPC-2                   Peter Macaluso                   6-17-16 [\[58\]](#)**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, parties requesting special notice, and Office of the United States Trustee on June 17, 2016. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

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

<b>The Motion to Disgorge Fees is -----.</b>
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David Cusick, the Chapter 13 Trustee, filed a Motion to Disgorge Attorney Fees on June 17, 2016. Dckt. 58.

The Trustee states that the Debtor filed the instant case on June 25, 2015. Dckt. 1. Debtor's attorney of record at the time of filing was Anthony Hughes. On June 20, 2015, the Debtors filed their Disclosure of Compensation of Attorney for Debtors which reports that attorney's fees charged in the case

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were \$4,000.00 and \$200.00 was paid prior to filing, leaving a balance of \$3,800.00. Dckt. 10.

On August 6, 2015, Debtors filed a Substitution of Attorney, changing representation from Mr. Hughes to Peter Macaluso. The Motion indicated that Debtor shall not increase the cost to the clients. On October 7, 2015, the court entered an order allowing the substitution. Dckt. 45.

On May 27, 2016, the Trustee conducted a 2004 Examination of both the Debtors. The Debtors provided:

1. A retainer for services agreement signed by Chris Calkins son of the Debtor on June 24, 2015 which required a retainer of \$1,200.00 and showed \$200.00 was paid initially; and
2. A money order stub and receipt from “Tasha” of Hughes Financial reflecting a \$500.00 payment client receipt dated July 1, 2015.

The Trustee’s concern is that Debtors’ case was filed on June 25, 2015 and that counsel never advised the court of the payment arrangement made with Debtor’s son nor of the payment made under that agreement. The Trustee asks the court to order counsel to refund the post-petition attorney fee payment of \$500.00.

## **APPLICABLE LAW**

### Sanction Authority

Bankruptcy Courts have the jurisdiction to impose sanctions even after a case has been dismissed. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990); *Miller v. Cardinale (In re DeVille)*, 631 F.3d 539, 548-49 (9th Cir. 2004). The court also has the inherent civil contempt power to enforce compliance with its lawful judicial orders. *Price v. Lehtinen (In re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009); *see also* 11 U.S.C. §105(a).

A Bankruptcy Court is also empowered to regulate the practice of law before it. *Peugeot v. U.S. Trustee (In re Crayton)*, 192 B.R. 970, 976 (B.A.P. 9th Cir. 1996). The authority to regulate the practice of law includes the right to discipline attorneys who appear before the court. *Chambers v. NASCO, Inc.* 501 U.S. 32,43 (1991); *see also Lehtinen*, 564 F.3d at 1058.

The primary purpose of a civil contempt sanction is to compensate losses sustained by another’s disobedience to a court order and to compel future compliance with court orders. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1192 (9th Cir. 2003). The contemtor must have an opportunity to reduce or avoid the fine through compliance. *Id.* The court’s authority to regulate the practice of law is broader, allowing the court to punish bad faith or willful misconduct. *Lehtinen*, 564 F.3d at 1058. However, the court cannot issue punitive sanctions pursuant to its power to regulate the attorneys appearing before it. *Id.* at 1059. Nevertheless, suspending an attorney from appearing before the court is permissible. *Id.*

The court’s jurisdiction over parties concerning their conduct in a bankruptcy case or adversary proceeding is not terminated by the dismissal of the case or adversary proceeding. *Schering Corp. v. Vitarine Pharmaceuticals, Inc.*, 889 F.2d 490, 495-496 (3rd Cir. 1989) (“The analogy of Rule 11 sanctions to contempt proceedings is apt. Both are designed to deter misbehavior before the Court. See Fed. R. Civ.

P. 11, advisory committee's note ('Since its original promulgation, Rule 11 has provided for the striking of pleadings and imposition of disciplinary sanctions to check abuses in the signing of pleadings...To hold that a district court has no power to order sanctions after a voluntary dismissal is to emasculate Rule 11 in those cases where wily plaintiffs file baseless complaints, unnecessarily sap the precious resources of their adversaries and the courts, only to insulate themselves from sanctions by promptly filing a notice of dismissal.');

*Greenberg v. Sala*, 822 F.2d 882, 885 (9th Cir. 1987) ("At the time the district court denied the defendants' motions for Rule 11 sanctions, the case had been dismissed. The dismissal, however, did not deprive the court of jurisdiction to consider the motions. See *Szabo Food Service, Inc. v. Canteen Corp.*, No. 86-3093, slip op. (7th Cir. Jun. 29, 1987) (voluntary dismissal under Rule 42(a)(1)).").

## **11 U.S.C. § 329**

This court has the authority, and responsibility, to consider attorneys' fees obtained or to be paid prior to or during a bankruptcy case. 11 U.S.C. § 329, 330, 331. Fees in excess of the reasonable value of such services may be ordered repaid. The application of 11 U.S.C. § 329 and Federal Rule of Bankruptcy Procedure, may seem harsh, but are necessary to not only protect vulnerable consumers and business owners, but to protect the integrity of the federal judicial process. See *Neben & Starrett v. Chartwell Fin. Corp. (In re Park-Helena Corp.)*, 63 F.3d 877, 881 (9th Cir. Cal. 1995). Debtor's counsel must lay bare all its dealings regarding compensation and must be direct and comprehensive. See *In re Bob's Supermarket's, Inc.*, 146 Bankr. 20, 25 (Bankr. D. Mont. 1992) *aff'd in part and rev'd in part*, 165 Bankr. 339 (Bankr. 9th Cir. 1993). The burden is on the person to be employed to come forward and make full, candid, and complete disclosure. *In re B.E.S. Concrete Products, Inc.*, 93 B.R. 228 (E.D. Cal. 1988). The federal courts are not mere devices to be used to generate fees for attorneys irrespective of any bona fide rights to be adjudicated.

11 U.S.C. § 329 requires that any attorney who provides services for a debtor must provide disclosures to the court and parties in interest. This section states,

### **§ 329. Debtor's transactions with attorneys**

- (a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.
- (b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to--
  - (1) the estate, if the property transferred--

- (A) would have been property of the estate; or
- (B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or
- (2) the entity that made such payment.

11 U.S.C. § 329.

### **Employment of Professionals by Fiduciaries of the Estate**

A trustee or debtor in possession may employ professionals to represent them in bankruptcy cases. 11 U.S.C. §§ 327, 1107. In Chapter 13 Cases, counsel for the debtor has his or her fees determined under the same standard. L.B.R. 2016-1(a) and (b). For the authorization to be employed, it must be shown not only that the professional has the skills to provide the services to the estate, but that the professional is “disinterested.”

#### **§ 327. Employment of professional persons**

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

11 U.S.C. § 327.

Such professionals, including attorneys, employed by the trustee or debtor in possession may request the court approve compensation for services provided to that fiduciary of the bankruptcy estate. 11 U.S.C. §§ 330, 331.

#### **§ 330. Compensation of officers**

(a) (1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103--

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount

of compensation that is requested.

(3) In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11 or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including--

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

11 U.S.C. § 330. Interim compensation may be allowed professionals during the prosecution of the case.

11 U.S.C. § 331. Such interim fees are subject to final approval at the end of the case.

## **DISCUSSION**

To date, the neither Debtor nor Debtor's counsel have filed a response to the instant Motion.

The court has, on multiple occasions, stressed to Debtor's counsel the court's concerns over the transfer of a substantial number of cases from Mr. Hughes to Mr. Macaluso. The court has been reassured by Debtor's counsel on all these occasions that they are complying with all applicable laws and are not charging additional fees without a proper Motion being filed.

Now, however, the Trustee comes with the instant Motion providing evidence that Debtor's counsel has received additional fees from the Debtor's son that the Debtor's counsel did not seek permission for nor disclosed. This causes great concern for the court.

At the hearing, xxxxx

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 Disgorgement of Attorney's Fees filed by Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Disgorge the retainer is xxxxx.

2. [16-21102-E-13](#) **LARRY VINCELLI** **CONTINUED OBJECTION TO**  
**DPC-1** **Bonnie Baker** **CONFIRMATION OF PLAN BY DAVID**  
**P. CUSICK**  
**4-20-16 [26]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney on April 20, 2016. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

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

**The Objection to Confirmation is sustained and the plan is not confirmed.**

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

1. The Debtor is \$1,100.00 delinquent in plan payments to the Trustee. The Debtor has paid \$0.00 into the plan to date.
2. The Debtor has failed to provide the Trustee with a tax transcript or a copy of the return.
3. The Debtor's plan relies on a Motion to Value Collateral of Employment Development Department but has failed to file one to date.
4. Debtor's schedules do not accurately list all creditors. The Plan proposes a secured payment to Employment Development Department, but fails to list the creditor on Schedule D. Additionally, all other unsecured creditors except for the Internal Revenue Service have also been omitted from the amended Schedule which was filed on April 15, 2016.
5. The Debtor's additional provisions provide for the payment of "Class 1 arrears pro rata." The Trustee objects that this is ambiguous and may be in violation of 11 U.S.C. § 1325(a)(5).

### **MAY 24, 2016 HEARING**

The court continued the hearing to 3:00 p.m. on July 19, 2016 to allow Debtor the time, in light of the health issues, to address these financial issues.

### **TRUSTEE'S SUPPLEMENT**

The Trustee filed a supplement to the Trustee's Objection on July 1, 2016. Dckt. 61. The Trustee states that the tax returns and EDD lien objections have been resolved. However, the Trustee still reports that the Debtor is \$1,100.00 delinquent in plan payments. The Trustee's objection as to the additional provisions still remains.

### **DEBTOR'S RESPONSE**

The Debtor filed a response on July 15, 2016. Dckt. 64. The Debtor states that he has made all necessary payments to date.

Additionally, the Trustee asserts that the only creditor owing arrears is the Debtor's mortgage company. The Debtor alleges that the Trustee agreed that the Debtor can modify the *pro rata* language in the order so that the objection can be resolved.

The escrow balance that appeared to be in excess was a deficiency balance.

### **DISCUSSION**

The Trustee's objections are well-taken.

The basis for the Trustee's objection is that the Debtor is \$1,100.00 delinquent in plan payments. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6). While the Debtor states that he is current, the Debtor has failed to provide any admissible evidence as to the delinquency being cured.

As to the Trustee's fourth objection, the court is equally as concerned that the Debtor's schedules and disclosures as to creditors do not match with the creditors proposed to be paid in the plan. Without the Debtor truthfully and completely filling out the information of the schedules, the court nor any other party in interest can determine if the plan is feasible or viable.

The lack of accuracy in the Schedules and the Plan is just further exasperated by the vague language proposed in the additional provision. The Debtor proposes a "pro rata" payment arrears to Class 1. However, the Debtor does not provide for an "equal" amount of monthly installments nor the specifics as to which claimant. The ambiguity coupled with the Debtor failing to properly disclose all creditors in the schedules is an additional ground to deny confirmation.

The Debtor states that he and the Trustee have reached some agreement as to proposed language in the order confirming to rectify the objection. However, no proposed language has been provided nor has the Trustee agreed to this. The court will not assume what agreement the parties have reached or that the agreement is one that is allowed by the Bankruptcy Code

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

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

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

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



3. [16-21305](#)-E-13      **RODERICK/ROSEMARIE TAPNIO MOTION TO VALUE COLLATERAL OF**  
**PGM-2**      **Peter Macaluso**      **FCI LENDER SERVICES, INC.**  
6-9-16 [\[57\]](#)

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

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

**Below is the court's tentative ruling.**  
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Local Rule 9014-1(f)(1) Motion - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on June 9, 2016. By the court's calculation, 40 days' notice was provided. 28 days' notice is required.

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

**The Motion to Value secured claim of FCI Lender Services, Inc. ("Creditor") is denied without prejudice.**

The Motion to Value filed by Roderick A. Tapnio and Rosemarie A. Tapnio ("Debtor") to value the secured claim of FCI Lender Services, Inc. ("Opponent") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 518 Kinsale Court, Vacaville, California 95688 ("Property"). Debtor seeks to value the Property at a fair market value of \$401,000.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See Fed. R. Evid. 701; see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

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

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

of a secured claim.

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

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

The court has reviewed the Claims Registry for this bankruptcy case. No Proof of Claim has been filed by a creditor which appears to be for the claim to be valued.

## **TRUSTEE'S RESPONSE**

David Cusick, the Chapter 13 Trustee, responds to Debtors Motion as follows:

1. The debtor's declaration (CD #59) is inconsistent in the Fair Market Value of the property. The debtor asserts in item 3, line 24 a fair market value of \$401,000.00. Also item 3, line 25 the debtors' assert a fair market value of \$449,708.00
2. Creditor Partners for Payment Relief DE II, LLC has filed a motion (MRG-1) for relief set for July 19, 2016. The Creditor states the property was purchased in a non-judicial foreclosure sale held on April 4, 2016. No secured claims have been filed with the court relating to the real property. The Trustee is uncertain the Motion to Value is appropriate if the Court determines the debtor is no long the owner of the subject property.

## **OPPONENT'S OPPOSITION**

Partners for payment Relief DE II, LLC oppose the Motion to Value for the following reasons:

1. The evidence demonstrates that Debtor is not the owner of the Property. The Instant Petition was dismissed on March 31, 2016. Opponent asserts that it acquired title to the Property by foreclosure sale on April 4, 2016. Opponent recorded the Trustee's Deed Upon Sale within the period provided by state law. The Order vacating the dismissal of the Petition was not entered until April 5, 2016. Therefore, Debtor's Motion to value Opponent's secured claim should be dismissed immediately.

2. Opponent further requested the hearing on this Motion be continued until after the hearing on Opponent's Motion for Relief, currently set for July 19, 2016. Thereafter, in the event that Opponent's Motion for Relief is not granted, Opponent requests the hearing on the Motion be continued for approximately 60 days to allow it an opportunity to conduct a full appraisal of the property, obtain a completed appraiser's report and file a declaration regarding the same.

## DISCUSSION

The court begins with the basics. This bankruptcy case was filed on March 2, 2016. The bankruptcy case was dismissed on Thursday March 31, 2016, by order of the court for Debtor's failure to file the required documents. Order, Dckt. 18.

On Tuesday April 5, 2016, the court issued its order vacating the dismissal of this bankruptcy case. Order, Dckt. 27. In the two business days and two weekend days between the dismissal and vacating the dismissal the dispute of the Debtor and this Creditor lies.

On April 4, 2016, a non-judicial foreclosure sale was conducted by which Opponent asserts that it has acquired title to the property and it is not a "creditor." While arguing such in the opposition to the present motion, no evidence has been provided by Opponent in connection with this Contested Matter. In the Reply, Debtor candidly states that there was a purported foreclosure sale conducted on April 4, 2016, "after Debtors' case has been *temporarily dismissed*." Reply ¶ 3, Dckt. 80 [emphasis not in original]. Debtor makes the further assertion that the "validity of the foreclosure sale will be determined by the court" as part of the motion for relief from stay filed by Opponent. *Id.* However, given the summary nature of relief from stay proceedings, the court will not be issuing any final orders or judgments on the motion for relief from the automatic stay determining the rights and interests of the parties in the property. FN.1.

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FN.1 *Hamilton v. Hernandez*, No. CC-04-1434-MaTK, 2005 Bankr. LEXIS 3427 (B.A.P. 9th Cir. Aug. 1, 2005), relief from stay proceedings are summary proceedings which address issues arising only under 11 U.S.C. Section 362(d). *Hamilton*, 2005 Bankr. LEXIS 3427 at \*8-\*9 (citing *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740 (9th Cir. 1985)). The court does not determine underlying issues of ownership, contractual rights of parties, or issue declaratory relief.  
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In connection with the Motion for Relief (Dckt. 63), Opponent has provided the declaration of John Sweeney, a Vice President of Opponent. Dckt. 65. He testifies that on April 4, 2016, Opponent was the successful purchaser of the property at a foreclosure sale. He directs the court to Exhibit A as the copy of the trustee's deed by which Opponent asserts its ownership of the Property. The trustee's deed is not a copy of one filed with the Country Reorder, but one stamped as provided by First American Title Insurance Company. In the upper right hand corner it states (hearsay) that First American Title Insurance Company states the trustee's deed was recorded on April 6, 2016 - which was the day after the court vacated the order dismissing this Chapter 13 case.

In opposing the Motion for Relief From the Automatic Stay filed by Opponent, Debtor argues Opponent fails to provide evidence that the "sale" was "recorded" on April 4, 2016. Debtor argues that since the trustee's deed was not recorded until after the dismissal was vacated, the "sale was not completed"

and as such, “the sale is invalid.” Dckt. 72 at 2.

The court denies the present Motion without prejudice. There exists a substantial question about what interest, if any, the bankruptcy estate has in the Property. It appears undisputed that a nonjudicial foreclosure sale was conducted when the automatic stay had terminated with the dismissal of this case. Though issued, it does not appear undisputed that the trustee’s deed from the foreclosure sale was not recorded until after the court vacated the order dismissing the case, thus bringing back the automatic stay to life.

While making broad pronouncements, the court cannot find in any of the pleadings a clear discussion of the effect of a foreclosure sale conducted when there is no automatic stay in effect and then the recording of the trustee’s deed after the automatic stay has gone into effect. Though it appears to be treated as an issue not worthy of legal authorities, the determination of this issue is more complex than either party is treating it.

The court cannot determine that the estate has any interest in the Property and cannot determine that there are real parties with actual claims or controversies arising under federal law to be adjudicated in this court. U.S. Const. Art. III, Sect. 2. Therefore, the Motion is denied without prejudice.

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

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

The Motion for Valuation of Collateral filed by Roderick A. Tapnio and Rosemarie A. Tapnio (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

**Final Ruling: No appearance at the July 19, 2016 hearing is required.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 24, 2016. By the court's calculation, 56 days' notice was provided. 35 days' notice is required.

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

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

Judith Layugan (Debtor") filed the instant Motion to Confirm the Modified Plan on May 24, 2016. Dckt. 177.

#### **TRUSTEE'S OPPOSITION**

David Cusick, the Chapter 13 Trustee, filed an opposition on July 1, 2016. Dckt. 193. The Trustee opposes Debtor's Motion to Confirm the Modified Plan on the basis that:

1. The Trustee is uncertain of the treatment of Supplemental Claims filed by Bank of America, NA. Section 6.02 of Debtor's Modified Plan proposes to provide for two supplemental claims filed by Bank of America, NA for \$375 each, but fails to provide a classification or a monthly dividend for this creditor. The Trustee would have no opposition if the order confirming included language clarifying the classification and monthly dividend for this creditor.
2. Section 2.15 of Debtor's Modified Plan proposes to increase the percentage to unsecured creditors from 1% to 4% where the trustee calculates the plan could potentially pay up to 13.47%. The Trustee would have no opposition if Debtor included language in the order confirming increasing the percentage to unsecured creditors to no less than 13.74%.

#### **DEBTOR'S RESPONSE**

The Debtor filed a response on July 5, 2016. Dckt. 196. Debtor responds as follows:

1. Debtor is amenable to correcting the classification of the supplemental claims of Bank of America, NA in Order Confirming Plan
2. Debtor agrees that the percentage paid to unsecured creditors should be corrected in the Order Confirming Plan.

## **DISCUSSION**

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

The Trustee's objections are well-taken. As noted by the Trustee, these appear to be more akin to scrivener's errors which can be corrected in the order confirming. The Debtor has agreed to both of the changes required by the Trustee.

Therefore, following the corrections in the order confirming as to the classification of Bank of America, N.A. and the percentage to unsecured creditors, the modified Plan complies with 11 U.S.C. §§ 1322, 1325(a) and 1329 and is confirmed.

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

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

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

**IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on May 24, 2016 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, correcting the classification of Bank of America, N.A.'s claim and that the dividend paid on general unsecured claims shall not be less than 13%, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

**Final Ruling:** No appearance at the July 19, 2016 hearing is required.  
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Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 6, 2016. By the court's calculation, 43 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the 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.

<b>The Motion to Confirm the Amended Plan is granted.</b>
---

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Debtors have provided evidence in support of confirmation. No opposition to the Motion has been filed by the Chapter 13 Trustee or creditors. The amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

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

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

**IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on June 6, 2016 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will

submit the proposed order to the court.

6. [16-22325-E-13](#) **RONALD/CONNIE WHITMAN** **MOTION TO CONFIRM PLAN**  
**DMB-2** **David Brady** **6-1-16 [24]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 1, 2016. By the court's calculation, 48 days' notice was provided. 42 days' notice is required.

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

<b>The court's decision is to continue the Motion to Confirm the Amended Plan to 3:00 p.m. on September 13, 2016.</b>
---

Ronald Wayne Whitman and Connie Whitman ("Debtors") filed the instant Motion to Confirm the Modified Plan on June 1, 2016. Dckt. 24.

**TRUSTEE'S OPPOSITION**

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on July 1, 2016. Dckt. 42. The Trustee opposes the confirmation on the following grounds:



1. The Debtors plan may not be the Debtors best effort under 11 U.S.C. 1325(b). Debtor is above median income according to the Statement of Current Monthly Income, form 122C-1. Dckt. 1, pages 57-59.

Debtors amended Schedule J, line 23c indicates net income is \$1,730.82. Adding the “expiring” \$318.00 EF Tourclub expense makes the actual net disposable income \$2,048.82 starting July 2016, while the Debtors’ proposed step payment is only \$1,650.02.

Line 24 of the Schedule indicates that Debtors’ child will need a prosthetic fitted, but provides no information of when this will occur. No information regarding this medical expense is offered in the Debtors Motion or Declaration in Support. Dckt. 26. Absent an explanation or evidence of this expense, the Trustee concludes that Debtors have \$398.80 in additional net income every month which may be paid in to the plan for the benefit of unsecured creditors.

## **DEBTOR’S REPLY**

The Debtor filed a reply to the Trustee’s opposition on July 12, 2016. Dckt. 45. The Debtor states that the Debtor’s daughter was born with a birth deformity. The Debtor has been paying monthly payments to have a prosthetic device fitted to their daughter. The Debtor also received help from their 125 health plan which has been paying or been used for the payments on the prosthetic device.

The Debtor also states that Debtor Connie Whitman underwent a surgery which used up their 125 health plan benefit.

Additionally, the Debtor states that the payment for the prosthetic must be made in an up front payment of \$3,500.00.

The Debtor argues that if the Trustee prevails, the Debtor will be unable to save up the money to pay the \$3,500.00 deductible.

The Debtor failed to report this to the attorney at the time of filing because they thought they would be able to continue with monthly payments.

Due to their daughter’s growth, the Debtor states that they will need to get a new prosthetic every 6-12 months based on the child’s growth and will be an ongoing expense through the plan.

## **DISCUSSION**

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

The Trustee’s opposition is well-taken.

