UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

July 30, 2019 at 3:00 p.m.

1.	**18-27801-E-13** **PGM-1**	**ROBERT SCOTT** **Peter Macaluso**	**CONTINUED MOTION TO CONFIRM PLAN** **5-27-19 [57]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on May 27, 2019. By the court's calculation, 36 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Plan is denied.

The debtor, Robert C. Scott ("Debtor"), seeks confirmation of the First Amended Chapter 13 Plan. The Plan provides for $1,550.00 to be paid through May 2019, and for monthly payments of $100.00 during June 2019, and $15,000 July 2019. Dckt. 59. The plan provides a 0 percent dividend to unsecured creditors. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on June 6, 2019. Dckt. 68. Trustee opposes confirmation on the grounds the claims to be paid from the lump sum total $17,650.00 and not $15,000.00. Trustee further opposes confirmation on the basis there was no prayer for relief in the Motion.

DEBTOR'S RESPONSE

Debtor filed a Reply to Trustee's Opposition on June 25, 2019. Dckt. 74. Debtor proposes increasing the lump sum payment to $17,650.00 in the order confirming the plan.

JULY 2, 2019 HEARING

At the July 2, 2019 Hearing, the court continued the hearing on the Motion to allow Debtor to sell property to fund the plan. Civil Minutes, Dckt 79.

DISCUSSION

While there was no clear prayer for relief requesting the Amended Plan be confirmed, the Motion otherwise appears to meet the pleading requirements. Debtor further proposes increasing the lump sum payment to $17,650.00 in the order confirming the plan to address Trustee's Opposition.

However, such a payment is premised on the court approving sale of property which Debtor lists on his Schedules as property he owns. As addressed in the ruling on the Motion to Sell, Debtor now presents evidence that he does not own the property but it is in the Barbara Ozobiani Revocable Trust.

A review of the docket shows tat Debtor's Motion To Sell (Dckt. 62) was heard July 16, 2019 and denied. Civil Minutes, Dckt. 85; Order, Dckt. 86.

At the hearing, xxxxxxxxxxxxxx.

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

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

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

2.	**19-23208-E-13 DPC-1**	**PAUL/PAMELA ROBERTS Matthew DeCaminada**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 7-3-19 [19]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on July 3, 2019. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

A. Debtor admitted at the Meeting of Creditors on June 27, 2019 that the listed"garnishment" expenses of $633.78 and $67.33 no longer exist. Debtor additionally admitted that their 20 year old adult son contributes $200.00 per month towards household expenses.

B. Pamela Roberts admitted at the Meeting of Creditors that she no longer resides with Paul Roberts and is living with family with no rental expense. However, Debtor failed to file a change of address.

DISCUSSION

Trustee's objections are well-taken. .

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

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

Debtor is over median income and propose only a 66% dividend to the unsecured creditors. Because expenses are lower and income higher than what is scheduled, Debtor is not providing all projected disposable income.

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

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

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

3. **19-20125-E-13 PGM-4** **ROBERT/DONNA DECELLE** **Peter Macaluso** **CONTINUED MOTION TO CONFIRM PLAN** **6-8-19 [86]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on June 8, 2019. By the court's calculation, 38 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Plan is XXXXXXXXXXX.

The debtors, Robert A. DeCelle and Donna M. DeCelle ("Debtor") seek confirmation of the First Amended Plan. The First Amended Plan provides for $6,540.00 to be paid through April 2019, payments of $2,380.00 for the remaining 57 months of the plan term, and a 0 percent dividend to unsecured claims totaling $66,069.60. Dckt. 88. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee") filed an Opposition on July 2, 2019. Dckt. 96. Trustee opposes confirmation on the basis that Debtor will have to pay $4,760.00 prior to the hearing date.

DEBTOR'S REPLY

Debtor filed a Reply on July 9, 2019. Dckt. 99. Debtor's counsel alleges that a payment of $2,380.00 was made on July 8, 2019, and that all payments will be made by the date of this hearing.

No declaration or other evidence was filed in support of Debtor's Reply.

JULY 16, 2019 HEARING

At the time Trustee filed his Opposition Debtor was current, but with two payments becoming due before the date of this hearing. No evidence has been presented by either party showing whether Debtor is current.

The Trustee did not oppose Debtor's request to continue the hearing to document the alleged payments.

DISCUSSION

At the hearing, xxxxxxxxxxxxxx.

~~The Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.~~

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

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

~~The Motion to Confirm the Chapter 13 Plan filed by Robert A. DeCelle and Donna M. DeCelle ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that the Motion is granted, and Debtor's Chapter 13 Plan filed on June 8, 2019, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to David Cusick ("the Chapter 13 Trustee") for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.~~

4. **19-20238-E-13 BLG-2** **MANUEL SAUCEDO-GONZALEZ AND REGINA SAUCEDO Chad Johnson** **MOTION TO MODIFY PLAN 6-17-19 [43]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on June 17, 2019. By the court's calculation, 43 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

The Motion to Confirm the Modified Plan is denied.