11. U.S.C. §1325(b) states that:

(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, the court may not approve the plan unless, as of the effective

date of the plan –

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

The value of property to be distributed under the plan on account of such claim is less than the amount of the claim. According to Debtors' Motion to Confirm Amended Plan, General unsecured claims shall receive approximately 30-31% of their allowed claim. Furthermore, it is not clear from the Debtors' amended plan and amended schedules that the plan provides that all of Debtors projected disposable income is to be received in the applicable commitment period will be applied to make payments to unsecured creditors under the plan. The Trustee correctly points out that Schedule J has \$1,730.82 in disposable income before the Debtors are relieved of their obligation to pay the EF Tourclub Education expense of \$318.00. Without that expense, disposable net income is \$2,048.82, however, the amended plan proposes a monthly payment of \$1,650.02.

While the Debtors also include an additional \$3,500.00 prosthetic fitting expense for their child, no detail has been provided about when this will occur or how this affects the plan in light of the "expiring expense." This Debtor needs to provide evidence of the additional expense and provide this court with more details about exactly how much the prosthetic expense will be and when the expenses will be incurred. Regardless, this new expense does not explain why the additional net disposable income of \$398.00 every month is not included in the plan to be paid to the benefit of unsecured creditors.

To afford the Debtor the opportunity to provide this information to the Trustee and court, the court continues the instant Motion to 3:00 p.m. on September 13, 2016. The Debtor shall file and serve any supplemental papers on or before August 23, 2016. Any responses or opposition shall be filed on or before September 6, 2016.

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

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

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

**IT IS ORDERED** that Motion to Confirm the Plan is continued to 3:00 p.m. on September 13, 2016. The Debtor shall file and serve any supplemental papers on or before August 23, 2016. Any responses or opposition shall be filed on or before September 6, 2016.

7. [14-27826-E-13](#) **ROLAND/IMELDA REGALA**  
**PPR-1** **W. Scott de Bie**

**MOTION TO PERMIT PARTIES TO  
ENTER INTO LOAN MODIFICATION  
AGREEMENT**  
**6-7-16 [44]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on June 7, 2016. By the court's calculation, 42 days' notice was provided. 14 days' notice is required.

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

<b>The Motion to Approve Loan Modification is granted.</b>
--

The Motion to Approve Loan Modification filed by Roland and Imelda Regala ("Debtor") and Creditor seeks court approval for Debtor to incur post-petition credit. The Bank of New York Mellon FKA The Bank of New York as Trustee for the Certificateholders of the CWABS Inc., Asset-Backed Certificates, Series 2005-HYB9, its agents, assignees and/or successors in interest ("Creditor"), whose claim the plan provides for in Class 4, has agreed to a loan modification which will reduce Debtor's mortgage payment to \$1,560.53, including escrow. The interest rate will be 3.375%.

The Motion is supported by the Declaration of Peter Murphy, employee of Bank of America, N.A., the authorized servicing agent of Creditor. The Declaration affirms post-petition financing and

provides evidence of Debtor's ability to pay this claim on the modified terms.

David Cusick, the Chapter 13 Trustee, filed a statement of non-opposition on July 1, 2016. Dckt. 49.

Though the motion does not comply with the requirements of Federal Rule of Bankruptcy Procedure 4001(c)(1)(B), the court will waive the defect since the declaration filed in this matter provides much of the information. The moving party is well served to ensure that future filings comply with the Federal Rules of Bankruptcy Procedure.

This post-petition financing is consistent with the Chapter 13 Plan in this case and Debtor's ability to fund that Plan. There being no objection from the Trustee or other parties in interest, and the motion complying with the provisions of 11 U.S.C. § 364(d), the Motion to Approve the Loan Modification is granted.

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

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

The Motion to Approve the Loan Modification filed by Debtor and Creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the court authorizes Roland and Imelda Regala ("Debtor") to amend the terms of the loan with The Bank of New York Mellon FKA The Bank of New York as Trustee for the Certificateholders of the CWABS Inc., Asset-Backed Certificates, Series 2005-HYB9, its agents, assignees and/or successors in interest, which is secured by the real property commonly known as 329 Catalina Way, Vallejo, California, on such terms as stated in the Modification Agreement filed as Exhibit A in support of the Motion, Dckt. 47.

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 22, 2016. By the court's calculation 27 days' notice was provided. 14 days' notice is required.

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

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

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

1. The Debtor is \$509.00 delinquent in plan payments to the Trustee to date and the next schedule payment of \$509.00 is due on June 25, 2016. The Debtor has paid \$0.00 into the plan to date.
2. The Internal Revenue Service filed a claim on June 1, 2016, Court Claim #2-2, indicating that the Debtor has failed to file income tax returns for 2012, 2013, and 2015. Debtors are required to have filed all their tax returns due during the 4-year period preceding the filing of the Petition, see 11 U.S.C. §§ 1308 & 1325(a)(9). The Internal Revenue Service filed a priority claim in the amount of \$20,135.83 and the

Debtor schedule this claim for only \$5,200.00 in Class 5 of the Plan.

The Trustee's objections are well-taken.

The basis for the Trustee's objection is that the Debtor is \$509.00 delinquent in plan payments. The Trustee reports that the Debtor has paid \$0.00 into the plan to date. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. §§ 1325(2) and 1325(6).

The Debtor has failed to file income taxes for 2012, 2013, and 2015. The Trustee correctly points out that Debtors are required to have filed all their tax returns due during the 4-year period preceding the filing of the petition. 11 U.S.C. §§ 1308 & 1325(a)(9).

### **COURT'S REVIEW OF CASE**

The Chapter 13 Plan, as proposed, provides for payment of the claim secured by Debtor's vehicle and to pay \$6,200.00 (the amount stated in the plan) of priority taxes. In addition, the Plan will also pay Debtor's counsel \$3,400.00 in fees through the plan. Amortizing the \$9,600.00 in priority taxes and attorneys' fees over sixty months requires a monthly payment of \$160.00. For the Class 2 Secured Claim, the payment is \$300.11 a month. The court estimates that there would be approximately \$35.00 a month in Chapter 13 Trustee fees for the necessary monthly plan payment to fund the plan proposed by the Debtor. Thus, the minimum plan payment appears to be \$495.00.

However, the Internal Revenue Service has filed Proof of Claim No. 2 which asserts a priority claim of \$20,135.83. The Debtor listed this claim on the Plan as being only \$5,200.00, and the additional \$15,000.00 of priority claim requires the monthly plan payment to be increased by \$250.00, rendering the \$509.00 proposed payment insufficient.

This is Debtor's second recent bankruptcy case in this District, the first being filed on June 26, 2015. 15-25180. That case was dismissed on February 21, 2016. (With the current case being filed on April 29, 2016.) In her prior Chapter 13 case (in which she was represented by the same counsel as the current case) the Internal Revenue Service filed Proof of Claim No. 1 in the amount of \$17,333.78, of which \$14,768.43 was asserted as a priority claim. The case was dismissed due to Debtor's defaults in Plan payments, having made only two payments of \$459.00 each, and failure to prosecute the case. 15-25180; Civil Minutes, Dckt. 51.

On her Statement of Financial Affairs in the current bankruptcy case, Debtor states that she has not made any payments aggregating more than \$600.00 to any creditor. Statement of Financial Affairs Part 3, Question 6; Dckt. 1. Therefore, it does not appear that Debtor could have paid down, or believed that she had paid down, the Internal Revenue Service priority claim that was asserted in the prior bankruptcy case.

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

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

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

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

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

9. [10-49028-E-13](#)      **ANGELICA MARQUEZ**      **MOTION FOR COMPENSATION FOR**  
**PGM-2**      **Peter Macaluso**      **PETER G. MACALUSO, DEBTOR'S**  
                **ATTORNEY**  
                **6-10-16 [86]**

**Final Ruling:** No appearance at the July 19, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, parties requesting special notice, and Office of the United States Trustee on June 10, 2016. By the court's calculation, 39 days' notice was provided. 28 days' notice is required.

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties 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.

<b>The Motion for Allowance of Professional Fees is granted.</b>
--

Peter G. Macaluso, the Attorney ("Applicant") for Angelica Salud Marquez, the Chapter 13 Debtor ("Client"), makes a Substantial and Unanticipated Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period January 25, 2016 through May 13, 2016. Applicant requests fees in the amount of \$2,100.00.

David Cusick, the Chapter 13 Trustee, filed a non-opposition to the instant Motion on June 14,

2016.

## **STATUTORY BASIS FOR PROFESSIONAL FEES**

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(I) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

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

### **Benefit to the Estate**

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



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

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

*Id.* at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including preparing a Objection to Mortgage Payment Change. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

#### **“No-Look” Fees**

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

“(a) Compensation. Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c). The failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall signify that the attorney has opted out of Subpart (c). When there is an objection or when an attorney opts out, compensation shall be determined in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017, and any other applicable authority.”

...

(c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.

(1) The maximum fee that may be charged is \$4,000.00 in nonbusiness cases, and \$6,000.00 in business cases.

(2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC

### 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.

(3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor's attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6)."

The Order Confirming the Chapter 13 Plan expressly provides that Applicant is allowed \$3,500.00 in attorneys fees. Applicant prepared the order confirming the Plan.

If Applicant believes that there has been substantial and unanticipated legal services which have been provided, then such additional fees may be requested as provided in Local Bankruptcy Rule 2016-1(c)(3). He may file a fee application and the court will consider the fees to be awarded pursuant to 11 U.S.C. §§ 329, 330, and 331. In the Ninth Circuit, the customary method for determining the reasonableness of a professional's fees is the "lodestar" calculation. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), *amended*, 108 F.3d 981 (9th Cir. 1997). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citation omitted). "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A compensation award based on the lodestar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). It is appropriate for the court to have this discretion "in view of the [court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437.

## FEES REQUESTED

### Fees

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

Objection to Mortgage Payment Change: Applicant spent 7 hours in this category. Applicant

assisted Client with preparing an Objection to Mortgage Payment Change, addressing responses, appeared for hearing, and reviewing the Trustee's Reconciliation of Payments.

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:

<b>Names of Professionals and Experience</b>	<b>Time</b>	<b>Hourly Rate</b>	<b>Total Fees Computed Based on Time and Hourly Rate</b>
Peter G. Macaluso	7	\$300.00	\$2,100.00
<b>Total Fees For Period of Application</b>			\$2,100.00

## **FEES AND COSTS & EXPENSES ALLOWED**

### **Fees**

Applicant seeks to be paid a single sum of \$2,100.00 for its fees incurred for the Client. The Applicant asserts that the additional post-confirmation work was actual, reasonable, necessary and unanticipated. Namely, the Applicant's work in preparing the Objection to Mortgage Payment Change.

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates \$2,100.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee under the confirmed plan from the available funds of the Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

Applicant is allowed, and the Trustee under the confirmed plan is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	\$2,100.00
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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 Peter G Macaluso ("Applicant"), Attorney for the Chapter 13 Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Peter G. Macaluso is allowed the following fees and expenses as a professional of the Estate:

Peter G. Macaluso, Professional Employed by Chapter 13 Debtor

Fees in the amount of \$2,100.00

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

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

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 13, 2016. By the court's calculation, 36 days' notice was provided. 35 days' notice is required.

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

<b>The court's decision is to deny the Motion to Confirm the Modified Plan.</b>
---

Janis Lynn Force ("Debtor") filed the instant Motion to Confirm the modified Plan on June 13, 2016. Dckt. 90.

**TRUSTEE'S OPPOSITION**

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant motion on July 5, 2016. Dckt. 101. The Trustee responds as follows:

1. It appears that the plan may not pay unsecured claims what they would receive in the event of a Chapter 7 Liquidation Analysis, 11 U.S.C. § 1325(a)(4). The Debtor is proposing the following payments: \$461.00 per month for 43 months, \$532.00 per month for 2 months, \$8,500.00 lump sum payment from the sale of 8124 Sheehan Way, Antelope California 95842 ("Property") to be paid by August 25, 2016, with a 41% dividend to unsecured creditors.

At the time this case was filed the Property had a value of \$138,000.00. When the Debtor filed a Motion to Sell on June 28, 2016, the Debtor stated that she received an offer for \$154,000.00, however, the final results from the property sale were significantly higher than anticipated. The property sold for \$175,000.00, leaving \$75,000.00 in non exempt equity (Debtor claimed \$100,000.00 as an exemption for the property pursuant to California Code of Civil Procedure § 704.950). The modified plan does not pay the liquidation value as of the effective date of the modified plan which is its confirmation. The Debtor has additional money to contribute into the Plan for the benefit of the creditors.

## **DISCUSSION**

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

11 U.S.C. § 1325(a)(4) states:

(A) Except as provided in subsection (b), the court shall confirm a plan if–

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of the title of such date.

The Trustee's opposition raises some legitimate issues pertaining to the effect of the property sale, which was significantly higher than anticipated. As the Trustee argues, the Debtor has additional money to contribute into the Plan for the benefit of the creditors. The Debtor cannot take all of the extra benefit as a result of the increase in sale price of the property when unsecured creditors will only receive a 41% dividend. While the Debtor stated in her Declaration that as a result of the sale her expenses will increase because she will need to pay \$1,000.00 in rent, the Debtor has failed to specify how the increase in sales price will affect the plan. The Debtor must account for the \$75,000.00 in nonexempt equity (now proceeds) in the modified plan. Since it is evident from the sale that the value of the property to be distributed under the plan on account of each allowed unsecured credit has increased by \$21,000.00, the Debtor must subsequently adjust the amount to be distributed pursuant to 11 U.S.C. § 1325(a)(4).

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

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

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

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

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

11. [16-22530-E-13](#)      **MARCIA CLARK**      **OBJECTION TO CONFIRMATION OF**  
**APN-1**      **Paul Bains**      **PLAN BY GATEWAY ONE LENDING &**  
                **FINANCE**  
                **6-3-16 [42]**

**Final Ruling:** No appearance at the July 19, 2016 hearing is required.  
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Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on June 3, 2016. By the court's calculation, 46 days' notice was provided. 14 days' notice is required.

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

**The court's decision is to continue the Objection to Confirmation to July 26, 2015  
AT 3:00 P.M.**

Gateway One Lending & Finance ("Secured Creditor") opposes confirmation of the Plan on the basis that:

1. The value allocated to Secured Creditor's collateral under Debtor's proposed Plan is substantially below the value given in the NADA Guide. In the absence of further evidence explaining the valuation discrepancy, Secured creditor contends that Debtor has not satisfied the burden under 11 U.S.C. 506(a)

## **DISCUSSION**

The Debtor's Plan states the Secured Creditor has a \$6,058.00 interest in the collateral (Porsche). However, in response to the Debtor's Motion to Value the collateral, the secured creditor filed an Opposition to Debtor's Motion to Value Collateral of Gateway One Lending & Finance on June 2, 2016. Dckt 37. The Secured Creditor claimed that the 2004 Porsche Cayenne has a replacement value to Debtor of \$10,775.00.

The hearing on the Motion to Value Collateral of Gateway one Lending and Finance was continued to July 26, 2016. Therefore, this court will continue this motion to be heard concurrently with the Motion to Value.

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 Gateway One lending & Finance having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Objection to confirmation the Plan is continued to July 26, 2016.



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

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

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

-----

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 8, 2016. By the court's calculation, 41 days' notice was provided. 14 days' notice is required.

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

<b>The court's decision is to sustain the Objection.</b>
--

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

- A. According to Trustee's calculations the Plan will complete in 152 months as opposed to 60 months proposed. This exceeds the maximum amount of time allowed under 11 U.S.C. 1322(d). Further, it appears the debtor failed to include the unsecured portion of the 2<sup>nd</sup> Deed of Trust, which the debtor lists in Class 2 of the plan, claiming it is wholly secured.
- B. Debtor lists mortgage arrears in Class 1 of the plan as \$68,628.01. On June 2, 2016, Deutsche Bank filed Court Claim #1, indicating that the mortgage arrears total \$96,706.94.

- C. The Debtor cannot make the payments under the plan or comply with the plan, 11 U.S.C. § 1325(a)(6). The Debtor proposes to value the secured claim of Anana Bliss Revocable Trust, but has not filed a motion to value collateral. Debtor's plan does not have sufficient monies to pay the claim in full and therefore should also be denied confirmation.
- D. The Debtor may not be able to make payments under the plan or comply with the plan under 11 U.S.C. § 1325(a)(6). The Debtor reports the bulk of his income is from roommates, however, Debtor has filed no declarations of his roommates to support the amount of income he reports on Schedule I. Dckt. 13. The Debtor has filed an unrealistic budget on Schedule J amounts in an effort to show ability to pay proposed plan payments. The Debtor has filed multiple cases and each case has provided a different picture of debtor's income and expenses. Dckt. 13. The current budget lists household expenses that total \$380.00. \$380 is barely sufficient to cover household utilities. The Trustee finds it difficult to believe that the debtor's household expenses are accurately reported.
- E. The Petition may not be filed in Good Faith 11 U.S.C. § 1325(a)(3). The Debtor has filed multiple prior bankruptcy cases, which, except for one Chapter 7 case in which Debtor obtained a discharge, have all been dismissed.

1. Case # 14-29671-13

- a. Filed.....9/29/14
- b. Dismissed.....6/29/15
- (1) Dismissed based on monetary defaults and unconfirmable plan due to failure to provide for Deutsche Bank National Trust, Company, as Trustee, claim. 14-29761; Civil Minutes, Dckt. 138.

2. Case # 14-24181-13

- a. Filed.....4/23/14
- b. Dismissed.....8/22/14
- (1) Dismissed based on monetary defaults. 14-24181; Motion and Order, Dckts. 69, 76.

3. Case # 13-33851-13

- a. Filed.....10/28/13
- b. Dismissed.....4/23/14
- (1) Dismissed based on monetary defaults (no payments made by Debtor) and failure to prosecute. 13-33851; Civil Minutes, Dckt. 80.

4. Case # 13-24737-13
- a. Filed.....4/5/13
  - b. Dismissed.....10/18/13
    - (1) Dismissed based on failure to prosecute case. 13-24737; Motion and Order, Dckts. 82, 84.
    - (2) Confirmation of Plan denied due to default in payments. *Id.*; Civil Minutes, Dckt. 81.
5. Case # 13-21452-13
- a. Filed.....2/1/13
  - b. Dismissed.....5/20/13
    - (1) Dismissed based on failure to prosecute case. 13-21452; Motion and Order, Dckts. 43, 80.
    - (2) Confirmation denied for failure to provide for secured claim. *Id.*; Civil Minutes, Dckt. 74.
6. Case # 12-29177-13
- a. Filed.....5/11/12
  - b. Dismissed.....10/24/12
    - (1) Dismissed based on monetary defaults (no payments made by Debtor) and failure to prosecute. 12-29177; Civil Minutes, Dckt. 81. FN.1.
- 
- FN.1. After going back for four years from the filing of the current case, the court did not further survey the grounds for dismissal of the earlier bankruptcy case. A review of the prior four years is sufficient for considering the current state of the Debtor's financial affairs and ability to make the plan payments.
- 
7. Case # 11-43836-13
- a. Filed.....10/3/11
  - b. Dismissed.....4/23/12
8. Case # 11-25228-7
- a. Filed.....3/1/11
  - b. Discharge Entered.....9/27/11
9. Case # 10-25066-13
- a. Filed.....3/2/10
  - b. Dismissed.....3/8/11

10. Case # 08-39044-13
- a. Filed.....12/23/08
- b. Dismissed.....3/12/10

## DISCUSSION

The Trustee's objections are well-taken.

First, the Debtor must adjust class 1 in the plan to make it consistent with the proof of claim filed by Deutsche Bank National Trust Company, as Trustee, on June 2, 2016, which states that there are arrearage due under the Note and Deed of Trust totaling \$96,706.94. The Plan does not propose to cure this arrearage. Because the Plan does not provide for the surrender of the collateral for this claim, the Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments. *See* 11 U.S.C. §§ 1322(b)(2), (b)(5) & 1325(a)(5)(B). Because it fails to provide for the full payment of arrearage, the plan cannot be confirmed.

Next, under the Debtor's current plan, the Debtor will be unable to pay the claim for the 2nd Deed of Trust in full and therefore needs to file a motion to value the claim of Anana Bliss Revocable Trust. After reviewing the Docket, it appears the Debtor did in fact file a Motion to Value the Claim of Anana Bliss Revocable Living Trust on June 22, 2016. Dckt. 29. However, the Debtor must include the unsecured portion of the 2nd Deed of Trust in Class 7 if the court were to grant the Debtor's Motion to Value. Given that the 2nd Deed of Trust is currently a secured claim, it is not clear that the debtor will be able to make all payments under the plan and to comply with the plan. *See* 11 U.S.C. § 1325 (a)(6).

Debtor is in material default under the plan because the plan will complete in more than the permitted 60 months. According to the Trustee, the plan will complete in 152 months due to the plan failing to provide for the full arrearage of Creditor as well as the failure to have valued the claim of the 2nd Deed of Trust. This exceeds the maximum 60 months allowed under 11 U.S.C. § 1322(d).

Next, the Debtor needs to provide some evidence of his source of income, which he lists in Schedule I as "Roommates." The Debtor must show that he is able to make payments under the plan and is able to comply with the plan pursuant to 11 U.S.C. § 1325(a)(6). Although Debtor's expenses as listed in Schedule J appear slightly undervalued, there is no reason to believe especially if he splits various costs with the "roommates."

## Review of Schedules

On Schedule I in the current case, Debtor states that he is not employed. Dckt. 13 at 26. He states that he has pension in come of \$480.00 a month and \$2,124.00 in "roommate income." In looking at his most recent bankruptcy cases which have been dismissed, Debtor has stated his income on various Schedules I as being:

- A. 14-29671, Dckt. 57 - Chapter 13 Case.
1. Workers' Compensation.....\$ 960.00
2. Roommates.....\$1,000.00

3. Expenses, *Id.*, Schedule J.....(\$540.00)
- B. 14-24181, Dckt. 18 - Chapter 13 Case.
1. Workers' Compensation.....\$ 960.00
  2. Roommates.....\$1,000.00
  3. Expenses, *Id.*, Schedule J.....(\$955.00)
- C. 13-33851, Dckt. 38 - Chapter 13 Case.
1. Gross Wages.....\$1,950.00
  2. Expenses, *Id.*, Schedule J.....(\$1,009.00)
- D. 13-24737, Dckt. 66 - Chapter 13 Case.
1. Workers' Compensation.....\$ 920.00
  2. Roommates and Handyman.....\$1,490.00
  3. Expenses, *Id.*, Schedule J.....(\$490.00)
- E. 13-21452, Dckt. 1 - Chapter 13 Case.
1. Workers' Compensation.....\$ 920.00 (stating "will be returning to work within next 2 months.")
  2. Expenses, *Id.*, Schedule J.....(\$820.00)
- F. 13-29177, Dckt. 20 - Chapter 13 Case.
1. Gross Wages.....\$2,728.00
  2. Expenses, *Id.*, Schedule J.....(\$1,321.00)

In the current case Debtor states his reasonable and necessary expenses on Schedule J. Dckt. 13 at 28-30. On Schedule J, Debtor states that his reasonable and necessary expenses, other than for his mortgage, total \$380.00 a month. To get to this number, Debtor statement under penalty of perjury of his expenses includes the following:

- A. Home Maintenance.....\$ 0.00
- B. Electricity and Gas.....\$ 50.00
- C. Water, Sewer, Garbage.....\$ 30.00
- D. Telephone, Internet, Cable.....\$ 35.00
- E. Food and Housekeeping Supplies.....\$100.00
- F. Clothing.....\$ 0.00
- G. Personal Care Products/Services.....\$ 0.00
- H. Medical and Dental Expenses.....\$ 0.00
- I. Transportation.....\$ 75.00
- J. Vehicle Insurance.....\$ 50.00
- K. Taxes.....\$ 0.00

As noted above, even with roommates "sharing" the expenses, the above amounts are patently unreasonable. Further, if roommates are paying \$2,000 a month toward rent, then they would not be sharing Debtor's living expenses.