The debtors, Manuel Saucedo-Gonzalez and Regina Saucedo ("Debtor"), seek confirmation of the Modified Plan to cure delinquent plan payments. The delinquency was caused by Debtor's unexpected illness (resulting in hospitalization), which prevented her from working and interrupted monthly income. Declaration, Dckt. 45. The Modified Plan provides for $3,267.00 to be paid in to the plan through March 4, 2019; $4,000.00 on June, 2019; $3,476.00 for the remaining 55 months of the plan; and for a 0 percent dividend to unsecured claims totaling $655.61. Modified Plan, Dckt. 48. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

CHAPTER 13 TRUSTEE'S OBJECTION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on July 15, 2019. Dckt. 58. The Trustee opposed confirmation of the Motion because Debtor is $7,476.00 delinquent under the proposed plan. Trustee states that on July 2, 2019 Trustee received Debtor's personal check for $6,000.00, which Trustee returned. Exhibit 1, Dckt. 47. Trustee notes that an additional payment of $3,467.00 comes due July 25, 2019.

DISCUSSION

The Chapter 13 Trustee asserts that Debtor is $7,476.00 delinquent in plan payments, which represents multiple months of the $3,467.00 plan payment. Before the hearing, another plan payment will be due. Here, Debtor attempted to make a $6,000.00 payments, which payment did not go through. Declaration, Dckt. 59. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

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

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

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

5. **19-22960-E-13 DPC-1** **JOSE OCHOA Chad Johnson** **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P CUSICK 7-2-19 [31]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney, on July 2, 2019. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

A. The debtor, Jose Ochoa ("Debtor"), has not filed a motion to value a secured claim, which Debtor's plan proposes to value the secured claim of the Internal Revenue Service at $16,000.00.

B. Debtor (1) admitted at the Meeting of Creditors to having a $1,300.00 rental expense at the June 27, 2019; (2) admitted at the Meeting of Creditors to no longer having medical coverage listed on Schedule J as a $2,225.00 expense; and (3) Schedule J lists a $109.99 "Self employment [tax]..." expense, which may be inadequate given the $30,000.88 of gross income attributed to Debtor's business.

DISCUSSION

Trustee's objections are well-taken.

Debtor's expenses have been shown to differ from what was stated on Schedule J. Debtor is no longer paying for health insurance, but likely has unlisted expenses for moving costs and self employment taxes. Declaration, Dckt. 33. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable. 11 U.S.C. § 1325(a)(6).

Furthermore, the plan relies on a motion to value secured claim. A review of the docket shows no such motion has been filed. Without the motion being granted, the plan is not feasible. 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 the Chapter 13 Trustee, David Cusick ("Trustee"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

6. **19-22972-E-13 JJC-1** **COLLEEN DAVIS** **Julius Cherry** **MOTION TO VALUE COLLATERAL OF INVESTORS SERVICING CORPORATION** **6-27-19 [17]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on June 27, 2019. By the court's calculation, 33 days' notice was provided. 14 days' notice is required.

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

The Motion to Value Collateral and Secured Claim of First Investors Servicing Corporation ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $7,000.00.

The Motion filed by the debtor, Colleen Davis ("Debtor"), seeks to value the secured claim of First Investors Servicing Corporation ("Creditor"), and is accompanied by Debtor's declaration. Declaration, Dckt. 19. Debtor is the owner of a 2015 Toyota Yaris ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $7,000.00 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).

Proof of Claim, No. 1, was filed by Creditor on June 26, 2019. The Proof of Claim asserts a secured claim in the amount of $9,384.27.

CHAPTER 13 TRUSTEE'S RESPONSE

On July 12, 2019, the Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response to Debtor's Motion. Trustee notes Proof of Claim, No. 1 filed by Creditor states a secured claim in the amount of $9,384.27.

DISCUSSION

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

Debtor's Declaration provides significant factual detail as to the condition of the Vehicle, including damage to the car seats, paint scratches and chips, missing roof trim, and window chips. Dckt. 19. Debtor's testimony is substantial evidence that has rebut the presumption of validity as to the Proof of Claim. *In re Austin,* 583 B.R. 480, 483 (B.A.P. 8th Cir. 2018).

The lien on the Vehicle's title secures a non-purchase money loan to secure a debt owed to Creditor with a balance of approximately $9,384.27. Proof of Claim, No. 1-1. Therefore, Creditor's claim secured by a lien on the asset's title is under-collateralized. Creditor's secured claim is determined to be in the amount of $7,000.00, the value of the collateral. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value Collateral and Secured Claim filed by Colleen 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 First Investors Servicing Corporation ("Creditor") secured by an asset described as 2015 Toyota Yaris ("Vehicle") is determined to be a secured claim in the amount of $7,000.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is $7,000.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

7. **19-22972-E-13** **COLLEEN DAVIS** **OBJECTION TO CONFIRMATION OF**
DPC-1 **Julius Cherry** **PLAN BY DAVID P. CUSICK**
6-24-19 [13]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on June 24, 2019. By the court's calculation, 36 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is overruled.