As has been borne out by the prior attempts and failures, Debtor's financial computations are not sound. On the one hand, Debtor purports to own two vehicles, both in poor conditions. His expenses for registration, gas, and maintenance is purported to be \$75.00 a month. Assuming registration and maintenance costs of \$20.00 a month, that leaves \$55.00 for gas. With a gas cost of \$2.50 a gallon, that would allow Debtor to buy 22 gallons of gas a month - 11 gallons for each vehicle. Considering the age and model of vehicles, assuming 15 miles per gallon is generous. That would allow Debtor to drive 330 miles a month. This breaks down to 82 miles a week, or 11 miles a day. This does not appear to represent a reasonable expense.

Further, Debtor has no provision for any home maintenance. It is commonly known that even a house in good condition requires maintenance. Further, Debtor's water, sewer, and garbage combined expense of \$30.00 a month appears suspect.

With respect to food and housekeeping supplies, the \$100.00 a month appears to be unreasonable. If only \$25.00 a month is spent on paper towels, cleaning supplies, soap, and the like, the remaining \$75.00 for food equates to \$0.86 per meal (assuming a thirty-one day month and three meals a day).

The court also notes that Debtor lists \$0.00 for taxes. However, by his account he is generating over \$24,000.00 a year in rental income for renting rooms. It appears that such income (which possibly qualifies as self-employed income) may well have tax consequences.

### **Defaults and Dismissals**

As the court's files show, Debtor has filed multiple prior bankruptcy cases, with all (but the Chapter 7 case) failing due to Debtor's defaults. While Debtor may have a deep seated belief that he wants to keep his real property and that the creditor should not be allowed to resort to the collateral securing the claim, Debtor has repeatedly demonstrated that he cannot financially make the necessary payments to continue as the owner of the real property.

In his current Plan, Debtor states that the monthly mortgage payment is \$973.00 and the arrearage payment (which he computes on a \$68,628.01 arrearage) is \$1,143.80. Debtor asserts that he can make this \$2,116.00 a month payment based on his room rental income and his pension. But that is only if the court were to believe that all of his other reasonable and necessary monthly expenses are \$380.00. As demonstrated by Debtor, he has previously stated that his expenses are much higher (though even such higher amount may not be reasonable). Further, even when he has purported to have had low expenses consistent with what he now states in the current case, Debtor has not been able to make the plan payments. His prior efforts, even when stating unrealistically low expenses have resulted in the cases failing and dismissal.

The Trustee's objections are well taken. In addition to being in default, the evidence (including Debtor's historic performance in his multiple prior cases) shows that Debtor cannot perform this Chapter 13 Plan. Further, the evidence shows that Debtor did not file, and is not prosecuting, this Chapter 13 case in good faith. Debtor is not pursuing any effective reorganization or rehabilitation as provided under the Bankruptcy Code.

Rather, in reviewing the prior cases, it appears that all Debtor is attempting is to obtain a loan

modification. See Motion to Confirm, Case No. 14-24181, Dckt. 53. But none has been forthcoming.

It also appears that in the prior cases when the Trustee advanced motions to dismiss, Debtor has not opposed the motions, but instead accepted the dismissals and then merely filed a new case.

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

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

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

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

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

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 7, 2016. By the court's calculation, 42 days' notice was provided. 14 days' notice is required.

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

<b>The court's decision is to sustain the Objection.</b>
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Deutsche Bank National Trust Company, as Trustee for Morgan Stanley ABS Capital I Inc. Trust 2006-NC4, Mortgage Pass-Through Certificate, Series 2006-NC4 ("Secured Creditor") opposes confirmation of the Plan on the basis that: opposes confirmation of the Plan on the basis that:

1. Deutsche Banks holds a secured claim evidenced by a promissory note in the original principal sum of \$100,000.00 executed by the Debtor on or about February 17, 2006, collateralized by a first priority deed of trust encumbering Debtor's residence located at 4831 Cibola Way, Sacramento, CA 95820 ("Property").



2. Deutsche Bank filed a Proof of Claim on June 1, 2016 that reflects that at the time of filing of the case on April 28, 2016, the arrearages due under the Note and Deed of Trust totaled \$96,706.94. The Proof of Claim also reflects the post-petition payment amount is \$1,162.01. The Debtor provides for Secured creditor in Section 2.08 of the Plan as a Class 1 claim holder, proposing to pay the ongoing post-petition payments to Secured Creditor in the amount of \$973.00 and cure a pre-petition default amount of \$68,628.01. Secured Creditor objects to the Plan because the total arrearage amount in the Plan is understated and the ongoing monthly payment is also understated.
3. Debtor's Plan cannot be confirmed as the Plan fails to provide for Secured Creditor's arrearage claim in full and fails to meet the feasibility requirement. See 11 U.S.C. §§ 1322(b)(5) and 1325(a)(6).

The Secured Creditor's objections are well-taken. As the Secured Creditor correctly argues, the Plan that the Debtor filed does not provide for all arrearages due under the Note and Deed of Trust. Under 11 U.S.C. 1322(b)(5), the plan, notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due. The Debtor must provide for the full \$96,706.94 arrearages in the plan. 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 Deutsche Bank National Trust Company having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

14. [12-40834](#)-E-13      **DAVID/SHELLIE FISCHER**      **MOTION FOR COMPENSATION BY THE**  
**CA-7**      **Michael Croddy**      **LAW OFFICE OF CRODDY &**  
                **ASSOCIATES, P.C. FOR MICHAEL D.**  
                **CRODDY, DEBTORS' ATTORNEY(S)**  
                **6-28-16 [108]**

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

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

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

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, and Office of the United States Trustee on June 28, 2016. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(6), 21 day notice requirement.)

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

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<p><b>The Motion for Allowance of Professional Fees is denied without prejudice.</b></p>
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Michael D. Croddy, the Attorney ("Applicant") for David Wayne Fischer and Shellie Jean Fischer the Debtor in Possession ("Client"), makes a First Interim Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period November 1, 2012 through July 19, 2016. Applicant requests fees in the amount of \$6,975.00.

**TRUSTEE'S OPPOSITION**

David Cusick, the Chapter 13 Trustee opposes the Motion for Allowance of Professional Fees for the following reasons:

1. The Movant only provided 14 days notice when FRBP 2002(a)(6) requires 21 days notice of a motion for compensation.
2. Various discrepancies exist between the motion and the record. The Caption of the Motion indicates this is the First Interim Application for Fees when a review of the record reveals that this is not the first fee application in this case. Applicant previously requested fees of \$5,042.90 by Motion filed January 22, 2013. Dckt. 32. That Motion sought fees for work performed from November 1, 2012 through January 22, 2013. The fees were granted by Civil Minute Order dated March 1, 2013. Dckt 48. The instant Motion further states on Page 2, lines 18-23 that prior to the filing of the case, Applicant received fees of \$5,923.90 and no further fees have been allowed by this court. The Trustee's records indicate that Applicant was paid \$5,042.90 by Trustee check #667106 on May 31, 2013, the disbursement of the fees awarded by the Order dated March 1, 2013.
3. The Debtor has a pending motion to modify. Dckt 95 and 103. Both motions may depend on the Schedule I which includes a detail, "property management income listed above assumes 75% occupancy on \$1,838.50=\$1,379.63," present in the latest Schedule I filed June 21, 2016, and in the original Schedule I filed November 30, 2012. Dckt. 102 and 1.

The Trustee recommends that this motion be continued to be heard on the same dates as the motions to modify.

## **STATUTORY BASIS FOR PROFESSIONAL FEES**

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

- (A) the time spent on such services;
- (B) the rates charged for such services;
- (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
- (D) whether the services were performed within a reasonable amount of time

commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

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

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

### **Benefit to the Estate**

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the services provided as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [professional fees and expenses] without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

*Id.* at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including multiple motions to value and multiple motions to confirm. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

Applicant requests fees as provided by Local Bankruptcy Rule 2016-1. He may file a fee application and the court will consider the fees to be awarded pursuant to 11 U.S.C. §§ 329, 330, and 331. In the Ninth Circuit, the customary method for determining the reasonableness of a professional's fees is the "lodestar" calculation. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), *amended*, 108 F.3d 981 (9th Cir. 1997). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citation omitted). "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A compensation award based on the lodestar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). It is appropriate for the court to have this discretion "in view of the [court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437.

## **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.

Significant Motions and Other Contested Matters: Applicant spent 18.6 hours in this category. Applicant Prepared and filed documents, multiple motions to value and multiple motions to confirm.

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:

<b>Names of Professionals and Experience</b>	<b>Time</b>	<b>Hourly Rate</b>	<b>Total Fees Computed Based on Time and Hourly Rate</b>
Michael Croddy	18.6	\$375.00	\$6,975.00
	0	\$0.00	<u>\$0.00</u>
<b>Total Fees For Period of Application</b>			\$6,975.00

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

Application	Interim Approved Fees	Interim Fees Paid
First Interim	\$5,923.00	\$5,923.00
Second Interim	\$0.00	\$0.00
Third Interim	\$0.00	\$0.00
	<u>\$0.00</u>	
Total Interim Fees Approved Pursuant to 11 U.S.C. § 331	\$5,923.00	

### **Fees**

It is not clear whether the Applicant is requesting fees that the Applicant was already paid pursuant to the Application and Declaration for Attorney Fees and Costs filed on January 22, 2013. Dckt 32. The dates for which the Attorney is now requesting additional fees overlaps with the dates for which the Attorney was already paid in January of 2013.

While the additional request does appear to be for necessary services, the applicant must specify what work was done and for how long the applicant worked on each motion etc. Without these details this court cannot determine that the services were in fact actual and not related to the fees that were previously disbursed by the Trustee.

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 Allowance of Fees and Expenses filed by Michael Croddy (“Applicant”), Attorney for the Debtor in Possession 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.

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 14, 2016. By the court's calculation, 35 days' notice was provided. 35 days' notice is required.

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

<b>The hearing on the Trustee's Motion to Confirm the Modified Plan is continued to 3:00 p.m. on July 26, 2016.</b>
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David Cusick, the Chapter 13 Trustee, filed a Motion to Confirm the Modified Plan on June 15, 2016. Dckt. 94. The Trustee states that he seeks to modify the plan to eliminate an ongoing mortgage payment to a second deed of trust to JP Morgan Chase where the claim has been satisfied and to reduce the plan payment by the amount that an ongoing Class 4 mortgage payment to Wells Fargo has increased.

The Trustee states that the Debtor's attorney has failed to file a timely modified plan.

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

The Debtor filed a proposed modified plan and Motion to Confirm on June 21, 2016. Dckt. 103 and 105. The hearing on the Motion is set for 3:00 p.m. on July 26, 2016.

In light of the interconnectedness of the instant Motion and the Motion to Confirm, the court continues the instant hearing to 3:00 p.m. on July 26, 2016.

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

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

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

**IT IS ORDERED** that Motion to Confirm the Plan is continued to 3:00 p.m. on July 26, 2016.

16.	<a href="#"><u>11-23535</u></a> -E-13 PGM-1	<b>ARSENIO/MARILOU SORIANO</b> <b>Peter Macaluso</b>	<b>CONTINUED MOTION TO AVOID LIEN OF DISCOVER BANK</b> <b>5-31-16 [85]</b>
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**Final Ruling:** No appearance at the July 19, 2016 hearing is required.

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The Debtor having filed a "Withdrawal of Motion" for the pending Motion to Avoid Lien of Discover Bank, the "Withdrawal" being consistent with the opposition filed to the Motion, the court interpreting the "Withdrawal of Motion" to be an ex parte motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rule of Bankruptcy Procedure 9014 and 7041 for the court to dismiss without prejudice the Motion to Dismiss the Bankruptcy Case, and good cause appearing, **the court dismisses without prejudice the Debtor's Motion to Avoid Lien of Discover Bank.**

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.

A Motion Avoid Lien of Discover Bank having been filed by the Debtor, the Debtor having filed an ex parte motion to dismiss the Motion without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, dismissal of the Motion being consistent with the opposition filed, and good cause appearing,

**IT IS ORDERED** that the Motion to Avoid Lien of Discover Bank is dismissed without prejudice.



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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 22, 2016. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

<b>The court's decision is to sustain the Objection.</b>
--

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

1. The plan fails the Chapter 7 liquidation analysis under 11 U.S.C. § 1325(a)(4). The Debtor lists an Annuity-Monthly on Schedule B and values this annuity at \$1,113.36. The Debtor lists this income on Schedule I in the amount of \$1,113.36. The Debtor proposed a 60 month plan with at least 0% dividend to unsecured creditors. The Trustee has requested a copy of the terms of the Annuity, but has only received a letter from Doylelyn Agee. Dckt. 15 Ex. A. The letter states that the sender is the administrator of the Debtor's father's estate and that Debtor receives an annuity payment each month from the estate.

The letter also states that Debtor is not entitled to a lump sum payment for her interest.

2. The Debtor's plan is not the Debtor's best efforts. The Debtor is over the median income and proposes plan payments of \$2,300.00 for 19 months, followed by \$3,076.75 for 41 months with a 0% dividend to unsecured creditors.

Debtor's Official Form 122C-2, line 45 indicates that Debtor has negative monthly disposable income to pay unsecured creditors. However, based on the Trustee's review, the Debtor has \$1,285.00 of disposable income. This is based on Debtor's failure to include \$1,550.00 per month of income from VA disability and a deduction for \$180.00 that Debtor lists for additional health care expenses without providing any information as to why this is necessary.

Debtor's 2015 income tax return reflects refunds of \$4,375.00 from Federal and \$698.00 from State. Debtor fails to provide for any future tax refunds to be paid into the Plan for the benefit of their unsecured creditors.

The Trustee's objections are well-taken.

The basis for the Trustee's objection is that the Debtor's plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. §1325(a)(4) and the Plan may not be in Debtor's best efforts. Debtor lists Annuity-Monthly on their Schedules, but has failed to provide the Trustee with the terms of the Annuity. The Trustee also states that while Debtor has reported a negative monthly net income, the Debtor has failed to include \$1,550.00 of monthly income from VA disability and has failed to provide any information as to why a \$180.00 deduction for health care expenses is necessary.

Additionally, the Debtor's plan does not appear to be the Debtor's best efforts. A review of the Debtor's financial information, it appears that there is potentially substantial additional income, namely the tax returns, that should be provided for in the plan. In light of the additional funds and the Debtor only proposing a 0% dividend to unsecured creditors, the plan cannot be confirmed.

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

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

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

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

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

**Final Ruling: No appearance at the July 19, 2016 Status Conference is required.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 22, 2016. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

On July 15, 2016, Debtor filed an amended Chapter 13 Plan. Dckt. 31. This the court accepts as a de facto dismissal of the prior plan. Upon review of the Motion and supporting pleadings, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

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

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

1. The Debtor failed to appear at the First Meeting of Creditors held on June 16, 2016. The Trustee does not have sufficient information to determine whether or not the case is suitable for confirmation. The Meeting has been continued to August 11, 2016 at 11:00 a.m.
2. The Debtor has failed to provide the Trustee with a tax transcript or a copy of his Federal Income Tax Return with attachments for the most recent pre-petition tax year for which a return was required, or a written statement that no such documentation exists.
3. The Debtor has failed to provide the Trustee with his Employer Payment Advices received 60 days prior to filing.
4. The Debtor's Plan fails to provide a dividend to unsecured creditor's under § 2.15 of the Plan.

The Trustee's objections are well-taken.

The basis for the Trustee's objection was that the Debtor did not appear at the meeting of creditors held pursuant to 11 U.S.C. § 341. The Trustee states that the Meeting of Creditors was continued to August 11, 2016 at 11:00 a.m., the court does not see a reason to continue the instant Objection. Appearance at the meeting of creditors is mandatory. *See* 11 U.S.C. § 343. To attempt to confirm a plan while failing to appear and be questioned by the Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). This is cause to deny confirmation. 11 U.S.C. § 1325(a)(1)

The Trustee argues that the Debtor did not provide either a tax transcript or a Federal Income Tax Return with attachments for the most recent pre-petition tax year for which a return was required. *See* 11 U.S.C. § 521(e)(2)(A); 11 U.S.C. § 1325(a)(9); Fed. R. Bankr. P. 4002(b)(3). The Debtor has failed to provide the tax transcript. This is an independent ground to deny confirmation. 11 U.S.C. § 1325(a)(1).

The Trustee also Objects on grounds that Debtor did not provide the Trustee with his Employer Payment Advices for the 60-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv); Fed. R. Bankr. P. 4002(b)(3). The Debtor has failed to provide the Employer Payment Advices. This is an independent ground to deny confirmation. 11 U.S.C. § 1325(a)(1)

Debtor's Plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). The Debtor has claimed a \$260,000.00 homestead exemption under C.C.P. § 704.730 however, this exceeds the maximum exemption under C.C.P § 704.730. The Debtor has not explained, under the proposed plan and the schedules filed under the penalty of perjury, why non-exempt assets should not be provided for in the plan.

In sum, the failure of the Debtor to provide complete, accurate, and truthful information as to the Debtor's financial reality. As the plan and schedules are presented now, the court cannot determine if the plan is feasible, viable, or best efforts.

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

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

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

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

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

**Final Ruling: No appearance at the July 19, 2016 hearing is required.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 13 Trustee, all creditors, and parties requesting special notice on June 23, 2016. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

On July 15, 2016, Debtor filed an amended Chapter 13 Plan. Dckt. 31. This the court accepts as a de facto dismissal of the prior plan. Upon review of the Motion and supporting pleadings, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion. At the hearing -----.

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

Bank of New York Melon, f/k/a Bank of New York, as Trustee for the registered holders of Alternative Loan Trust 2005-27, Mortgage Pass-Through Certificates Series 2005-27, by and through its servicing agent Select Portfolio Servicing, Inc., as its attorney in fact, ("Creditor") a secured creditor, opposes confirmation of the Plan on the basis that:

1. The Debtor has classified Creditor as an unsecured claim under Class of the Plan. Creditor is entitled to receive payments pursuant to a Promissory and is secured by a Deed of Trust on the subject property commonly known as 3273 California Avenue, Carmichael, California. Thus, Creditor should be classified as a secured clam.

The Creditor's objections are well-taken.

11 U.S.C. § 1322(a) is the section of the Bankruptcy Code that specifies the mandatory provisions of the plan. It requires only that the Debtor adequately fund the plan with future earnings or other future income that is paid over to the Trustee, 11 U.S.C. § 1322(a)(1), provide for payment in full of priority claims, 11 U.S.C. § 1322(a)(2) & (4), and provide the same treatment for each claim in a particular class, 11 U.S.C. § 1322(a)(3). But nothing in § 1322(a) compels a debtor to propose a plan that provides for a

secured claim.

11 U.S.C. § 1322(b) specifies the provisions that a plan may include at the option of the debtor. With reference to secured claims, the debtor may not modify a home loan but may modify other secured claims, 11 U.S.C. § 1322(b)(2), cure any default on a secured claim, including a home loan, 11 U.S.C. § 1322(b)(3), and maintain ongoing contract installment payments while curing a pre-petition default, 11 U.S.C. § 1322(b)(5).

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

- (1) provides a treatment that the debtor and secured creditor agree to, 11 U.S.C. § 1325(a)(5)(A);
- (2) provide for payment in full of the entire claim if the claim is modified or will mature by its terms during the terms of the Plan, 11 U.S.C. § 1325(a)(5)(B); or
- (3) surrender the collateral for the claim to the secured creditor, 11 U.S.C. § 1325(a)(5)(C).

However, these three possibilities are relevant only if the plan provides for the secured claim.

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

Notwithstanding the absence of a requirement in 11 U.S.C. § 1322(a) that a plan provide for a secured claim, the fact that this plan fails to classify Creditor's claim as such raises doubts about the Plan's feasibility. *See* 11 U.S.C. § 1325(a)(6). The Debtor does not provide a reason for why this claim was incorrectly classified. This is reason to sustain the objection.

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

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

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

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

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

20. [16-22740-E-13](#) AARON MILLER  
DPC-1 Barry Spitzer

OBJECTION TO CONFIRMATION OF  
PLAN BY DAVID P. CUSICK  
6-8-16 [\[14\]](#)

WITHDRAWN BY M.P.

**Final Ruling: No appearance at the July 19, 2016 hearing is required.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on June 8, 2016. By the court's calculation, 41 days' notice was provided. 14 days' notice is required.

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

Upon review of the Motion and supporting pleadings, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion. The defaults of the non-responding parties in interest are entered.

<b>The court's decision is to overrule the Objection.</b>
---

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

1. The Debtor failed to attend the Meeting of Creditors.

#### **TRUSTEE'S NOTICE OF DISMISSAL**

The Trustee filed a Notice of Dismissal of Objection on July 5, 2016. Dckt. 19. The Trustee states that the Debtor appeared at the continued meeting. The Objection is now resolved.

Therefore, with no pending objections and upon independent review, Plan does comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is overruled and the Plan is confirmed.

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

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

The Objection to the Chapter 13 Plan filed by the Trustee having been

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

**IT IS ORDERED** that the Objection is overruled, Debtor's Chapter 13 Plan filed on April 28, 2016 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.



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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 22, 2016. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

<b>The court's decision is to sustain the Objection.</b>
--

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

1. The Debtor is \$4,520.00 delinquent in plan payments, The Debtor has paid \$0.00 into the plan to date.
2. The Debtor failed to provide proof of his social security number at the First Meeting of Creditors Held June 16, 2016.
3. The Plan completes in 75 months as opposed to the 60 months proposed based on the

priority claim filed by the Internal Revenue Service May 25, 2016 in the amount of \$79,355.12. This exceeds the maximum time allowed under 11 U.S.C. § 1332(d).

4. The Debtor owns R&D Bodyworx, Inc. and receives both wages and other monthly income from the business of \$3,500.00 per month. The Trustee has requested balance sheets from the business, but none have been provided to date.
5. The Debtor lists an expense for income taxes in the amount of \$1,375.00 on Schedule J. However, Debtor filed this case on April 28, 2016 and failed to indicate that they have saved \$1,375 per month for January 2016 through April 28, 2016 on Schedule B. Where the Debtor is not maintaining these payments in a separate account and providing for any unused payments to be paid into the plan, the Debtor has not shown that they can make the plan payments and comply with the plan or whether the payments are necessary at all and the plan is in the Debtor's best effort.

The Trustee's objections are well-taken.

The basis for the Trustee's objection is that the Debtor is \$4,520.00 delinquent in plan payments. According to the Trustee, the Debtor has paid \$0.00 into the plan to date. The debtor's delinquency indicates that the plan is not feasible, and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

The Debtor has failed to provide proof of his social security number at the First Meeting of Creditors held June 16, 2016. *See* 11 U.S.C. § 521(h)(1); Fed. R. Bankr. P. 4002(b)(1)(B). This is cause to deny confirmation. 11 U.S.C. 1325(a)(1).

The Debtor is in material default under the plan because the plan will complete in more than the permitted 60 months. According to the Trustee, the plan will complete in 75 months due to the priority claim filed by the Internal Revenue Service on May 25, 2016 in the amount of \$79,355.12. Debtor's Schedules indicate a monthly net income of \$4,520.00, all of which is currently paid into the plan. With the addition of the priority claim filed by the Internal Revenue Service, the Debtor may not be able to make plan payments or comply with the plan. This indicates the plan is not feasible, and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

The Debtor has failed to timely provide the Trustee with business documents from R&D Bodyworx, Inc. Debtor owns this business and receives both wages and other income from the business of \$3,500.00 per month. 11 U.S.C. § 521(e)(1); Fed. R. Bankr. P. 4002(b)(2). Without the Debtor submitting these required documents, the court and the Trustee are unable to determine if the plan is feasible, viable, or complies with 11 U.S.C. § 1325.

Lastly, the Trustee asserts that the plan, as presented, may not be in the Debtor's best efforts given the conflicting information apparent in the Debtor's Schedules. The debtor lists an expense for income taxes in the amount of \$1,375. On Schedule J. Yet the Debtor failed to indicate that they have saved \$1,375 per month for January 2016 through when this case was file on April 28, 2016 on Schedulle B. Many of the Trustee's objections deal with the accuracy and truthfulness of the information provided by Debtor. The failure of the Debtor to provide complete, accurate, and truthful information has made it indeterminable for the court whether the plan is feasible, viable, or the Debtor's best efforts.

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

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

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

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

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

22.	<a href="#"><u>16-22942-E-13</u></a>	<b>TRACI HAMILTON</b> <b>Richard Jare</b>	<b>OBJECTION TO CONFIRMATION OF PLAN BY U.S. BANK TRUST, N.A.</b> <b>6-23-16 [38]</b>
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**Tentative Ruling:** The Objection to Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 23, 2016. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy

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

<b>The court's decision is to sustain the Objection.</b>
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U.S. Bank Trust, N.A., as Trustee for LSF8 Master Participation Trust, serviced by Caliber Home Loans, Inc. ("Creditor"), a secured creditor, opposes confirmation of the Plan on the basis that:

1. The Debtor's Plan in § 6.02 understates the pre-petition arrearage owed to Creditor. The Plan states the pre-petition arrears of \$16,700.00, while the pre-petition arrears asserted by the Creditor are in the amount of \$19,187.32. (No evidence is provided for this larger amount and no proof of claim has been filed by this creditor.) Debtor fails to provide a cure for the arrears within a reasonable time.
2. The Debtor's Plan in § 6.04 indicates that Debtor will make an adequate protection payment of \$1,350.00 beginning June 29, 2016 to be applied to July 1, 2016 installment payment date. The current mortgage amount as of July 1, 2016 is \$1,572.77. The first post-petition monthly mortgage payment is due June 1, 2016.

Debtor intends to treat disbursement priority as if this were a Class 2 Claim. Creditor asserts that since this is Debtor's principal residence, and there is an arrearage owed, Debtor cannot modify Creditor's claim and the claim should be treated as a Class 1 claim.

3. In § 6.05, the Plan states that Debtor shall not commence making payments under the terms of the loan modification until it has been approved by the court. If the Debtor is approved for a permanent loan modification, Debtor should refer to the terms of such modification to determine when the first payment is due, so as not to be in default on any modification terms
4. The § 6.08 termination of the automatic stay contradicts § 6.07 events of default and should be removed from Debtor's Plan.

## **REVIEW OF PLAN TERMS**

The Debtor appears to be attempting to confirm a Chapter 13 Plan with what is commonly referred to as an "Ensminger Adequate Protection Pending Loan Modification Decision Additional Provision." This provision, created through the combined efforts of the debtor and creditor bars, provides for adequate protection payments to be made to the creditor under a confirmed plan pending decision on a loan modification and the automatic termination of the automatic stay in the event the creditor denies the loan modification.

The Additional Provides provide for a \$1,350.00 a month adequate protection payment to be made to creditor Caliber Home Loans. If Caliber Home Loans denies the loan modification, it will so

communicate in writing the denial. If denied, Debtor has fourteen days to file an amended plan to properly address this creditor's claim.

However, Debtor and Debtor's counsel have eviscerated the standard provisions which were worked out and have been successfully used previously in this court by a number of debtors and creditors. The court has addressed this issue before with Debtor's counsel in unrelated cases.

First, Debtor's counsel has deleted key language from the Adequate Protection Payment additional provision (§ 6.04). The missing critical language is,

"This Chapter 13 Plan **does not** modify the rights of [Creditor Name] for this secured claim, but provides adequate protection payments during the loan modification process."

By choosing to delete this very simple statement, Debtor creates a cloud of mystery about whether the plan does not modify the right, or somehow, outside the bounds of the law, has modified the rights of this creditor.

In the additional provisions relating to any possible loan modification (§ 6.05), Debtor merely states that she will provide a copy of the loan modification to the Trustee. Once again, Debtor and Debtor's counsel have neutered the balanced loan modification process additional provisions by deleting the following standard language:

"2. For a loan modification which does not provide for any pre-petition arrearage cure payments to be made during the life of the Plan, the claim shall be paid by the Debtor as a Class 4 Claim under this Plan pursuant to the terms of the loan modification, with no modification of this Plan required so long as the monthly plan payments to the Chapter 13 Trustee are reduced only by the monthly Class 4 payment in an amount not greater than the adequate protection payment.

3. For a loan modification which requires arrearage cure payments to be made during the term of this plan, the Claim shall be paid as a Class 1 claim with the current monthly payment and the arrearage cure being paid through the Plan. If the Class 1 payment can be made without altering the treatment provided for creditors holding general unsecured claims, no modification of the plan shall be required, with the court order approving the modification documenting the agreed treatment of the Class1 claim."

This creates a air of confusion as to whether, based on confirming this plan, the Debtor can override the normal Class 4 requirements that a claim qualifies for Class 4 treatment only so long as there are no arrearages to be cured. § 6.05, Subparagraph 2, continues to state Debtor's opinion (not a plan term) that she predicts there will not be any arrearage cure to be made during the life of the plan.

Debtor's gamesmanship continues, slicing and dicing out of the additional provisions a key adequate protection provisions - the creditor's right to seek relief from the stay for any reason, including Debtor's failure to diligently or in good faith pursue the loan modification. Debtor and Debtor's counsel have stripped from the terms the following required provision in the events of default:

“Events of Default, Failure to Modify Plan Upon Rejection of Modification, Failure to Prosecution Loan Modification

The Debtor shall be in default under the terms of this Plan, and [Creditor Name] entitled to exercise its rights to conduct a nonjudicial foreclosure sale, as described in the modification of the automatic stay in this Paragraph [X.02], of the Property in the event of any of the following defaults.

...

5. Failure to diligently prosecute the loan modification application. For purposes of these Additional Provisions, the failure to diligently prosecute the loan modification application shall be documented by [Creditor Name] that forms, documents, records, or other information relating to the requested loan modification were requested in writing from the Debtor, and not provided by the Debtor within 30 days of the written request having been mailed to or delivered personally, by facsimile, or email to the Debtor or designated representative of the Debtor.”

By deleting this provision, Debtor and Debtor’s counsel have attempted to create a Chapter 13 Plan term which does effectively modify the creditor’s rights - putting on hold all of the creditor’s rights to foreclose so long as Debtor asserts that she is prosecuting a loan modification, or re-prosecuting a loan modification, or needing more time to re-re-re-prosecute a loan modification.

Rounding out her attempt to create a plan which improperly modifies the rights of this creditor, Debtor has created a truncated right to seek relief from the automatic stay, limiting it to only an event of default specified in Section 6.07 of the plan - which consist of merely: (1) default in the adequate protection payment, (2) default in the terms of any loan modification, (3) failure to propose and serve a plan after denial of the loan modification, and (4) non-monetary post-petition default. Effectively, so long as Debtor contends she is prosecuting a loan modification, it appears that she and counsel are setting up the argument that the debt has been modified so no action can be taken.

The reasonable and good faith efforts by the debtor bar and the creditor bar worked out the standard relief from stay provision for these types of additional provisions. Rather than merely being for the limited circumstances provided by the Debtor in the plan, the necessary, good faith, adequate protection provisions are stated as follows:

“[X.02.6] Modification of the Automatic Stay.

If [Creditor Name] denies in writing Debtor's loan modification request and Debtor does not file a Modified Plan and Motion to Confirm Modified Plan within 14 days of the mailing of that denial, served on the Debtor [and Debtor's bankruptcy counsel], or other grounds for modification exist under the terms of these Additional Provisions for the [Creditor Name] secured claim, [Creditor Name] may serve and file an ex parte motion for relief from the automatic stay to allow it to conduct a non-judicial foreclosure sale of the property and lodge a proposed order with the court. The *ex parte* motion shall be limited to the grounds set forth in these Additional Provisions. Any opposition to the ex parte motion shall be in writing, filed with the court within 14 days

of the mailing of the ex parte motion to the Debtor [and Debtor's counsel], and limited to disputing the grounds arising under these Additional Provisions. The Debtor shall set a hearing on its opposition to the ex parte motion for the first available regular Chapter 13 motion for relief from automatic stay calendar for this court that is more than 14 days after the date the ex parte motion was mailed to the Debtor.

**The grounds specified herein for modification of the automatic stay and ex parte motion procedure are without prejudice to [Creditor Name] filing a motion for relief from the automatic stay on any other grounds and setting the motion for hearing pursuant to the Federal Rule of Bankruptcy Procedure and Local Bankruptcy Rule.”**

The highlighted language above is necessary to insure that confirmation of a plan which provides for adequate protection payments while a loan modification is pending is not a disguised impermissible modification of the creditor’s claim.

As stated above, the court has previously addressed this issue with Debtor’s counsel, rejecting this type of stripped down loan modification additional provisions which are in reality a disguised, impermissible loan modification. The court having been clear in the prior ruling, it is inconceivable that counsel and Debtor in this case (having been advised by her counsel) are not aware that the proposed plan provisions are not permitted by law, but have intentionally attempted to advance a plan which does not comply with the Bankruptcy Code. FN.1.

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FN.1. Even if Creditor had not objected, the Supreme Court has made it clear that a federal judge is not to ignore the law and issue orders, including confirming plans, merely because someone asked for it. *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)).  
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## **SUSTAINING OBJECTION TO CONFIRMATION**

The objecting creditor holds a deed of trust secured by the Debtor’s residence. The creditor has filed a timely proof of claim in which it asserts \$19,187.32 in pre-petition arrearages. The Plan does not propose to cure these arrearages. Because the Plan does not provide for the surrender of the collateral for this claim, the Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments. *See* 11 U.S.C. §§ 1322(b)(2), (b)(5) & 1325(a)(5)(B). Because it fails to provide for the full payment of arrearages, the plan cannot be confirmed.

The proposed plan seeks to improperly modify the rights of this Creditor for its claim secured by Debtor’s residence. 11 U.S.C. § 1322(b)(2) prohibits such modification. The proposed additional provisions does not merely allow the Debtor a good faith period to make adequate protection payments and diligently prosecute a loan modification. Rather, as intentionally drafted by Debtor’s counsel and Debtor, it straight-jackets Creditor modifying for five years its right to be paid anything other than the adequate protection payments and strips away Creditor’s right to seek relief from the automatic stay.

If Debtor had advanced Additional Provisions which properly balanced Creditor's rights, provided adequate protection (including the right to seek relief from the automatic stay for any reason, not merely the Debtor's "special, limited reasons), there might have been a reason to address whether a \$1,350.00 is a sufficient adequate protection payment. Creditor asserts that the current contractual amount of the payment is \$1,572.77.

Creditor not having filed a proof of claim and not providing any evidence with this Objection to Confirmation, the court cannot ascertain what portion, if any, of the asserted current payment represents insurance and property taxes, if any. On Schedule J Debtor does not list any amounts for property taxes or homeowner's insurance, so it appears that such amount does include taxes and insurance. Dckt. 28 at 25.

On Schedule A Debtor lists this property having a value of \$300,000.00. *Id.* at 3. On Schedule D Debtor lists this Creditor's claim to be (\$427,952.00), which eclipses the value of the property. If Debtor is able to do a loan modification which reduced the debt to the current value of the property, \$300,000.00, (a debtor home run), then amortize that over thirty years at 4% interest, the payment of principal and interest only would be \$1,432.25 a month. (The court does not express an opinion that this is the "worst" that the Debtor could expect, and may well be the best, and possibly highly unlikely, loan modification which would be agreed to by Creditor.) FN.2.

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FN.2. The court used the Microsoft Excel Loan Amortization Program to compute the monthly payment.  
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While Creditor's objection based on the amount of the arrearage stated in the Plan (in light of express plan provision stating that the amount stated in the proof of claim controls unless an order thereon is issued by the court) and the amount of the arrearage (in light of there being no evidence) do not carry the day, the objection that the plan term does propose an impermissible modification of a loan secured only by the Debtor's residence does carry the day.

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

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

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

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

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



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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on June 22, 2016. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

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

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

1. The Plan payments may be uncertain. The plan calls for \$1,800.00 for a month in Section 1.01 but also lists the plan payment as \$1,850.00 in Section 6.01 but then in writing crosses out the \$1,850.00 and writes in \$1,800.
2. The Debtor cannot make payments or comply with the plan. The Debtor has not started the process of either a HAMP or Non-HAMP Application for modification of their loan secured by their residence and Debtor has not provided any basic information regarding the content or status of their loan modification agreement.

3. The Additional Provisions of the plan calls for an Adequate Protection Payment, but does not explain how the payment provides adequate protection.
4. The plan is not clear as to how many loan modification applications may be submitted before a rejection triggers § 6.06. The plan does not provide treatment for arrears if a loan modification is proposed and denied. The plan provides if a loan modification is not approved, it will result in a 14 day requirement to file a modified plan. The provision also appears to require that the creditor must still be paid under a modified plan, as the plan will be modified “to provide for payment.”
5. The plan appears to require the Debtor to pay property taxes and insurance only if the creditor “is not able to impound for.” The Debtor does not have any budget expenses that allow for this and the creditor is able to impound, but may choose not to do so. The reasoning and effect of this provision is not clear.
6. The Debtor has not filed her 2014 income tax returns.
7. The Plan fails the Chapter 7 Liquidation Analysis. The Debtor lists Tax Refunds for both Federal and State at values of \$20,000.99 and \$1,000.99, but has failed to provide a breakdown of these claims. The Debtor also lists a wrongful termination action against KFC restaurants valued at “unknown”. The Plan proposes a 0% dividend to unsecured creditors.
8. The Debtor cannot make the payments under the plan or comply with the plan. The Debtor’s motion to value the secured claim of Quality First Home Improvement, RJ-2 was denied and the debtor has failed to re-set the motion for hearing to date. The Plan currently provides for the debt to be valued at \$0.00 but scheduled for \$9,000.00. The Plan will not complete within 60 months unless the motion to value is reset and granted.
9. The Debtor owns a business which has provided for \$3,000.00 of net income. The Debtor has failed to provide the Trustee with six months of bank statements; profit and loss statements; and business tax returns.

The Trustee’s objections are well-taken.

As to the Trustee’s first five objections, the main concern is the Debtor’s apparent failure to provide sufficient information to determine if the plan is viable or feasible. The Debtor fails to even provide consistent statements as to the monthly plan payment. The Debtor appears to utilize what the court has come to call “Ensminger Provisions” when the debtor is attempting to gain a loan modification. However, the Debtor provided additional provisions that just further “muddled” the waters. The court, like the Trustee, is unable to determine the basic triggering events for particular provisions nor can discern how many loan modifications are in fact pending.

The Debtor’s federal income tax return for the 2014 tax year still has not been filed. Filing of the return is required. 11 U.S.C. § 1308. Debtor’s failure to file the return is grounds to deny confirmation.

The Trustee opposes confirmation of the Plan on the basis that the Debtor's plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. §1325(a)(4). Trustee states that the Debtor has supplied insufficient information relating to the assets, specifically the tax refunds and wrongful termination claim, to assist the Trustee in determining the value of the assets. The Debtor has not explained how, under the proposed plan and the schedules filed under the penalty of perjury, that the unsecured claimants are entitled to a 0% dividend when there may be non-exempt assets.

A review of the Debtor's plan shows that it relies on the court valuing the secured claim of Quality First Home Improvement. However, the Debtor has failed to file a new Motion to Value the Collateral after the court denied the Debtor's prior attempt. Without the court valuing the claim, the plan is not feasible. 11 U.S.C. § 1325(a)(6). Therefore, the Trustee's objection is sustained.

The Debtor has failed to timely provide the Trustee with business documents including: six months of bank statements; profit and loss statements; and business tax returns. 11 U.S.C. § 521(e)(2)(A); Fed. R. Bankr. P. 4002(b)(3). These documents are required 7 days before the date set for the first meeting, 11 U.S.C. § 521(e)(2)(A)(I). Without the Debtor submitting the required documents, the court and the Trustee are unable to determine if the plan is feasible, viable, or complies with 11 U.S.C. § 1325.

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

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

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

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

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

**Final Ruling:** No appearance at the July 18, 2016 hearing is required.  
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Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 26, 2016. By the court's calculation, 54 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the 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 court's decision is to grant the Motion to Confirm the Amended Plan.**

Ines Moreno, Jr. And Angelina R. Moreno ("Debtor") filed the instant Motion to Confirm the Amended Plan on May 26, 2016. Dckt. 47.

#### **TRUSTEE'S OPPOSITION**

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant motion on July 5, 2016. Dckt. 47. The Trustee objects to the confirmation on the following ground that the Debtor is \$2,245.00 delinquent in plan payments under the proposed plan. The Debtor has paid \$8,980.00 into the plan to date.

#### **DEBTOR'S RESPONSE**

The Debtor filed a response on July 12, 2016. Dckt. 50. Debtor indicates that they were late in getting their payment to the Trustee for June of 2016 due to a medical emergency. Debtor's have made the delinquent June payment and are now current.

#### **TRUSTEE'S STATEMENT OF NON-OPPOSITION**

The Trustee filed a statement of non-opposition on July 14, 2016. Dckt. 52.

## **DISCUSSION**

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

The Trustee reports that the Debtor is now current and no longer opposes confirmation.

Therefore, with no further opposition pending and upon independent review of the proposed plan, the amended Plan complies with 11 U.S.C. §§ 1322, 1323 and 1325(a) and is confirmed.

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

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

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

**IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on May 26, 2016 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on July 5, 2016. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

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<p><b>The Motion to Value secured claim of Santander Consumer USA ("Creditor") is granted and the secured claim is determined to have a value of \$12,415.00.</b></p>
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The Motion filed by Jody Christopher and Joy Marie Silva ("Debtor") to value the secured claim of Santander Consumer USA ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2010 Ford F150 Super Cab, Short Bed with 125,000 miles at a replacement value of \$12,415.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The lien on the Vehicle's title secures a purchase-money loan incurred in December, 2011, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately \$23,981.44. Therefore, the Creditor's claim secured by a lien on the asset's title is under-collateralized. The creditor's secured claim is determined to be in the amount of \$12,415.00. *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 for Valuation of Collateral filed by Jody Christopher and Joy Marie Silva ("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 Santander Consumer USA ("Creditor") secured by an asset described as a 2010 Ford F150 Super Cab, Short Bed with 125,000 ("Vehicle") is determined to be a secured claim in the amount of \$12,415.00, 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 \$12,415.00 and is encumbered by liens securing claims which exceed the value of the asset.

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on July 5, 2016. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

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**The Motion to Value secured claim of Quantum3 Group LLC as Agent for NCEP, LLC ("Creditor") is granted and the secured claim is determined to have a value of \$12,583.00.**

The Motion filed by Jody Christopher and Joy Marie Silva ("Debtor") to value the secured claim of **Quantum3 Group LLC as Agent for NCEP, LLC** ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2008 Chrysler Aspen SUV with 100,000 miles ("Vehicle"). The Debtor seeks to value the Vehicle at a replacement value of \$12,583.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash.*



*Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The lien on the Vehicle's title secures a purchase-money loan incurred in December, 2010, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately \$29,056.11. Therefore, the Creditor's claim secured by a lien on the asset's title is under-collateralized. The creditor's secured claim is determined to be in the amount of \$12,583.00. *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 for Valuation of Collateral filed by Jody Christopher and Joy Marie Silva ("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 **Quantum3 Group LLC as Agent for NCEP, LLC** ("Creditor") secured by an asset described as a 2008 Chrysler Aspen SUV with 100,000 miles ("Vehicle") is determined to be a secured claim in the amount of \$12,583.00, 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 \$12,583.00 and is encumbered by liens securing claims which exceed the value of the asset.

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on April 22, 2016. By the court's calculation, 53 days' notice was provided. 42 days' notice is required.

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

<b>The Motion to Confirm the Amended Plan is <span style="color: red;">XXXXXX</span></b>
--

Kenneth Tabor ("Debtor") filed the instant Motion to Confirm the Amended Plan on April 25, 2016. Dckt. 25.

**TRUSTEE'S OPPOSITION**

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on May 27, 2016. Dckt. 32. The Trustee objects on the following grounds:

1. The Debtor appeared at the Meeting of Creditors but failed to timely file the necessary documents to review. The Trustee has received an itemized list of vehicles that the Debtor listed on Schedule A/B as 87 vehicles worth \$20,000.00. The Trustee is seeking additional information.
2. The Debtor failed to provide business documents.

3. The Debtor lists Seterus as a Class 2 debt. However, the Debtor's Schedule D indicates that the loan is secured by Debtor's residence. It appears that this debt should be provided for in Class 1 or that the debt should be provided for in the Additional Provisions to clarify that the Debtor is accelerating this debt to pay in full over the plan. (The Trustee does not otherwise object to the acceleration of the debt).
4. The Debtor testified at the Meeting of Creditors that he owns a collection of about 100 vehicles that he restores as a hobby. These vehicles are not individually listed and may not be properly valued. The plan proposes to pay unsecured creditors in full but does not propose interest, which may cause the Debtor to fail Chapter 7 Liquidation.

### **DEBTOR'S REPLY**

The Debtor filed a reply on June 7, 2016. Dckt. 35. The Debtor states that the Debtor has provided his 2015 tax return.

As to the monthly breakdown for the Debtor's 6 month profit and loss statement, the Debtor states that he does not have a bank account or know how to operate a computer - he hand tallied handwritten notes and receipts. The Debtor's girlfriend is currently hospitalized and the Debtor has been spending spare time with her which is why it has taken the Debtor longer to complete (and the fact that the Debtor is handwriting the calculations).

The Debtor states that the Seterus mortgage loan is modified by the plan and is therefore correctly classified as a Class 2 debt.

Lastly, the Debtor states that the cars he works on are non-operable. None of them are running and many of them are rusted out or have no engine at all. The Debtor asserts that there is no market value on any of the vehicles.

### **TRUSTEE'S REPLY**

The Trustee filed a reply on June 9, 2016. Dckt. 40. The Trustee states that the Meeting of Creditors was concluded on June 2, 2016. The Trustee states that the Debtor has supplied details regarding his business with the exception of profit and loss statement, which the Debtor states he will soon provide.

The Trustee states that due to there being no unsecured claims and the plan proposing to pay 100% of unsecured, the Trustee does not object to the Seterus claim being listed as a Class 2 claim.

As to the disclosure of property, the Trustee requests the court continue the current Motion to June 28, 2016 to allow the Debtor the opportunity to file the appropriate amendments and to provide the profit and loss statement.

### **JUNE 14, 2016 HEARING**

At the hearing, in light of the Trustee's reply and the unique facts of the case, the court continued

the hearing to 3:00 p.m. on June 28, 2016.

### **TRUSTEE'S SUPPLEMENTAL DECLARATION**

The Trustee filed a supplemental declaration on June 21, 2016. Dckt. 46. The Trustee states that the following objections remain:

1. The Trustee has not received copies of tax returns. On June 7, 2015, Debtor filed a declaration which indicates that due to an accident in August 2011, Debtor did not work through the beginning of 2015. He explains that his former spouse may have filed joint tax returns during this period, but the Debtor has no records of returns. Debtor claims to have requested his transcripts from the Internal Revenue Service for 2011-2014. The Trustee has not received the transcripts to date.

### **DEBTOR'S REPLY**

The Debtor filed a reply on June 22, 2016. Dckt. 49. Debtor states that he has provided his most recently filed tax return and the tax returns for earlier years either do not exist or are not available. Debtor attempted to order tax transcripts for tax returns that may have been filed by his former spouse for earlier years. He did not earn income during the earlier years, so he did not make any tax filings himself. Debtor's request was rejected by the Internal Revenue Service due to an address discrepancy. Pursuant to the instructions on the tax transcript form, Debtor listed the address he uses for tax filings (the address used on his 2015 tax return). He has not used any other address for his tax filings. Hence it is unclear why the request was rejected. Debtor is in process of submitting another request.

### **JUNE 28, 2016 HEARING**

In light of the Debtor's response and the administrative issue in getting the transcript, the court finds that additional time to get copies of the transcript is necessary. The Debtor has made active attempts to cure the Trustee's objections. Therefore, the Motion was continued to 3:00 p.m. on July 19, 2016.

### **DEBTOR'S STATUS REPORT**

The Debtor filed a status report on July 6, 2016. Dckt. 59. The Debtor states that the Debtor's attorney has made numerous attempts to obtain transcript but all have been denied. The Debtor has an in-person appointment scheduled for July 12, 2016.

### **TAX DOCUMENTS**

On July 14, 2016, the Debtor filed the tax documents. Dckt. 63.

### **DISCUSSION**

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

At the hearing, xxxx

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

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

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

**IT IS ORDERED** that Motion to Confirm the Plan is granted, ~~Debtor's Chapter 13 Plan filed on xxxx is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.~~

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

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

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

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 8, 2016. By the court's calculation, 41 days' notice was provided. 42 days' notice is required.

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

<p><b>The court's decision is to deny the Motion to Confirm the Amended Plan.</b></p>
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Gregory Brutus ("Debtor") filed the instant Motion to Confirm the Amended Plan on June 8, 2016. Dckt. 77.

**FAILURE TO PROVIDE SUFFICIENT NOTICE**

According to the Debtor's Proof of Service, the Debtor only provided 41-days notice. Dckt. 81. Pursuant to Local Bankr. R. 3015-1, a minimum of 42 days is required.

Given the one-day insufficiency, the court waives the defect for purposes of the instant Motion.

**TRUSTEE'S OBJECTION**

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant motion on July 1, 2016.

Dckt. 89. The Trustee objects to the confirmation on the ground that Debtor is \$246.00 delinquent in plan payments.

## **DISCUSSION**

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

The Trustee's objection is well taken.

The debtor's delinquency indicates that the Plan is not feasible, and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6). The amended Plan does not comply with 11 U.S.C. §§ 1322, 1323 and 1325(a) and is not confirmed.

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

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

The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, proper service not having been documented, and good cause appearing,

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

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

### **ALTERNATIVE RULING**

Gregory Brutus ("Debtor") filed the instant Motion to Confirm the Amended Plan on June 8, 2016. Dckt. 77.

### **FAILURE TO PROVIDE SUFFICIENT NOTICE**

According to the Debtor's Proof of Service, the Debtor only provided 41-days notice. Dckt. 81. Pursuant to Local Bankr. R. 3015-1, a minimum of 42 days is required.

Given the one-day insufficiency, the court waives the defect for purposes of the instant Motion.

### **TRUSTEE'S OBJECTION**

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant motion on July 1, 2016. Dckt. 89. The Trustee objects to the confirmation on the ground that Debtor is \$246.00 delinquent in plan payments.

## DISCUSSION

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

At the hearing, the Debtor provided evidence that the delinquency has been cured.

Without any additional objections remaining and upon independent review, the amended Plan complies with 11 U.S.C. §§ 1322, 1323 and 1325(a) and is confirmed.

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

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

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

**IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on June 8, 2016 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.



**Tentative Ruling:** The Objection to Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4003(b). The failure of the Debtor and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) on June 16, 2016. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

The Objection to Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4003(b). The failure of the Debtor and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

**The objection to claimed exemptions is sustained and the claimed exemptions pursuant to California Code of Civil Procedure §§ 704.010 and 704.730 are disallowed in their entirety**

The Trustee objects to the Debtor's claimed exemptions as follows:

1. On Schedule C, Debtor exempts his real property under California Code of Civil Procedure § 704.730 in the amount of \$496,600.00, which exceeds the allowances under California Code of Civil Procedure § 704.730.
2. Debtor claims as exempt two vehicles, a 1994 Toyota PV and a 2000 Chevy Tahoe. The vehicles are exempt under California Code of Civil Procedure § 704.010. The Toyota's value is reported to be \$1,600.00 and the Chevy is valued at \$2,900.00 for a

combined total of \$4,500.00. The claimed exemption allows for a vehicle allowance of \$3,050.00. It appears the Debtor has over claimed the allowed exemption by \$1,450.00.

California Code of Civil Procedure § 704.730 states the following:

(a) The amount of the homestead exemption is one of the following:

(1) Seventy-five thousand dollars (\$75,000) unless the judgment debtor or spouse of the judgment debtor who resides in the homestead is a person described in paragraph (2) or (3).

(2) One hundred thousand dollars (\$100,000) if the judgment debtor or spouse of the judgment debtor who resides in the homestead is at the time of the attempted sale of the homestead a member of a family unit, and there is at least one member of the family unit who owns no interest in the homestead or whose only interest in the homestead is a community property interest with the judgment debtor.

(3) One hundred seventy-five thousand dollars (\$175,000) if the judgment debtor or spouse of the judgment debtor who resides in the homestead is at the time of the attempted sale of the homestead any one of the following:

(A) A person 65 years of age or older.

(B) A person physically or mentally disabled who as a result of that disability is unable to engage in substantial gainful employment. There is a rebuttable presumption affecting the burden of proof that a person receiving disability insurance benefit payments under Title II or supplemental security income payments under Title XVI of the federal Social Security Act satisfies the requirements of this paragraph as to his or her inability to engage in substantial gainful employment.

(C) A person 55 years of age or older with a gross annual income of not more than twenty-five thousand dollars (\$25,000) or, if the judgment debtor is married, a gross annual income, including the gross annual income of the judgment debtor's spouse, of not more than thirty-five thousand dollars (\$35,000) and the sale is an involuntary sale.

(b) Notwithstanding any other provision of this section, the combined homestead exemptions of spouses on the same judgment shall not exceed the amount specified in paragraph (2) or (3), whichever is applicable, of subdivision (a), regardless of whether the spouses are jointly obligated on the judgment and regardless of whether the homestead consists of community or separate property or both. Notwithstanding

any other provision of this article, if both spouses are entitled to a homestead exemption, the exemption of proceeds of the homestead shall be apportioned between the spouses on the basis of their proportionate interests in the homestead.

California Code of Civil Procedure § 704.010 states:

(a) Any combination of the following is exempt in the amount of two thousand three hundred dollars (\$2,300):

- (1) The aggregate equity in motor vehicles.
- (2) The proceeds of an execution sale of a motor vehicle.
- (3) The proceeds of insurance or other indemnification for the loss, damage, or destruction of a motor vehicle.

(b) Proceeds exempt under subdivision (a) are exempt for a period of 90 days after the time the proceeds are actually received by the judgment debtor.

(c) For the purpose of determining the equity, the fair market value of a motor vehicle shall be determined by reference to used car price guides customarily used by California automobile dealers unless the motor vehicle is not listed in such price guides.

(d) If the judgment debtor has only one motor vehicle and it is sold at an execution sale, the proceeds of the execution sale are exempt in the amount of two thousand three hundred dollars (\$2,300) without making a claim. The levying officer shall consult and may rely upon the records of the Department of Motor Vehicles in determining whether the judgment debtor has only one motor vehicle. In the case covered by this subdivision, the exemption provided by subdivision (a) is not available.

The court's review of the Debtor's Schedule C shows that the Debtor has improperly claimed exemptions in excess of those permitted by state law. The Debtor attempts to claim \$496,600.00 exemption in the Debtor's real property. However, as shown supra, the maximum possible exemption for the Debtor, if meeting all necessary prerequisites, \$175,000.00. The Debtor does not appear to qualify for that full exemption amount. Without the Debtor citing the specific exemption section, the court cannot determine the appropriateness of the claimed exemption. Therefore, the Debtor's exemption under California Code of Civil Procedure § 704.730 is disallowed in its entirety.

As to the Debtor's claimed exemption in the Vehicles, the Debtor appears to claim exemptions that is \$2,200.00 over the allowed amount under California Code of Civil Procedure § 704.010. Because the Debtor is able to allocate the exemption amount, the court cannot discern what the Debtor's intention is in bifurcating the \$2,300.00 allowed in exemptions. Therefore, the Debtor's exemption under California

Code of Civil Procedure § 704.010 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 Exemptions filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Objection is sustained and the claimed exemptions pursuant to California Code of Civil Procedure §§ 704.010 and 704.730 are disallowed in their entirety.

**Final Ruling:** No appearance at the July 16, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 20, 2016. By the court's calculation, 60 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the 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.

<b>The Motion to Confirm the Amended Plan is granted.</b>
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11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Debtors have provided evidence in support of confirmation. No opposition to the Motion has been filed by the Chapter 13 Trustee or creditors. The amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

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

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

**IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on May 20, 2016 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

31. [16-22157](#)-E-13      **ROBIN/THOMAS HARLAND**  
DPC-1      **Stephen Reynolds**

**CONTINUED OBJECTION TO  
CONFIRMATION OF PLAN BY DAVID  
P. CUSICK**  
5-25-16 [\[19\]](#)

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on May 25, 2016. By the court's calculation, 45 days' notice was provided. 14 days' notice is required.

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

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

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

1. The Debtor cannot make the plan payments. The Debtor's monthly projected disposable income on Schedule J reflects \$3,061.41 and the Debtor is proposing plan payments of \$3,105.00 per month. It appears that the Debtor is \$44.00 short each month.
2. Tax returns were not filed for tax years 2012, 2013, 2014, and 2015.
3. The Debtor's plan will take 122 months to complete as opposed to the maximum 60

months allowed. This is due to the Debtor failing to provide for the Internal Revenue Service's priority claim.

4. The plan is not the Debtor's best efforts. The Debtor is above median income and proposes plan payments of \$3,105.00 for 60 months, with a 1% dividend to unsecured creditors. However, the Debtor's Form B22C reflects negative monthly disposable income of \$710.00. The Trustee's revisions to the form indicate that the Debtor's disposable income is \$1,326.00.

## **JUNE 28, 2016 HEARING**

Due to court oversight, the court continued the hearing to 3:00 p.m. on July 19, 2016. Dckt. 23.

## **TRUSTEE'S STATUS REPORT**

The Trustee filed a status report on July 5, 2016. Dckt. 24. The Trustee states that the Internal Revenue Service filed an amended Proof of Claim No. 4, which resolved the Trustee's objection as to the taxes. However, all other objections remain.

## **DISCUSSION**

The Trustee's objections are well-taken.

The Debtor's Schedule J lists a \$3,061.41 monthly net income, while the Plan provides for a \$3,105.00 monthly payment. Taken together, this suggests the plan is not feasible. *See* 11 U.S.C. § 1325(a)(6).

Debtor is in material default under the plan because the plan will complete in more than the permitted 60 months. According to the Trustee, the plan will complete in 122 months due to the Debtor's plan failing to provide for the payment of the Internal Revenue Service's priority claim. This exceeds the maximum 60 months allowed under 11 U.S.C. § 1322(d). Therefore, the objection is sustained.

Lastly, the court concurs with the Trustee that the Debtor's plan does not appear to be the Debtor's best efforts. The court's review of Form B22C shows that the Debtor attempts to take inappropriate deductions which gives the false illusion of negative income. Rather, the Debtor over deducts certain expenses that results in the Debtor reporting a negative monthly income. This is improper. Without the Debtor providing accurate and truthful financial information, the plan cannot be confirmed.

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

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

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

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

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

32. [15-23258](#)-E-13      **MOSES/PATRICIA MERCADO**      **MOTION TO MODIFY PLAN**  
BLG-1                      **Paul Bains**                      **5-27-16 [34]**

**Final Ruling:** No appearance at the July 19, 2016 hearing is required.  
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Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 27, 2016. By the court's calculation, 53 days' notice was provided. 35 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). 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 continued to 3:00 p.m. on August 16, 2016.**

Moses J. And Patricia A. Mercado ("Debtor") filed the instant Motion to Confirm the Modified Plan on May 27, 2016. Dckt. 34

#### **TRUSTEE'S OPPOSITION**

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on June 13, 2016.



Dckt. 51. The Trustee opposes confirmation on the following grounds:

1. The attorney's fees in § 2.06 of the proposed modified plan are different from the confirmed plan. The Confirmed Plan provided for attorney's fees in the amount of \$4,000.00, with \$1,400.00 paid prior to filing and \$2,600 to be paid through the plan. § 2.06 of the Proposed Plan indicates attorney's fees paid prior to filing in the amount of \$500 with \$3,500 to be paid through the plan. The Trustee has already disbursed \$2,600 in attorney's fees pursuant to the terms of the confirmed plan and the order confirming.
2. Debtor may have borrowed additional funds from retirement accounts. Debtor's original Schedule I reflect monthly deductions for two 401K loans of \$90.24 for the first loan and \$70.37 for the second. Debtor's supplemental Schedule I continues to show payroll deductions for two 401K loan, but the monthly payment for the first loan has increased from \$90.24 to \$222.76.

It appears Debtors have borrowed additional funds from their 401K account. The Trustee is unable to locate within the docket that the Debtors obtained permission to borrow additional funds. Debtor provides no explanation for the increased payment, when the additional funds were borrowed, why they were borrowed, or when the payments will end.

3. Debtor has provided conflicting information regarding the monthly rent expense for Patricia Mercado. Supplemental Schedule J-2 for Patricia Mercado indicates Debtor's monthly rent payment is \$1,640.00, but later states, "RENT Increase will occur in July 2016 from \$1,470 to \$1,495". The Trustee is uncertain the amount budgeted on Debtor's Supplemental Schedule J is an accurate reflection of Debtor's current rent expense.

## **STIPULATION AND ORDER CONTINUING**

On June 12, 2016, the parties filed a stipulation to continue the hearing on the instant Motion o 3:00 p.m. on August 16, 2016. Dckt. 54.

On June 12, 2016, the court granted the request and continued the matter to 3:00 p.m. on August 16, 2016. Dckt. 55.

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

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

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

**IT IS ORDERED** that Motion to Confirm the Plan is continued to 3:00 p.m. on August 16, 2016.

33.	<a href="#"><u>16-23259</u></a> -E-13 RWF-1	CHRISTOPHER/LORA CLARK Robert Fong	MOTION TO VALUE COLLATERAL OF GM FINANCIAL 6-9-16 [ <a href="#"><u>13</u></a> ]
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**Tentative Ruling:** The Motion to Value secured claim has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on June 13, 2016. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

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

**The Motion to Value is continued to 3:00 p.m. on August 30, 2016.**

The Motion filed by Christopher James and Lora Ann Clark (“Debtor”) to value the secured claim of GM Financial (“Creditor”) is accompanied by Debtor’s declaration. Debtor is the owner of a 2013 Chevrolet Captiva (“Vehicle”). The Debtor seeks to value the Vehicle at a replacement value of \$10,950.00 as of the petition filing date. As the owner, the Debtor’s opinion of value is evidence of the asset’s value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

## OPPOSITION

Creditor has filed an opposition requesting the court to value the vehicle at not less than \$12,625.00. Creditor arrived at this valuation based upon the NADA retail value of the vehicle. The *NADA Guide* suggests a retail value of \$12,925.00 for a 2013 Chevrolet Captiva. The Creditor assumes a dealer cost of about \$300.00 to clean and detail the vehicle for retail presentation, bringing the retail value to approximately \$12,625.00. Debtor has not provided contrary evidence as to the condition of the vehicle.

## **DEBTOR'S REPLY**

The Debtor filed a reply on July 12, 2016. Dckt. 29. The Debtor states that the Creditor has failed to consider that actual condition of the vehicle. The Debtor has provided supplemental information and declaration as to the condition of the Vehicle.

## **DISCUSSION**

The lien on the Vehicle's title secures a purchase-money loan incurred in November, 2013, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately \$17,589.78.

The Creditor requests additional time to perform an appraisal of the Vehicle. Therefore, the court will continue the instant Motion to August 30, 2016. Any supplemental paper shall be filed and served on or before August 9, 2016. Any replies or oppositions shall be filed and served on or before August 23, 2016.

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

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

The Motion for Valuation of Collateral filed by Christopher James and Lora Ann Clark ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is continued to 3:00 p.m. on August 30, 2016. Any supplemental paper shall be filed and served on or before August 9, 2016. Any replies or oppositions shall be filed and served on or before August 23, 2016.

34. [16-22761](#)-E-13 CHARLTON CURRY  
Pro Se

STATUS CONFERENCE RE:  
VOLUNTARY  
PETITION  
4-29-16 [\[1\]](#)

Debtor's Atty: Pro Se

Notes:

Status Conference set by order of the court dated 5/16/16 [Dckt 16]. Debtor to appear in person at the Status Conference in addition to any counsel he may have engaged to represent him in this case.

Trustee's Statement Regarding Chapter 13 Status Conference filed 6/29/16 [Dckt 37]

35. [14-26567](#)-E-13 SAMUEL TAPIA  
JGD-4 John Downing

CONTINUED MOTION TO APPROVE  
LOAN MODIFICATION  
5-16-16 [\[74\]](#)

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 16, 2016. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

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

<b>The Motion to Approve Loan Modification is <span style="color: red;">XXXX</span></b>
---

## **INCOMPLETE INFORMATION PROVIDED TO AND BY DEBTOR**

The court cannot rule on the Motion due to the Debtor not having, and not providing, evidence of the actual person with whom this consumer Debtor is purporting, and is being told, it is entering into a contract to modify the loan. The court discusses below this shortcoming and non-disclosure by Ocwen Loan Servicing, LLC.

It may be that Debtor has the information and evidence and quickly provide it to the court. If so, notwithstanding Ocwen Loan Servicing, LLC having provided incomplete (and misleading) documents, the court could structure an order properly exercising federal judicial power with the real parties in interest who have an actual claim or controversy before the court.

If Debtor has further documentation or evidence identifying the other party to this loan modification, the creditor to whom the obligation is owed, the court can address the non or misleading disclosures in the Loan Modification Agreement by separate order to appear and order to show cause, if necessary and appropriate.

Therefore, the court continues the hearing to July 19, 2016 (the next available Chapter 13 law and motion date) to afford this consumer debtor the opportunity to get the loan modification locked down.

If Ocwen Loan Servicing, LLC has not provided, or does not promptly provide the Debtor with a completed Loan Modification Agreement and identify the real party in interest with whom this consumer Debtor is contracting, the court may continue this hearing further. The court will not, so long as this consumer Debtor is attempting to prosecute the Motion in good faith; which includes propounding written discovery in this Contested Matter or through a written interrogatories 2004 examination (there appearing to be little utility in this consumer Debtor being forced to incur the cost and expense of an oral deposition or 2004 examination), just deny the Motion. Such may cause the actual lender to withdraw from the promised loan modification, which could possibly be part of a larger scheme of that creditor and Ocwen Loan Servicing, LLC to deprive consumer borrowers of a loan modification they are otherwise entitled.

## **REVIEW OF MOTION**

The Motion to Approve Loan Modification filed by Samuel Tapia ("Debtor") seeks court approval for Debtor to incur post-petition credit. Ocwen Loan Servicing ("Ocwen"), whose claim the plan provides for in Class 4, has agreed to a loan modification which will reduce Debtor's mortgage payment to \$1,102.52 (including escrow). The modification provides for a modified principal balance of \$311,678.84. \$75,128.64 of the modified principal shall be deferred, no interest will be paid on that amount and it is forgivable if Debtor does not default on payments for the first three years of the loan. The remaining \$236,500.00 of the modified principal balance shall earn 2% interest.

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

David Cusick, the Chapter 13 Trustee, filed a non-opposition to the instant Motion on June 13,

### **Identity of Creditor**

Owen Loan Servicing, LLC has appeared many times in this court and has been ordered to appear and address the failure to identify the actual creditor in contracts and loan modifications it is presenting to consumer debtors. As in the present case, Ocwen Loan Servicing, LLC would prepare contracts in which it is ambiguously identified as “Lender/Loan Servicer/Agent for Loan Servicer.” Ocwen Loan Servicing, LLC was preparing and presenting to consumer and consumer attorneys loan modification agreements which were not with the creditor and for which Ocwen Loan Servicing, LLC was not identified as executing the agreement for a disclosed principal.

Two of the cases in which the court has order Ocwen Loan Servicing, LLC to appear and address it preparing and presenting contracts to be approved in this federal court which did not include the real parties with a case or controversy are *In re Nissen*, Bankr. E.D. Cal, 11-30546, and *In re Raposo*, Bankr. E.D. Cal. 09-27153.

No Proof of Claim has been filed. There is no indication on the actual Modification Agreement as to who is the real creditor in interest. The balloon payment agreement only identifies Ocwen as “Lender/Servicer or Agent for Lender/Servicer,” appearing to be nothing but a “catch-all” in order to cover all possible roles Ocwen may be playing in a certain transaction without stating explicitly and affirmatively who they are in terms of the transaction.

Notably absent from the Motion itself is the identity of the creditor. Rather, the Motion remains silent as to what entity the Debtor is attempting to enter a modification. The Debtor, appearing to “hide the ball” instructs the court to search the “Motion, on the Declaration of Samuel Tapia and Exhibit” to discern the parties of the modification; the respective roles of the party (i.e. Ocwen as servicer or creditor); the actual change in mortgage payments and principal balance; etc. The court declines such invitation.

As discussed supra, Ocwen Loan Servicing, LLC has been ordered to appear before and, as the court has emphasized on these occasion, understands the creditor must be identified. However, notwithstanding Ocwen Loan Servicing, LLC’s prior appearances, it appears that the modification documents in the instant case have been prepared to intentionally hide the identity from the court and circumvent the obligations of parties in federal court.

### **JUNE 28, 2016 HEARING**

In light of the above, and Ocwen Loan Servicing, LLC’s history at failing to identify the real creditor in interest, the court will issue an Order to Appear, in person, no telephonic, for Ocwen Loan Servicing, LLC to address (1) why the identify of the creditor is not disclosed and (2) why the documents do not have any completed signature blocks for the creditor.

The court continued the instant Motion to 3:00 p.m. on July 19, 2016. Supplemental pleadings if any, including a amended loan modification agreement, were ordered to be filed and served on or before July 14, 2016.

## DEBTOR'S SUPPLEMENTAL DECLARATIONS

On July 13, 2016, John G. Downing filed his declaration in support of the Motion to Approve the Loan Modification. Dckt. 107. Mr. Downey testifies that he made several inquiries of Owen Loan Servicing, LLC, and received an email response on July 12, 2016. The response is attached as Exhibit 1 to the declaration. It states that Ocwen Loan Servicing, LLC obtained the "servicing rights of the loan from Bank of America, N.A. on December 1, 2013." [Emphasis added.] Further, that Ocwen Loan Servicing, LLC, is "[o]bligated to service the loan in accordance with the terms of the Note and Mortgage...." [Emphasis added].

Nowhere in the response does Ocwen Loan Servicing, LLC state that it is the creditor or that it is attempting to collect a debt that is owed to it. Rather, Ocwen Loan Servicing, LLC states that it acquired only the servicing right and that it is obligated to provide the services of a loan servicer.

Mr. Downing filed a second declaration on July 14, 2016, in which he testifies as to a second communication he received from Ocwen Loan Servicing, LLC. Dckt. 108. The document Mr. Downey testifies receiving on July 14, 2016, from Ocwen Loan Servicing is provided as Exhibit 2 (Dckt. 109) and consists of the following:

- A. It is titled "Notice of Servicing Transfer (RESPA), Welcome to Ocwen Loan Servicing, LLC."
- B. It states that Samuel Tapia, the consumer Debtor in this case, is the "customer" of Ocwen Loan Servicing, LLC.
- C. Effective November 30, 2013, Ocwen Loan Servicing, LLC will be servicing Mr. Tapia's mortgage instead of Bank of America.
- D. "This communication is from a debt collector attempting to collect a debt; any information obtained will be used be used for that purpose. However, if the debt is in active bankruptcy or has been discharged through bankruptcy, this communication is not intended as and does not constitute an attempt to collect a debt."
- E. "At Ocwen Loan Servicing, LLC we understand the importance ,of home ownership. We're dedicated to providing you with assistance and information you need about your mortgage loan, as well as additional products you may need as a homeowner, To get started, visit OcwenCustomers.com, select "New Customers" and sign up as a new user with your new Ocwen loan number."

In addition to not stating anywhere that Ocwen Loan Servicing, LLC is the creditor or owns the obligation which it is trying to collect, Ocwen Loan Servicing, LLC goes further to advise the Debtor that it is the Debtor who is Ocwen Loan Servicing, LLC's customer, not a third-party who owes a monetary obligation that Ocwen Loan Servicing, LLC owes a contractual duty and fiduciary duty, as a loan servicer, to collect. Ocwen Loan Servicing, LLC goes so far as to assure this Debtor that Ocwen Loan Servicing, LLC is dedicated to provide the Debtor with assistance, as well as to provide information about additional products which Debtor may need as a home owner.

Though given time, unfortunately the efforts of Debtor's counsel were sufficient to get Ocwen Loan Servicing, LLC (which as previously been before this court) to disclose the simple information of who is the principal for which Ocwen Loan Servicing, LLC is the agent.

## **DISCUSSION**

At the hearing, xxxxx

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

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

The Motion to Approve the Loan Modification filed by Samuel Tapia 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 xxxxx



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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 17, 2016. By the court's calculation, 42 days' notice was provided. 35 days' notice is required.

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

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

Samuel Tapia ("Debtor") filed the instant Motion to Modify Chapter 13 Plan on May 25, 2016. Dckt. 85. FN.1.

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FN.1. This is the amended Motion filed by the Debtor.  
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**TRUSTEE'S OPPOSITION**

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on June 10, 2016. Dckt. 89. The Trustee opposes the Motion on the following grounds:

1. The Debtor's Motion does not comply with applicable law and does not cite 11 U.S.C. § 1329.

Though a motion is not a points and authorities providing extensive citations, quotation, arguments, conjecture, and speculation, it should at least identity the statutes and law upon which the relief is requested. Here, the Motion seeks confirmation pursuant to 11 U.S.C. § 1325. Since there is already a confirmed plan in this case, confirmation of a modified plan is pursuant to 11 U.S.C. § 1329 (which includes the requirements of §§ 1325, 1323, and 1322. This part of the Trustee's Opposition appears to, correctly, be more informational for counsel to update his motion to confirm a modified plan form, as opposed to a substantive opposition.

2. The Debtor is \$1,201.00 delinquent in plan payments under the proposed plan.
3. The Trustee is uncertain of monthly payment for attorney fees to be paid through the plan. The Debtor's confirmed plan called for attorney fees of \$3,000.00 to be paid through the plan. The box complying with Local Bankr. R. 2016-1(c) was checked. The order confirming authorized a monthly dividend of \$200.00 as none was specified in the plan. The Debtor's proposed plan states additional fees of \$4,750.00 shall be paid through this plan, which appears to be \$1,750.00 of additional fees to the fees already approved. The box filing and serving a motion in accordance with 11 U.S.C. § 329 and 330 is checked. The plan does not specify in 2.07 a monthly amount to be paid. The attorney is owed \$765.19 of the original \$3,000.00 allowed.
4. The treatment of the secured Class 1 creditor is contingent on the court granting the Debtor's Motion fo Loan Modification set on the same calendar.

## **DISCUSSION**

### **Failure to Properly Serve**

The only address served for creditors was a post office box. Service upon a post office box is plainly 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.").

Additionally, Local Bankruptcy Rule 2002-1 provides that notices in adversary proceedings and contested matters that are served on the Internal Revenue Service shall be mailed to three entities at three different addresses, including the Office of the United States Attorney, unless a different address is specified:

### **LOCAL RULE 2002-1 Notice Requirements**

**(a) Listing the United States as a Creditor; Notice to the United States.** When listing an indebtedness to the United States for other than taxes and when giving notice, as required by

FRBP 2002(j)(4), the debtor shall list both the U.S. Attorney and the federal agency through which the debtor became indebted. The address of the notice to the U.S. Attorney shall include, in parenthesis, the name of the federal agency as follows:

**For Cases filed in the Sacramento Division:**

United States Attorney  
(For [insert name of agency])  
501 I Street, Suite 10-100  
Sacramento, CA 95814

**For Cases filed in the Modesto and Fresno Divisions:**

United States Attorney  
(For [insert name of agency])  
2500 Tulare Street, Suite 4401  
Fresno, CA 93721-1318

. . .

**(c) Notice to the Internal Revenue Service.** In addition to addresses specified on the roster of governmental agencies maintained by the Clerk, notices in adversary proceedings and contested matters relating to the Internal Revenue Service shall be sent to all of the following addresses:

- (1) United States Department of Justice  
Civil Trial Section, Western Region  
Box 683, Ben Franklin Station  
Washington, D.C. 20044
- (2) United States Attorney as specified in LBR 2002-1(a) above; and,
- (3) Internal Revenue Service at the addresses specified on the roster of governmental agencies maintained by the Clerk.

The proof of service lists only the P.O. Box address. The proof of service states that the addresses used for service are the preferred addresses for the Internal Revenue Service specified in a Notice of Address filed by that governmental entity.

A motion is a contested matter. *See* Fed. R. Bankr. P. 9014. The proof of service in this case indicates service was not made on all three addresses, and service was therefore inadequate.

**JUNE 28, 2016 HEARING**

At the hearing on the Motion to Confirm the Plan, the court continued to 3:00 p.m. on July 19, 2016.

**DISCUSSION**

No supplemental papers have been filed in connection with the instant Motion.

Fails to Comply with 11 U.S.C. § 1329

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The substance of this part of the Opposition is that Debtor appears to ignore that the modification must be sought pursuant to 11 U.S.C. § 1329, which incorporates portions of 11 U.S.C. §§ 1325, 1323, and 1322. While the difference are subtle, there is a difference. It appears that Debtor is using a motion to confirm an original Chapter 13 plan in the place of motion to confirm a modified plan.

**The Trustee's objections are well-taken.**

The basis for the Trustee's objection is that the Debtor is \$1,201.00 delinquent in plan payments. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

As to the Trustee's third objection, the court's review of the proposed plan as well as the docket in total indicates that the Debtor is attempting to include additional unanticipated and substantial fees that the Debtor is seeking in the Motion for Additional Fees. Dckt. 94. The court granted the Motion for Additional Fees. Therefore, the Trustee's third objection is overruled.

As to the Trustee's final objection, the court has been forced to continue the hearing and Order Ocwen Loan Servicing, LLC because the identity of the creditor with which the loan modification is proposed is not disclosed and the modification documents presented are devoid of any identification as to who is signing the agreement and who affirmatively states that they have a claim in this case.

While not all, a portion of Debtor's problems relate to Ocwen Loan Servicing, LLC failing to disclose the identity of the creditor with whom Debtor is to enter into a loan modification agreement. See Civil Minutes for June 28, 2016 hearing on Motion to Approve Loan Modification, Docket Control Number JDG-4.

At the hearing, xxxx.

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

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

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

**IT IS ORDERED** that the Motion to Confirm the Plan is xxxxx

37. [14-26567](#)-E-13      **SAMUEL TAPIA**  
**JGD-6**                      **John Downing**

**CONTINUED MOTION FOR  
COMPENSATION FOR JOHN G.  
DOWNING, DEBTOR'S ATTORNEY  
6-14-16 [\[94\]](#)**

**Final Ruling:** No appearance at the June 28, 2016 hearing is required.  
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Local Rule 9014-1(f)(2) Motion.

Correct Notice not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditors, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on June 14, 2016. By the court's calculation, 14 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(6), 21 day notice requirement.)

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

John Downing, the Attorney ("Applicant") for Samuel Tapia the Debtor in Possession ("Client"), makes a Additional Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period November 24, 2016 through May 25, 2016. The order of the court approving employment of Applicant was entered on June 24, 2014, Dckt. 7. Applicant requests fees in the amount of \$1,750.00.

Unfortunately, the Applicant failed to provide the 21 days' notice that is required for a hearing on any entity's request for compensation or reimbursement of expenses if the request exceeds \$1,000. Fed. R. Bankr. P. 2002 (a)(6). The Applicant filed the Application for Additional Attorney's fees on June 14, 2016. Dckt. 94. Only 14 days' notice was provided.

While notice could be "fixed," there is a more significant impediment to granting fees now - the two items for which fees are requested, the motion to approve loan modification and motion to confirm modified plan, cannot be concluded. While the shortcomings in the motion to modify rest with the Debtor, it may well be that the Debtor and the bankruptcy estate may incur further substantial legal fees due to Ocwen Loan Servicing, LLC having failed (or intentionally hidden) the identify of the actual creditor with whom the consumer Debtor must enter into the loan modification.

## **JUNE 28, 2016 HEARING**

The court continued the hearing to be conducted in conjunction with the hearings on the Motion

to Confirm and the Motion to Approve Loan Modification (which fees Ocwen Loan Servicing, LLC can significantly reduce by promptly disclosing the identity of the creditor with whom the consumer Debtor will have to enter into the loan modification agreement).

## **DISCUSSION**

To date, no supplemental papers have been filed in connection with the instant Motion.

At the hearing, xxxx

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 John Downing (“Applicant”), Attorney for the Debtor in Possession 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 xxxx

38. [16-23267](#)-E-13      **GEORGE NJENGE AND RACHEL**      **OBJECTION TO DISCHARGE BY DAVID**  
**DPC-1**      **EKINDESONE**      **P. CUSICK**  
      **D. Randall Ensminger**      **6-21-16 [16]**

**Final Ruling:** No appearance at the June 19, 2016 hearing is required.  
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Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on June 21, 2016. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Objection to Discharge has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4003(b). The failure of the Debtor and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the Debtor and the other parties in interest are entered, the matter will be resolved without oral argument and the court shall issue its ruling from the parties' pleadings.

<b>The Objection to Discharge is sustained.</b>
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David Cusick, the Trustee ("Objector"), filed the instant Objection to Debtor's Discharge on June 21, 2016. Dckt. 16.

The Objector argues that George Ndile Njenge and Rachel Nzelle Ekindesone ("Debtor") is not entitled to a discharge in the instant bankruptcy case because the Debtor previously received a discharge in a Chapter 7 case.

The Debtor filed a Chapter 7 bankruptcy case on June 30, 2015. Case No. 15-25260. The Debtor received a discharge on October 13, 2015. Dckt.

The instant case was filed under Chapter 13 on May 13, 2016.

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

Here, the Debtor received a discharge under 11 U.S.C. § 727 on October 13, 2015, which is less than

four-years preceding the date of the filing of the instant case. Case No. 15-25260, Dckt. 20. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), the Debtor is not eligible for a discharge in the instant case.

Therefore, the objection is sustained. Upon successful completion of the instant case (Case No. 16-23267), the case shall be closed without the entry of a discharge and Debtor shall receive no discharge in the instant case.]

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

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

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

**IT IS ORDERED** that Objection to Discharge is sustained.

**IT IS ORDERED** that, upon successful completion of the instant case, Case No. 16-23267, the case shall be closed without the entry of a discharge.



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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on May 18, 2016. By the court's calculation, 62 days' notice was provided. 28 days' notice is required.

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

**The Motion to Convert the Chapter 13 Bankruptcy Case to a Case under Chapter 7 is denied.**

This Motion to Dismiss or Convert the Chapter 13 bankruptcy case of Debra Kay McClain ("Debtor") has been filed by Dusty Sullivan, Dusty Sullivan Profit Sharing Plan, Sierra Investments Robert Chonka Profit Sharing Plan, Poly Comp Trust Company and West America Bank, Polycomp for the benefit of Marilyn Chiang, Dean A. Howell Profit Sharing Plan, Kenneth Meyer IRA, Connie Holt IRA, Westamerica Bank, Polycomp FBO Margo Glendenning, IRA, David N. Muraki and Judy Muraki as joint tenants custodian for Peter Muraki, minor child ("Movant"), the creditors. Movant asserts that the case should be dismissed or converted based on the following grounds.

**Prior Plan Denied, No New Plan**

Movant argues that Debtor did not file a Plan or a Motion to Confirm a Plan following the court's denial of confirmation to Debtor's prior plan on April 12, 2016. A review of the docket shows that Debtor has filed a new motion to confirm a plan on June 30, 2016. Dckt. 93. Debtor offers no explanation for the delay in setting the Plan for confirmation. This is unreasonable delay which is prejudicial to creditors. 11 U.S.C. §1307(c)(1).

## **DEBTOR'S OPPOSITION**

The Debtor filed an opposition to the instant Motion on July 11, 2016. Dckt. 101. The Debtor states that the reason for the delayed response was due to Debtor's counsel's mother passing away, requiring him to fly to Florida.

Th Debtor states that the Motion to Confirm the new proposed plan is set for hearing August 16, 2016. Dckt. 99 and 93.

## **RULING**

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

The Bankruptcy Code Provides:

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

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

Cause does not exist to dismiss this case pursuant to 11 U.S.C. § 1307(b). The debtor has filed a Third Amended Plan that is currently awaiting confirmation. There is no unreasonable delay by the debtor that is prejudicial to creditors and while Debtor's Second Amended Plan was denied, there was no denial of additional time for filing another plan or a modification of plan.

The Debtor has provided sufficient justification as to counsel's unfortunate loss. There is not undue prejudice to the creditors at this time. Therefore, the Motion is denied without prejudice.

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

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

hearing.

The Motion to Dismiss the Chapter 13 case filed by the 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 Dismiss is denied without prejudice.

40. 16-22972-E-13      **ELIZABETH BARRIOS**      **OBJECTION TO CONFIRMATION OF**  
**DPC-1**                      **Richard Jare**                      **PLAN BY DAVID P. CUSICK**  
6-22-16 [22]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 22, 2016. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

<b>The court's decision is to sustain the Objection.</b>
--

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

1. The plan failed to provide sufficient information regarding Bank of America. The plan provides for Bank of America, NA as Class 2 and also lists Bank of America Home Loans in the Additional Provisions. The plan fails to specify the seniority of the liens, only specifying the street address, making the plan ambiguous as to the treatment of Bank of America.
2. The Debtor has failed to serve the Bank of New York Mellon, who has asserted an interest in the first deed of trust and has filed a claim.
3. The Debtor's Plan Section 6.04 indicates that the Debtor has not even started the process of either a HAMP or Non-HAMP Application for modification of their loan secured by a first deed of trust. The court should not find that the Debtor can make the payments where the Debtor has not provided any basic information regarding the content or status of their loan modification
4. The Additional Provisions of the plan calls for an Adequate Protection Payment, but does not explain how the payment provides adequate protection.
5. The Plan fails to provide treatment for the arrears if a loan modification is proposed and denied. The Plan also appears to require that the creditor must still be paid under a modified plan. The Plan is unclear as to how many loan modification applications may be submitted before a rejection occurs.
6. The Plan appears to require the Debtor to pay property taxes and insurance only if the creditor "is not able to impound for." The Debtor does not have any budget expenses that clearly allow for this and the creditor is able to impound, but may choose not to do so, the reasoning and effect of this provision is not clear.

The Trustee's objections are well-taken.

## **REVIEW OF PLAN TERMS**

The Debtor appears to be attempting to confirm a Chapter 13 Plan with what is commonly referred to as an "Ensminger Adequate Protection Pending Loan Modification Decision Additional Provision." This provision, created through the combined efforts of the debtor and creditor bars, provides for adequate protection payments to be made to the creditor under a confirmed plan pending decision on a loan modification and the automatic termination of the automatic stay in the event the creditor denies the loan modification.

The Additional Provides provide for a \$1,350.00 a month adequate protection payment to be made to creditor Caliber Home Loans. If Caliber Home Loans denies the loan modification, it will so communicate in writing the denial. If denied, Debtor has fourteen days to file an amended plan to properly address this creditor's claim.

However, Debtor and Debtor's counsel have eviscerated the standard provisions which were worked out and have been successfully used previously in this court by a number of debtors and creditors.

The court has addressed this issue before with Debtor's counsel in unrelated cases.

First, Debtor's counsel has deleted key language from the Adequate Protection Payment additional provision (§ 6.04). The missing critical language is,

“This Chapter 13 Plan **does not** modify the rights of [Creditor Name] for this secured claim, but provides adequate protection payments during the loan modification process.”

By choosing to delete this very simple statement, Debtor creates a cloud of mystery about whether the plan does not modify the right, or somehow, outside the bounds of the law, has modified the rights of this creditor.

In the additional provisions relating to any possible loan modification (§ 6.05), Debtor merely states that she will provide a copy of the loan modification to the Trustee. Once again, Debtor and Debtor's counsel have neutered the balanced loan modification process additional provisions by deleting the following standard language:

“2. For a loan modification which does not provide for any pre-petition arrearage cure payments to be made during the life of the Plan, the claim shall be paid by the Debtor as a Class 4 Claim under this Plan pursuant to the terms of the loan modification, with no modification of this Plan required so long as the monthly plan payments to the Chapter 13 Trustee are reduced only by the monthly Class 4 payment in an amount not greater than the adequate protection payment.

3. For a loan modification which requires arrearage cure payments to be made during the term of this plan, the Claim shall be paid as a Class 1 claim with the current monthly payment and the arrearage cure being paid through the Plan. If the Class 1 payment can be made without altering the treatment provided for creditors holding general unsecured claims, no modification of the plan shall be required, with the court order approving the modification documenting the agreed treatment of the Class1 claim.”

This creates a air of confusion as to whether, based on confirming this plan, the Debtor can override the normal Class 4 requirements that a claim qualifies for Class 4 treatment only so long as there are no arrearages to be cured. § 6.05, Subparagraph 2, continues to state Debtor's opinion (not a plan term) that she predicts there will not be any arrearage cure to be made during the life of the plan.

Debtor's gamesmanship continues, slicing and dicing out of the additional provisions a key adequate protection provisions - the creditor's right to seek relief from the stay for any reason, including Debtor's failure to diligently or in good faith pursue the loan modification. Debtor and Debtor's counsel have stripped from the terms the following required provision in the events of default:

“Events of Default, Failure to Modify Plan Upon Rejection of Modification,  
Failure to Prosecution Loan Modification

The Debtor shall be in default under the terms of this Plan, and [Creditor Name] entitled to exercise its rights to conduct a nonjudicial foreclosure sale, as described in the modification of the automatic stay in this Paragraph [X.02], of the Property in the event of any of the following defaults.

...

5. Failure to diligently prosecute the loan modification application. For purposes of these Additional Provisions, the failure to diligently prosecute the loan modification application shall be documented by [Creditor Name] that forms, documents, records, or other information relating to the requested loan modification were requested in writing from the Debtor, and not provided by the Debtor within 30 days of the written request having been mailed to or delivered personally, by facsimile, or email to the Debtor or designated representative of the Debtor."

By deleting this provision, Debtor and Debtor's counsel have attempted to create a Chapter 13 Plan term which does effectively modify the creditor's rights - putting on hold all of the creditor's rights to foreclose so long as Debtor asserts that she is prosecuting a loan modification, or re-prosecuting a loan modification, or needing more time to re-re-re-prosecute a loan modification.

Rounding out her attempt to create a plan which improperly modifies the rights of this creditor, Debtor has created a truncated right to seek relief from the automatic stay, limiting it to only an event of default specified in Section 6.07 of the plan - which consist of merely: (1) default in the adequate protection payment, (2) default in the terms of any loan modification, (3) failure to propose and serve a plan after denial of the loan modification, and (4) non-monetary post-petition default. Effectively, so long as Debtor contends she is prosecuting a loan modification, it appears that she and counsel are setting up the argument that the debt has been modified so no action can be taken.

The reasonable and good faith efforts by the debtor bar and the creditor bar worked out the standard relief from stay provision for these types of additional provisions. Rather than merely being for the limited circumstances provided by the Debtor in the plan, the necessary, good faith, adequate protection provisions are stated as follows:

"[X.02.6] Modification of the Automatic Stay.

If [Creditor Name] denies in writing Debtor's loan modification request and Debtor does not file a Modified Plan and Motion to Confirm Modified Plan within 14 days of the mailing of that denial, served on the Debtor [and Debtor's bankruptcy counsel], or other grounds for modification exist under the terms of these Additional Provisions for the [Creditor Name] secured claim, [Creditor Name] may serve and file an *ex parte* motion for relief from the automatic stay to allow it to conduct a non-judicial foreclosure sale of the property and lodge a proposed order with the court. The *ex parte* motion shall be limited to the grounds set forth in these Additional Provisions. Any opposition to the *ex parte* motion shall be in writing, filed with the court within 14 days of the mailing of the *ex parte* motion to the Debtor [and Debtor's counsel], and limited to disputing the grounds arising under these Additional Provisions. The Debtor shall set a hearing on its opposition to the *ex*

parte motion for the first available regular Chapter 13 motion for relief from automatic stay calendar for this court that is more than 14 days after the date the ex parte motion was mailed to the Debtor.

**The grounds specified herein for modification of the automatic stay and *ex parte* motion procedure are without prejudice to [Creditor Name] filing a motion for relief from the automatic stay on any other grounds and setting the motion for hearing pursuant to the Federal Rule of Bankruptcy Procedure and Local Bankruptcy Rule.”**

The highlighted language above is necessary to insure that confirmation of a plan which provides for adequate protection payments while a loan modification is pending is not a disguised impermissible modification of the creditor’s claim.

As stated above, the court has previously addressed this issue with Debtor’s counsel, rejecting this type of stripped down loan modification additional provisions which are in reality a disguised, impermissible loan modification. The court having been clear in the prior ruling, it is inconceivable that counsel and Debtor in this case (having been advised by her counsel) are not aware that the proposed plan provisions are not permitted by law, but have intentionally attempted to advance a plan which does not comply with the Bankruptcy Code. FN.1.

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FN.1. Even if Creditor had not objected, the Supreme Court has made it clear that a federal judge is not to ignore the law and issue orders, including confirming plans, merely because someone asked for it. *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)).  
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The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the Plan is not confirmed.

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

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

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

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

**Final Ruling:** No appearance at the June 19, 2016 hearing is required.  
-----

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 23, 2016. By the court's calculation, 57 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

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

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Debtors have provided evidence in support of confirmation. No opposition to the Motion has been filed by the Chapter 13 Trustee or creditors. The amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

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

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

**IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on May 23, 2016 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the



proposed order to the court.

42. [16-22677](#)-E-13      **ANDRES SUAREZ**      **OBJECTION TO CONFIRMATION OF**  
DPC-1      **Richard Jare**      **PLAN BY DAVID P. CUSICK**  
6-22-16 [\[31\]](#)

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on June 22, 2016. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

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

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

1. The Debtor has failed to provide the Trustee with proof of his social security number.
2. The Additional Provisions of the plan are unclear.
  - a. § 6.02 of the Plan provides that, "the stepped dividend language in

the Class 1 charts”, will be adopted. This provision then states that the “Arrears dividend payment does not begin until month”, without specifying a month. § 2.09 does not call for a dividend until month 15 of the plan.

- b. § 6.05 of the Plan appears to add one post-petition mortgage payment to the pre-petition arrears claim, and calls for the ongoing mortgage to be paid \$660.98 per month starting in June 2016 with the arrears to be paid \$148.30 per month starting in month 15. However, the provision is unclear if the Trustee is not certain that this is what the Plan provides.

The Trustee’s objections are well-taken.

The Trustee argues that the Debtor did not provide proof of social security number. *See* 11 U.S.C. § 521(h); 11 U.S.C. § 1325(a)(1); Fed. R. Bankr. P. 4002(b)(1)(B). The Debtor has failed to provide proof of social security number. This is a ground to deny confirmation.

The Trustee asserts that the Additional Provisions of the Plan are unclear. The court agrees. It appears that the plan was filed before the Plan was finalized. § 6.02 of the Plan provides for additional provisions for § 2.09 as follows:

Adopt the stepped dividend language in the Class 1 charts for Specialized Loan Servicing LLC. The Arrears dividend does not begin until month

The Trustee makes a logical assumption that § 2.09 of the Plan calls for no dividend until month 15 based on the Table for Class 1 Creditors in § 2.08. However, it is unclear from the text of the plan whether this is actually what the Additional Provision calls for.

Additionally, the Trustee argues that § 6.05 is not clear and the Trustee is not sure what it is trying to provide. § 6.05 states:

The trustee shall pay post petition arrears on the Class 1 obligation for Specialized Loan Servicing LLC through disbursements beginning in month 15 (funded by the lump sum of \$710.00 as if it were a class 1 arrears at 0% interest (this sum is for one \$660.98 installments of the monthly contractual amount plus a late charge). Since this plan pays post petition arrears, the ongoing class 1 ongoing (conduit) distributions which were not already made prior to the filing of this plan are suspended and resume beginning with the end of June 28<sup>th</sup>, 2016 (or July 1<sup>st</sup> 2016) and all subsequent months. Upon the filing of this plan, trustee disbursements shall resume with the trustee making paying only 1 (one) mortgage installment per month (and skipping end of May 2016) in the sum of \$660.98 (which may change with the terms of the note and deed of trust to take into account escrow and rate changes).

This seems to be trying to add one of the post-petition mortgage installments to the pre-petition arrears claim with the ongoing payments suspended until June or July and the arrears to be paid \$148.30 per month

starting in month 15.

The plan as presented does not appear to be in the Debtor's best efforts. The incomplete and incoherent provisions in the Plan are indications that the Plan is not in the Debtor's best efforts and therefore is not confirmable.

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

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

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

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

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

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 23, 2016. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

<b>The court's decision is to sustain the Objection and deny confirmation of the Chapter 13 Plan.</b>
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Bank of New York Mellon FKA The Bank of New York, as Trustee for the certificate holders of the CWABS, Inc., ASSET-BACKED CERTIFICATES, SERIES 2006-15 ("Creditor") opposes confirmation of the Plan on the basis that:

1. The Debtor's plan fails to provide for the payment in full of Creditor's pre-petition arrearage.
2. The Debtor's plan fails to provide for the curing of the default on Creditor's claim in a reasonable time period. The proposed payment start

date is month 15 of the plan, which would violate the requirement in 11 U.S.C. 1325(a)(5)(B)(iii)(I) for equal monthly payments.

3. The plan attempts to modify a debt secured by Debtor's principal residence. Debtor's plan proposes to not distribute any funds on the pre-petition arrears due on Creditor's claim for 15 months, which is an attempt to modify Creditor's claim.
4. The Additional Provisions of the plan are unclear.
  - a. § 6.02 Provides that, "the stepped dividend language in the Class 1 charts", will be adopted. This provision then states that the "Arrears dividend payment does not begin until month", without specifying a month.
  - b. § 6.05 is unclear in its reference to Creditor's claim including repayment of post-petition arrears.
5. Debtor's plan fails to provide how the Debtor will be able to make all payments under the plan.
6. Debtor proposed payments will be insufficient to fund the plan once the arrears on Creditors claim is fully provided for.

The Creditor's objections are well-taken.

The basis of the Creditor's objection is that the plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). Non-compliance with the requirements of a plan are grounds to deny the plan. The Debtor's inability to make the proposed plan payments indicates the plan is not feasible, and is reason to deny confirmation. *See* 11 U.S.C. 1325(a)(6).

The Creditor argues that the Debtor has not provided for the curing of the default on the Creditor's secured claim. The Plan provides for arrears in the amount of \$6,822.00, however amount fails to account for pre-petition fees due, escrow deficiency for funds advanced, and projected escrow shortage. When factoring in these additional costs less funds on hand, the total pre-petition arrearage is \$12,872.74. Claim # 6.

However, the Plan terms do not set the amount of the arrearage to be cured. That is set by the proof of claim filed by creditor or an order of the court. Chapter 13 Plan, ¶ 2.04. Thus, the question is whether the plan, as funded, will be sufficient to cure the arrearage.

11 U.S.C. § 1322(a) is the section of the Bankruptcy Code that specifies the mandatory provisions of the plan. It requires only that the Debtor adequately fund the plan with future earnings or other

future income that is paid over to the Trustee, 11 U.S.C. § 1322(a)(1), provide for payment in full of priority claims, 11 U.S.C. § 1322(a)(2) & (4), and provide the same treatment for each claim in a particular class, 11 U.S.C. § 1322(a)(3). But nothing in § 1322(a) compels a debtor to propose a plan that provides for a secured claim.

11 U.S.C. § 1322(b) specifies the provisions that a plan may include at the option of the debtor. With reference to secured claims, the debtor may not modify a home loan but may modify other secured claims, 11 U.S.C. § 1322(b)(2), cure any default on a secured claim, including a home loan, 11 U.S.C. § 1322(b)(3), and maintain ongoing contract installment payments while curing a pre-petition default, 11 U.S.C. § 1322(b)(5).

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

- (1) provides a treatment that the debtor and secured creditor agree to, 11 U.S.C. § 1325(a)(5)(A);
- (2) provide for payment in full of the entire claim if the claim is modified or will mature by its terms during the terms of the Plan, 11 U.S.C. § 1325(a)(5)(B); or
- (3) surrender the collateral for the claim to the secured creditor, 11 U.S.C. § 1325(a)(5)(C).

However, these three possibilities are relevant only if the plan provides for the secured claim.

Here, the plan does provide for the Creditor but not for the full amount. This is grounds to deny confirmation.

The Creditor asserts that the Additional Provisions of the Plan are unclear. § 6.02 of the Plan fails to specify when payments on the arrears will begin. § 6.02 of the Plan provides for additional provisions for § 2.09 as follows:

Adopt the stepped dividend language in the Class 1 charts for Specialized Loan Servicing LLC. The Arrears dividend does not begin until month

The provision does not specify a month. This Provision of the plan appears to be incomplete.

Additionally, the Creditor argues that § 6.05 is ambiguous in its reference to the treatment of the Creditor's secured claim. § 6.05 states:

The trustee shall pay post petition arrears on the Class 1 obligation for Specialized Loan Servicing LLC through disbursements beginning in month 15 (funded by the lump sum of \$710.00 as if it were a class 1 arrears at 0% interest (this sum is for one \$660.98 installments of the monthly contractual amount plus a late charge). Since this plan pays post petition arrears, the ongoing class 1 ongoing (conduit)

distributions which were not already made prior to the filing of this plan are suspended and resume beginning with the end of June 28<sup>th</sup>, 2016 (or July 1<sup>st</sup> 2016) and all subsequent months. Upon the filing of this plan, trustee disbursements shall resume with the trustee making paying only 1 (one) mortgage installment per month (and skipping end of May 2016) in the sum of \$660.98 (which may change with the terms of the note and deed of trust to take into account escrow and rate changes).

This seems to be trying to add one of the post-petition mortgage installments to the pre-petition arrears claim with the ongoing payments suspended until June or July and the arrears to be paid \$148.30 per month starting in month 15. The Plan is unclear in its current form and must be clarified with correct calculations before it can be confirmed.

The plan as presented does not appear to be in the Debtor's best efforts. The incomplete and less than clear provisions in the Plan are indications that the Plan is not in the Debtor's best efforts and therefore is not confirmable.

Debtor's plan fails to provide how the Debtor will be able to make all payments under the plan. The Debtor's Schedules show a monthly net income of \$1,080.00. Under the plan, Debtor's payments will increase in month 15 from \$1,080.00 each month to \$1,200 each month, which exceeds Debtor's current monthly net income. Debtor's schedules are based on the Debtor's sons being "less of a burden very soon". However, no evidence has been provided to support this assertion. A Plan based on such speculation is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Lastly, the Creditor contends that the Plan fails to provide for the payment in full of Creditor's pre-petition arrearage. The Creditor holds a Deed of Trust secured by the debtor's principal residence. The creditor has filed a timely proof of claim in which it asserts \$12,872.74 in pre-petition arrearage. The Plan does not propose to cure this arrearage. Because the plan does not provide for the surrender of the collateral for this claim, the Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments. *See* 11 U.S.C. §§ 1322(b)(2), (b)(5); 11 U.S.C. § 1325(a)(5)(B). Because it fails to provide for the full payment of arrearages, the plan cannot be confirmed.

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

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

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

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

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

**No Tentative Ruling:** The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on March 18. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

<b>The Motion to Dismiss is xxxxxx.</b>
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David Cusick, the Chapter 13 Trustee, filed the instant Motion to Dismiss on March 18, 2016. Dckt. 56.

The Trustee seeks dismissal of the case on the basis that the Debtor is \$560.00 delinquent in plan payments, which represents multiple months of the \$280.00 plan payment.

**DEBTOR'S OPPOSITION**

On March 30, 2016, Debtor filed an opposition to the instant motion. Dckt. 60. Debtor states that she believes she is current, and completed her plan with her month 60 payment. Debtor further explains that payments have stopped because the court stopped automatic withdrawals after month 60. Debtor is conferring with Trustee to determine what error, if any, exists.



## **TRUSTEE'S REPLY**

Trustee filed a reply on April 5, 2016, adding that Debtor is overextended because her plan will complete in 124 months. Dckt. 62. Debtor's Amended Plan increased the unsecured creditor dividend to 27%, but to date each claim has only been paid 6.09%. Trustee also adds that the Internal Revenue Service filed a priority claim for the amount of \$1,316.46, which has not been provided for. Trustee continues to assert that while 60 months have passed, Debtor has missed more than one payment.

## **APRIL 20, 2016 HEARING**

Debtor has filed a Motion to Modify the Plan. In light of this case having been filed in 2010 and the Debtor investing five years into it, the court continued the hearing on this motion to the time and date of the hearing on the Motion to Confirm at 3:00 p.m. on June 15, 2016.

## **JUNE 14, 2016 HEARING**

At the hearing, the court continued the hearing to 3:00 p.m. on June 28, 2016. Dckt. 79.

## **JUNE 28, 2016 HEARING**

At the hearing, the court continued the hearing to 3:00 p.m. on June 28, 2016. Dckt. 81.

## **DISCUSSION**

On July 18, 2016, Debtor and the Chapter 13 Trustee filed a Stipulation for Modification of Debtor's Chapter 13 Plan to provide for payment of the amended Internal Revenue Service priority claim in the amount of \$46.51. The Stipulation further states that such modification does not negatively impact the treatment of any other claim under the Plan. Dckt. 82.

At the hearing, xxxxx

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

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

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

**IT IS ORDERED** that the Motion to Dismiss is xxxxx

**No Tentative Ruling:** The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on April 14, 2016. By the court's calculation, 61 days' notice was provided. 35 days' notice is required.

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

<b>The Motion to Confirm the Modified Plan is granted.</b>
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Maria De La Garza ("Debtor") filed the instant Motion to Confirm the Modified Plan on April 14, 2016. Dckt. 64.

**TRUSTEE'S OPPOSITION**

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on May 31, 2016. Dckt. 73. The Trustee objects on the following grounds:

1. The Debtor fails to provide treatment for priority creditor Internal Revenue Service. The Internal Revenue Service filed Proof of Claim No. 1 for a total of \$2,233.29. The claim indicates that the priority portion of the claim is \$1,316.46 which is not listed in the plan.

2. The months paid in stated in the Debtor's proposed plan payments differ from the Trustee's records. The Debtor has listed the proposed plan payments as "\$1,800.00 per month for 2 months, \$2,150.76 per month for 22 months, \$100.00 per month for 2 months, \$280.00 per month for 34 months" in the additional provisions. The total proposed amount paid in should total \$60,636.72 to complete the plan.

According to the Trustee's records, Debtor has paid in \$60,916.72 through month 61, which is December 2015. Where this case was filed on November 16, 2010 so the first payment was due on December 25, 2010.

## **DEBTOR'S REPLY**

The Debtor filed a reply on June 9, 2016. Dckt. 76. The Debtor states that she reads the Trustee's opposition stating two issues:

1. The amount of priority claim for Internal Revenue Service in the amount of \$1,316.46 is disputed.
2. The Debtor's total proposed is \$60,636.72 whereas the Debtor has actually paid \$60,916.72. It appears that the Debtor has overpaid \$280.00.

The Debtor states that she believes that this can be corrected in the order confirming and have it provide a small payment to cover the priority of \$1,326.56, in part with the extra \$280.00, leaving \$1,036.46, to complete the "project."

## **JUNE 14, 2016 HEARING**

At the hearing, the court continued the hearing to 3:00 p.m. on June 28, 2016. Dckt. 78.

## **JUNE 28, 2016 HEARING**

At the hearing, the court continued the hearing to 3:00 p.m. on JULY 19, 2016. Dckt. 80.

## **DISCUSSION**

On July 18, 2016, Debtor and the Chapter 13 Trustee filed a Stipulation for Modification of Debtor's Chapter 13 Plan to provide for payment of the amended Internal Revenue Service priority claim in the amount of \$46.51. The Stipulation further states that such modification does not negatively impact the treatment of any other claim under the Plan. Dckt. 82.

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

At the hearing, XXXXXXXXXXXXXXXXXXXXXXX.

The modified Plan does comply with 11 U.S.C. §§ 1322, 1325(a) and 1329 and is confirmed.

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

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

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

**IT IS ORDERED** that Motion to Confirm the Plan is granted and the Modified Chapter 13 Plan filed on April 14, 2016, as amended to provide:

- A. For payment of a \$46.51 priority claim to the Internal Revenue Service;
- B.
- C.

is confirmed. Counsel for the Debtor shall prepare and forward to the Chapter 13 Trustee a proposed order confirming the Plan, which upon approval by the Trustee shall be lodged with the court.

**No Tentative Ruling:** The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on February 11, 2016. By the court's calculation, 54 days' notice was provided. 42 days' notice is required.

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

<b>The Motion to Confirm the Amended Plan is xxxxxx</b>
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Ruth Clark ("Debtor") filed the instant Motion to Confirm the Amended Plan on February 11, 2016. Dckt. 135.

**TRUSTEE'S OPPOSITION**

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on March 16, 2016. Dckt. 147. The Trustee opposes confirmation on the following grounds:

1. Debtor has failed to file a declaration in support of the Motion setting forth evidence to support findings of fact and conclusions of law for all the requirements of 11 U.S.C. § 1325(a).

2. The Declaration filed by Tom Carey does not offer any evidence of the source of the \$810.00 income or why he is making this income available to the Debtor. Mr. Carey's prior declaration stated that he would contribute up to \$400.00 per month. Dckt. 68. There is no explanation as to why the amount has been increased to \$810.00.
3. Debtor's stated living expenses are not reasonable. The Debtor lists food and housekeeping expenses at \$200.00, clothing/laundry/dry cleaning at \$5.00, and personal care at \$5.00. The Internal Revenue Service allowable living expense for one person as \$585.00 per month. The Debtor also lists total utilities at \$289.00 while the local housing and utilities standard is \$529.00 per month.
4. The plan indicates that there are additional provisions but none are attached.
5. It appears that the Debtor has improperly altered the Form Plan by explicitly stating that the additional provisions are appended when they are not.
6. Debtor cannot confirm a plan. This case was filed March 19, 2015. A full year has elapsed since the filing. Four plans have been proposed but none have been confirmed. The Trustee does not believe the Debtor can confirm a plan.

#### **EL DORADO SAVINGS BANK'S CONCURRENCE IN OPPOSITION**

El Dorado Savings Bank filed a document entitled "joinder" in which it concurs and supports the Chapter 13 Trustee's Opposition. Dckt. 150.

#### **RESPONSE OF RUTH CLARK**

The Debtor first responds, that because the Chapter 13 Trustee and Creditor objected, she has now filed her declaration. Additionally, a supplemental declaration of Tom Carey is provided. The Debtor believes that in her declaration she adequately addresses the issues relating to her stated living expenses.

In her Declaration, Dckt. 153, Debtor testimony includes the following:

- A. As of March 24, 2016, Debtor has paid \$12,809.09 to the Chapter 13 Trustee over 11 months. (Which averages \$1,164 a month.)
- B. Beginning with the March 2016 payment, Debtor will begin making payments of \$1,560.00.
- C. Telling the court that she "filed for protection under the bankruptcy code because my how was being foreclosed upon." [emphasis in original]
- D. The source of income to fund the plan will be from:
  1. Social Security (in an unstated amount);

2. Annuity from Worker's Compensation (in an unstated amount);
  3. Food Stamps (\$120 a month); and
  4. Assistance from Tom Carey (in an unstated amount).
- E. That the Debtor does not lie.
- F. Because Debtor does not live in the city, people like her who live in the country use less money to live than those in the city.
- G. Debtor is happy with her lifestyle.
- H. Debtor seeks no social acceptance, as she is satisfied with herself.
- I. Debtor follows the counsel of the Elders of her Church (unnamed).

In additional testimony of Tom Carey in his Supplemental Declaration, Dckt. 154, includes:

- A. He is the Debtor's
1. Friend,
  2. Parishioner, and
  3. Family Member.
- B. His source of income is:
1. State of California Retirement (in unstated amount);
  2. Chevron/Texaco Retirement (in unstated amount);
  3. Social Security;
  4. His Investment Account Mandatory Withdrawals;
  5. Wife's Retirement (in unstated amount);
  6. Wife's Social Security; and
  7. Wife's Investment Account Mandatory Withdrawals.
- C. That Mr. Carey is providing the assistance because the Debtor is disabled and in recovery. Further, someday the Debtor will be gainfully employed and not need Mr. Carey's assistance.

## **APRIL 5, 2016 HEARING**

At the hearing, the court issued the following order:

**IT IS ORDERED** that the hearing for the Motion to Confirm the Amended Plan to 3:00 p.m. on June 14, 2016. Debtor shall file and serve supplemental pleadings on or before May 6, 2016, and Replies, if any, shall be filed and served on or before May 20, 2016.

Dckt. 158.

## **SUPPLEMENTAL DECLARATION OF THOMAS L. CAREY**

Thomas L. Carey, a friend of the Debtor, filed a declaration on May 6, 2016. Dckt. 159. Mr. Clark states that after the Debtor was shot seventeen times, the Debtor requested that Mr. Carey be her Power of Attorney which Mr. Carey accepted. Debtor also requested that Mr. Carey be the Debtor's Durable Power, which Mr. Carey also accepted.

Since November 20, 2013, Mr. Carey states he has willingly helped the Debtor meet some of her financial obligations, including some of the Debtor's utility bills and medicine. Mr. Carey states that he has provided transportation for the Debtor and has taken Debtor to the food banks twice a week where she receives free food. Mr. Carey declares that Debtor "spends \$200 per month, or less, to supplement what she receives from the food banks."

Mr. Carey states that he will continue to assist Debtor until she is self-sufficient. Mr. Carey states that he does not have any verbal or written agreements for the repayment of any time or expenditures spent on her.

Mr. Carey declares that he will "send a bank check in the amount of \$1,560.00 to the Trustee by the 25<sup>th</sup> day of each month, which is the amount in [Debtor's] bankruptcy plan." Dckt. 159.

## **TRUSTEE'S RESPONSE**

The Trustee filed a response on May 11, 2016. Dckt. 161. The Trustee states that after reviewing the Declarations of Debtor (Dckt. 153) and of Mr. Carey (Dckts. 154 and 159) that he is satisfied on the matters of Debtor's low living expenses and the reason for the financial assistance.

The Trustee requests that the reference to additional provisions in Section 6 of the Third Amended Plan be stricken in the Order Confirming Plan.

The Trustee agrees that the Debtor is current under the plan at this time and the Trustee no longer opposes confirmation of the Debtor's plan.

## **JUNE 14, 2016 HEARING**



At the hearing, the court continued the hearing to 3:00 p.m. on July 19, 2016. Dckt. 164.

## **DISCUSSION**

To date, no supplemental papers have been filed.

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

The Trustee's objections are well-taken.

### **Adequate Facts Withheld From the Court**

Only after having her "back to the wall," was the Debtor willing (or forced) to provide a declaration to support the relief she was requesting. Such begrudging providing of the minimal evidence and prosecution of her case is not indicative of a debtor who commenced the case and is proposing the Chapter 13 Plan in good faith.

Once again, the declaration of Tom Carey fails to provide sufficient evidence as to how and why Mr. Carey is committing \$810.00 per month to the Debtor. This is especially worrisome when Mr. Carey's previous declaration indicated a contribution of only \$400.00. The one-page declaration filed by Mr. Carey does not address why the contributions has doubled or where and how Mr. Carey is able to provide this substantial assistance. When a plan relies on the contribution of a third party, the Debtor must provide competent evidence that the third party is pledging these funds in order to determine that the plan is feasible. The declaration as filed does not provide this assurance.

In his Supplemental Declaration Mr. Carey does not provide any economic specifics, but that he intends to fund the \$810.00 gift (over \$40,000.00) from both his income and his wife's income. Mr. Carey's wife does not provide her declaration, though it now appears that her income is part of the funding.

### **Debtor's Unreasonable Statement of Expenses**

As to the Trustee's third objection, the court also find these expenses unreasonably low. The Debtor is proposing a budget that is nearly half of what the Internal Revenue Service proposes for a single-person household. The Debtor, not having filed a declaration, does not provide any explanation at how this dramatic reduction in expenses is possible. Absent explanation from the Debtor as to how he proposes to achieve this drastic decrease in expenses, the court does not believe the Debtor's projection is in good faith. This is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(3).

Other than saying that the Debtor is happy with her "country lifestyle," Debtor offers no explanation as to how she can maintain at least a subsistence standard of living for the five years of the Plan. The court takes judicial notice that even persons living in the country need: food, clothing, personal care products, insurance, transportation, health supplies, medical treatment, household goods, and home maintenance.

The Debtor's latest financial information purports to state her expenses to be:

Expense	February 12, 2016 Amended Schedule J; Dckt. 142	May 6, 2015 Amended Schedule J; Dckt. 57	Original Schedule J; Dckt. 19
Property Ins.	\$60	\$60	\$60
Home Maintenance	\$100	\$100	\$100
Electricity/Gas	\$165	\$165	\$165
Water, Sewer, Garbage	\$44	\$44	\$44
Phone, Internet, Cable	\$80	\$80	\$80
Food and Housekeeping Supplies	\$200	\$200	\$250
Clothing, Laundry	\$5	\$5	\$0
Personal Care Products	\$5	\$5	\$20
Medical, Dental	\$100	\$100	\$160
Transportation	\$130	\$180	\$0
Entertainment	\$7	\$7	\$0
Charitable	\$0	\$0	\$0
Health Ins	\$105	\$105	\$105
Total Expenses	\$1,001	\$1,051	\$984

What the Debtor has shown through the incarnations of Schedule J is that her expenses are not based on what her expenses are, but only what needs to be the bottom line number to show that she can “afford” to make the monthly mortgage payment.

The glaring deficiencies are for:

- A. Food - Debtor dropping from \$250.00 a month to \$200.00, without showing that such represents her real, three meals a day, food bill and housekeeping supplies expenses. If the court assumes only \$25.00 a month for housekeeping supplies, that would leave \$175.00 a month for food.

Assuming a thirty-day month and three meals a day, Debtor must pay for food for 90 meals. With \$175.00 a month for food, that allows for \$1.94 per meal. The Debtor makes no showing that she can properly provide for herself and put basic, low cost meals on the table for five years at \$1.94 per meal.

- B. Clothing/Laundry – Here, Debtor provides the court with no evidence of how she will cloth herself for five years, spending on average \$5.00 per month.
- C. Debtor does not explain her \$130.00 transportation expense. Debtor no owing a vehicle, it may be for taxis, Uber, or bus fare. However, the Debtor fails (or is unwilling) to disclose such information to the court.

From the Debtor’s declaration it is clear that she has made the determination that this is her Plan and that is shall be confirmed. Debtor has drawn her conclusions and states them to the court. In substance, Debtor is withholding actual facts from the court, and instead is dictating the conclusions of law and findings of fact to the court.

This court has many “country folk” who seek relief in this court and successfully either reorganize or obtain a fresh start through a Chapter 7 discharge. Those “country folk” do not come to this court purporting to spend \$1.94 per meal for food and \$5 a month for clothing. Even someone living in the country needs more than that to scratch out even a basic survival lifestyle.

### **Inconsistent Statements in Plan**

The Trustee’s third and fourth objection also deal with the improper and incomplete form of the instant proposed plan. The plan, in Section 6, modified the plan form to explicitly and clearly state “Additional Provisions are appended to this plan.” Dckt. 139. However, no such provisions are attached. The court nor any party in interest can determine the viability and feasibility of a plan when the plan, as filed, does not have all the terms.

The Debtor does address this in her Reply, seeking the court to allow this to be corrected as a clerical error in the order confirming.

### **Benefactor’s Incorrect Premise**

In his Supplemental Declaration, Tom Carey states under penalty of perjury his opinion that, “Some day, she [Debtor] will be gainfully employed and will no longer need my assistance.” Declaration, p. 2:6.5-7.5; Dckt. 154. This statement conflicts with Debtor’s repeated statements under penalty of perjury that she is “Retired/Disabled.” Second Amended Schedule I, Dckt. 142 at 4; First Amended Schedule I, Dckt. 57 at 10; and Original Schedule I; Dckt. 19 at 18 (stating occupation as “Retired/Disabled RN,” employer as “SSDI,” and having been “employed” for 18 years).

It appears that Mr. Carey’s statement that the Debtor will not need his assistance because “someday” she will be gainfully employed conflicts with the statements by Debtor under penalty of perjury that she is retired (age 59, Debtor’s Declaration ¶ 6; Dckt. 152) and disabled.

### **Consideration of Additional Financial Information**

On the Original Statement of Financial Affairs Debtor stated under penalty of perjury that she had no income in 2015, 2014, or 2013. Statement of Financial Affairs Questions 1 and 2, Dckt. 1; filed by Debtor in pro se. This was corrected in May 2016, with the assistance of counsel, in which Debtor reported the total gross income for each of the three years:

	2015 YTD of March 19, 2015 Filing	2014	2013
Statement of Financial Affairs Question 1	\$0	\$0	\$0
Statement of Financial Affairs Question 2	\$5,400	\$21,004	\$21,000
Total	\$5,400	\$21,004	\$21,000
Average Per Month (3 months)	\$1,800	n/a	n/a
Average Per Month (12 months)	n/a	\$1,750	\$1,750

### **FURTHER AMENDED FINANCIAL INFORMATION**

Amended Statement of Financial Affairs, Question 1 and 2; Dckt. 57 at 17.

Based on this information, it appears that the Debtor's Annuity, SSI income, and the utility credit (as reported on the Amended Statement of Financial Affairs) average out to be income of \$1,800.00 a month.

In Debtor's latest Amended Schedule I (Dckt. 142 at 4-5), in which Debtor states that she is "Retired/Disabled," she states that she has SSI, Utilities Discount, and Worker's Compensation benefits totaling \$1,750 a month.

Buried in paragraph 17 of Debtor's late filed Declaration, she states under penalty of perjury that she now receives \$120 a month in food stamp benefits. Adding that to the \$1,750 stated by Debtor, she has \$1,870 a month in income.

Even adding in all of her benefits (in case Debtor was listing a food expense net of the food stamp benefits), the stated expenses do not make economic sense.

### **Debtor's Inability to Confirm a Plan**

The Trustee's last objection is a summation of the concern the Trustee and the court has had with the instant case. In the year since the instant case has been filed, the Debtor has been unable to confirm a plan. The Debtor either does not properly provide sufficient explanation and evidence to support confirmation.

## RULING

The Chapter 13 Trustee has become convinced that the Debtor, with the support of Mr. Carey, will have the ability to perform the Chapter 13 Plan. Usually, the court gives great deference to such a determination by the Chapter 13 Trustee. However, in this case, the court is not convinced that such deference can be given.

The Chapter 13 Debtor in this case, Mr. Carey, and the Debtor's very experienced consumer counsel have been reluctant to provide financial information - doing so only when pushed by creditors and the Trustee. It was only belatedly told that Mr. Carey was not merely a "friend," but is a fiduciary exercising a power of attorney for Debtor. Debtor affirmatively misrepresented that she was paying all of her expenses and living on her income and the assistance provided by Mr. Carey. But when the court concluded that her "expenses" were unreasonably, unrealistically, and illogically low, she and Mr. Carey then (after the possible source of assistance was mentioned by the court) stated that, "yes, Mr. Carey takes the Debtor to the food closet to obtain free food."

To assuage the court's concerns, the Debtor testifies under penalty of perjury,

"14. I was taught by my parents and elder relatives to always tell the Truth, especially concerning legal matters. actually, speaking, I don't posses the mental capacity to keep track of lies as they other stack upon each other. Therefore, I tell the truth to minimize the stress of trying to falsify events of my life. I personally understand what the National Average has determined for living expenses."

Declaration, 153. In reading the statements under penalty of perjury by the Debtor in this case, and the above paragraph particularly, the court is reminded of the famous quote from Hamlet, "'The lady doth protest too much, methinks.'" The court does not find the Debtor's statement above to be credible. She has repeatedly withheld information, provided selective information, and provide inaccurate information concerning her finances. This was done by the Debtor because the Debtor wanted what she wanted, and would say whatever she thought was necessary to get what she wanted – irrespective of the legal accuracy of what she stated.

Mr. Carey has also provided qualified, incomplete statements to the court. The most recent is (with the assistance of Debtor's counsel), that "8. I will continue to assist Clark until she is self sufficient." Declaration, Dckt. 159. While this could be charitably read as Mr. Carey stating that he will be in it for the long-haul, there is a darker side to it. If Mr. Carey's other testimony that the Debtor is permanently disabled (based on the description of the Debtor's travails), then she will never be self-sufficient. Therefore, the statement could well indicate that Mr. Carey will provide the support only to when he concludes that the Debtor is self sufficient, then he will cut off the support, and if the Debtor fails to provide for her expenses, will then use the power of attorney to deal with Debtor's property.

Debtor's attorney, surprisingly, has been complicit in these inaccurate, incomplete, and qualified statements. This is surprising, and may well be grounded in overly empathizing with his client.

The Debtor's precarious financial and emotional state warrant the court being overly cautious before confirming the plan.

At a minimum, given the qualified commitment in the declaration by Mr. Carey (which declaration was prepared by Debtor's counsel) any order confirming the plan must also include an express mandatory injunction ordering Mr. Care to make the support payment of \$1,560.00 to the Chapter 13 Trustee for each month of the Plan, when payment must be made until further order of the court.

At the hearing, xxxxx

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

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

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

**IT IS ORDERED** that **xxxxxxxxxxxxxxxxxx**.

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

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

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

-----

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 22, 2016. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

<b>The court's decision is to sustain the Objection.</b>
--

## **TRUSTEE'S OBJECTION**

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

1. The Debtor improperly scheduled the County of Sacramento's secured property taxes in Class 1 in the amount of \$2,324.00. This debt should be scheduled in Class 2 because it matures before the completion of the plan.
2. Debtor may not be able to make the required payments under 11 U.S.C. § 1325(a)(6). The Debtor has failed to list expenses on schedule J for real property taxes and

insurance. Debtor owns encumbered real property, which is Debtor's residence. If the ongoing mortgage payment provided for in Class 1 does not include real property taxes and insurance, Debtor cannot afford to make the plan payment and pay these expenses.

## **DEBTOR'S RESPONSE**

The Debtor filed a response on July 1, 2016. Dckt. 24.

Debtor states that the Trustee is correct in that the secured property tax claim of the County of Sacramento should be provided for as a class 2 claim. The Debtor proposes to change the classification of the claim via the Order Confirming Plan. Debtor asserts that the change in classification from a Class 1 to a Class 2 claim will not material impact County of Sacramento's rights regarding payment of the Claim or the secured real property.

As to the debtor's failure to include monthly expenses for property taxes and home-owners insurance in their budget on Schedule J, the Debtor states that Debtor's schedule have been amended on June 30, 2016 to include those expenses. Debtor states that they will still be able to make their ongoing monthly plan payments with these new expenses included.

## **DISCUSSION**

The Trustee's objections are well-taken.

The basis for the Trustee's objection is that the Debtor improperly schedules the County of County of Sacramento's secured property classes in Class 1 instead of Class 2. The Debtor indicates in their response that they propose to change the classification of the claim via the Order Confirming Plan. Such an amendment could be made at the confirmation hearing.

The Trustee also objected on the basis that Debtor may be unable to make the required payments under 11 U.S.C. 1325(a)(6). Debtor had failed to list expenses on Schedule J for real property taxes and insurance. Debtor has amended Schedule J to account for these additional expenses. The court compares the May 11, 2016 filed Schedule J (Dckt. 11) with Debtor's latest revised expenses (Dckt. 23.):

Expense	Original Schedule J (Dckt. 11)	Latest Statement of Expenses (Dckt. 23)	Increase/ (Decrease) in Expense
Real Estate Taxes	\$0.00	\$193.00	\$193.00
Property, homeowner's, or renter's insurance	\$0.00	\$62.00	\$62.00
Home maintenance, repair, and upkeep expenses	\$50.00	\$50.00	\$0.00



Electricity, heat, natural gas	\$95.00	\$95.00	\$0.00
Water, sewer, garbage collection	\$300.00	\$300.00	\$0.00
Telephone, cell phone, Internet, satellite, and cable services	\$307.00	\$307.00	\$0.00
Food and housekeeping supplies	\$600.00	\$500.00	(\$100.00)
Clothing, laundry, and dry cleaning	\$50.00	\$10.00	(\$40.00)
Personal care products and services	\$10.00	\$0.00	(\$10.00)
Medical and dental expenses	\$100.00	\$95.00	(\$5.00)
Transportation	\$250.00	\$250.00	\$0.00
Entertainment	\$100.00	\$0.00	(\$100.00)
Health insurance	\$87.00	\$87.00	\$0.00
Vehicle insurance	\$95.00	\$95.00	\$0.00
Boat insurance	\$5.00	\$5.00	\$0.00
Total Expenses	\$2,049.00	\$2,049.00	\$0.00

Under Debtor's new budget, the expenses remain the same at \$2,049.00 with the inclusion of the real estate taxes and insurance. In order to remain at the same total expenses, Debtor reduces the monthly allowance for food and housekeeping supplies by \$100 to a new total of \$500; clothing laundry and dry cleaning by \$40 to a new total of \$10; Personal care products and services by \$10 for a new total of \$0; medical and dental expenses by \$5 for a new total of \$95; and entertainment by \$100 for a new total of \$0.

The Debtor does not provide any evidence to support this new budget. This appeared to be a mere ploy to ease the Trustee's concerns without actually proposing any changes in good faith.

A review of the expenses and unexplained changes indicate that these do not represent real expenses, but "Made as Instructed" expenses to achieve an illusory monthly net income number to fund a plan. Just because a debtor changes numbers on a budget, without evidence of why and how such changes are reasonable, they carry little weight.

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

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

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

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

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

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 31, 2016. By the court's calculation, 49 days' notice was provided. 14 days' notice is required.

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

<b>The court's decision is to sustain the Objection.</b>
--

Kinecta Federal Credit Union opposes confirmation of the Plan on the basis that:

1. The Debtor has incorrectly valued the collateral securing Kinecta Federal Credit Union's claim at \$5,036.00. Kinecta Federal Credit Union claims that the value of the collateral is \$9,338.00 based on an online Kelly Bluebook Appraisal Guide. The Debtor has not filed a Motion to Value Collateral.

Kinecta Federal Credit Union's objections are well-taken.

The basis for Kinecta Federal Credit Union's objection is that the Debtor has based the plan on the collateral securing the claim of Kinecta Federal Credit Union being valued at \$5,036.00. However, Debtor has not filed a Motion to Value Collateral. The amount of the secured claim of Kinecta Federal Credit Union is listed as \$10,076.00 in Debtor's schedule D. Additionally Kinecta Federal Credit Union contests the valuation the Debtor is seeking. Dckt. 15. Kinecta Credit Union seeks to have the collateral valued at \$9,338.00 based upon an online Kelly Bluebook Appraisal Guide. Dckt. 16 Ex. 5.

The Debtor's Schedule J lists a \$176.41 monthly net income, while the Plan calls for a \$175.00 payment each month for 60 months. The Debtor has provided no indication as to how the Debtor will be able to make this payment unless without the collateral of Kinecta Federal Credit Union being valued at \$5,036.00. The Debtor has yet to file a motion requesting such a valuation. As it stands, Debtor does not have sufficient income to make the Plan payments once Kinecta Federal Credit Union's claim is properly accounted for. This suggests the plan is not feasible. *See* 11 U.S.C. § 1325(a)(6).

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

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

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

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

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

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 8, 2016. By the court's calculation, 41 days' notice was provided. 14 days' notice is required.

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

<p><b>The court's decision is to sustain the Objection.</b></p>
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David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that:

1. The Debtor cannot make the payments under the plan or comply with the plan. The Debtor's plan relies on a proposal to value the secured claim of Kinecta Federal Credit Union, but no such motion has been filed. Debtor's plan does not have sufficient monies to pay the claim in full without a successful motion to value.

The Trustee's objections are well-taken.

The basis for Trustee's objection is that the Debtor has based the plan on the collateral securing

the claim of Kinecta Federal Credit Union being valued at \$5,036.00. However, Debtor has not filed a Motion to Value Collateral. The amount of the secured claim of Kinecta Federal Credit Union is listed as \$10,076.00 in Debtor's schedule D. Additionally Kinecta Federal Credit Union has filed its own Objection to Confirmation of Debtor's Chapter 13 Plan in which it contests the valuation the Debtor is seeking. Dckt. 15. Kinecta Credit Union seeks to have the collateral valued at \$9,338.00 based upon an online Kelly Bluebook Appraisal Guide. Dckt. 16 Ex. 5.

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

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

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

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

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

**Final Ruling:** No appearance at the June 19, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 20, 2016. By the court's calculation, 60 days' notice was provided. 35 days' notice is required.

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

<b>The Motion to Confirm the Modified Plan is granted.</b>
--

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtors have filed evidence in support of confirmation. No opposition to the Motion was filed by the Chapter 13 Trustee or creditors. The modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329, and is confirmed.

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

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

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

**IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on May 20, 2016 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

51. [16-21099](#)-E-13      **KWAJHALIEN DORN-DAVIS**  
MAC-2                      **Marc Carpenter**

**MOTION TO VALUE COLLATERAL OF  
THE BANK OF NEW YORK MELLON,  
N.A.**  
**6-1-16 [34]**

**Final Ruling: No appearance at the July 19, 2016 hearing is required.**  
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Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on June 1, 2016. By the court's calculation, 48 days' notice was provided. 28 days' notice is required.

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

**The Motion to Value secured claim of The Bank of New York Mellon, N.A. ("Creditor") is granted and Creditor's secured claim is determined to have a value of \$00.00.**

The Motion to Value filed by Kwajalien Dorn-Davis ("Debtor") to value the secured claim of The Bank of New York Mellon, N.A. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 5021 Sky Parkway, Sacramento, California ("Property"). Debtor seeks to value the Property at a fair market value of \$194,492.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See Fed. R. Evid. 701; see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

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

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



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

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

The court has reviewed the Claims Registry for this bankruptcy case. No Proof of Claim has been filed by a creditor which appears to be for the claim to be valued.

## **OPPOSITION**

Creditor has not filed an opposition.

## **DISCUSSION**

The senior in priority first deed of trust secures a claim with a balance of approximately \$292,775.03. Creditor's second deed of trust secures a claim with a balance of approximately \$19,802.80. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's secured claim is determined to be in the amount of \$0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. See 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

The Motion for Valuation of Collateral filed by Kwajhalien Dorn-Davis ("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 Bank of New York Mellon, N.A. secured by a second in priority deed of trust recorded against the real property commonly known as 5021 Sky Parkway, Sacramento, California, is determined to be a secured claim in the amount of \$0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed

bankruptcy plan. The value of the Property is \$194,492.00 and is encumbered by senior liens securing claims in the amount of \$292,775.03, which exceed the value of the Property which is subject to Creditor's lien.