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

A. Debtor failed to attend the First Meeting of Creditors held on June 20, 2019. Debtor's Attorney contacted the Trustee's office prior to the Meeting to advise that Debtor was unable to attend due to hospitalization and anticipated surgery. The meeting was continued to July 11, 2019.

B. The Plan relies on a Motion to Value the collateral of First Investors, a Class 2 claim. Debtor has failed to file a Motion to Value Collateral.

DISCUSSION

While Debtor failed to appear at the first Meeting of Creditors, a Trustee Report entered on

the docket July 12, 2019 indicates Debtor and Debtor's counsel both appeared at the continued Meeting on July 11, 2019.

A review of Debtor's Plan shows that it relies on the court valuing the secured claim of First Investors Servicing Corporation. Debtor filed a Motion to Value the Secured Claim of First Investors Servicing Corporation, with a hearing set for the same day as this motion. A review of the docket shows the court has granted that motion.

The 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 Chapter 13 Trustee, David Cusick ("Trustee"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is overruled, and Coleen Marie Davis's ("Debtor") Chapter 13 Plan filed on May 9, 2019, is confirmed. Counsel for Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

8. **19-23796-E-13 RJ-1** **SHARON LOCKETT** **Richard Jare** **MOTION TO VALUE COLLATERAL OF ELITE ACCEPTANCE CORP. 7-16-19 [16]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, and Office of the United States Trustee on July 16, 2019. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion to Value Collateral and Secured Claim of Elite Acceptance Corp. ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $1,400.00.

The Motion filed by the debtor Sharon Kay Lockett ("Debtor") to value the secured claim of Elite Acceptance Corp. ("Creditor") is accompanied by Debtor's declaration. Declaration, Dckt. 18. Debtor is the owner of a 2014 Nissan Altima S ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $1,400.00 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).

In the Declaration, Debtor provides specific information concerning this vehicle, including that while a 2014 model, it has 186,000 miles on it. Additionally, "It has deferred maintenance. Has serious hesitation, electrical and electronic gremlins, Dealer repair estimate is high." Declaration ¶ 2, Dckt. 18.

DISCUSSION

The lien on the Vehicle's title secures a purchase-money loan incurred in June 2014, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $13,100.88. Declaration, Dckt. 18. Therefore, Creditor's claim secured by a lien on the asset's title is under-collateralized. Creditor's secured claim is determined to be in the amount of $1,400.00, the value of the collateral. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value Collateral and Secured Claim filed by Sharon Kay Lockett ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of Elite Acceptance Corp. ("Creditor") secured by an asset described as 2014 Nissan Altima S ("Vehicle") is determined to be a secured claim in the amount of $1,400.00, 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 $1,400.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

9.	**14-28961-E-13 MLA-5**	**RODEL MAULINO AND MIMSY ABARA-MAULINO Mitchell Abdallah**	**MOTION TO MODIFY PLAN 6-17-19 [144]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on June 17, 2019. By the court's calculation, 43 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

The Motion to Confirm the Modified Plan is xxxxx.

The debtors, Rodel and Mimsy Maulino ("Debtor"), seek confirmation of the Modified Plan to bring plan payment current based on present income and expenses, due to an August 1, 2018 mortgage payment increase. Declaration, Dckt. 146. The Modified Plan provides for $170,254.12 through April, 2019, with payments of $3,952.71 for the remaining four months of the plan, and a zero percent (0.00%) dividend to unsecured claims totaling $136,440.00. Modified Plan, Dckt. 147. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response on July 15, 2019. Dckt. 157. Trustee notes in the Response that Debtor is current with plan payments, and that the proposed plan competes with 60 months.

TRUSTEE'S AMENDED RESPONSE

Trustee filed an Amended Response on July 19, 2019. Dckt. 160. The Trustee opposes confirmation of the proposed plan, on the basis that it is unclear what filed documents in this case have been signed and when. Trustee notes that Debtor's counsel uses the "/s/" electronic signature, but only specifies a "submitted" date and not an execution date.

Trustee requests that Debtor's Counsel produce physically signed copies of all documents with electronic "/s/Name" signatures.

DEBTOR'S RESPONSE

Debtor filed a Response on July 23, 2019. Dckt. 166. Debtor argues wet signature, paper forms of all the documents were retained, and have been filed as Exhibits in support of the Response. Exhibit A, Dckt. 169.

DISCUSSION

Local Bankruptcy Rule 9004-1(c)(1)(D) states the following:

> Retention Requirements When "/s/ Name" or a Software-Generated Electronic Signature Is Used. When "/s/ Name" or a software-generated electronic signature is used in an electronically filed document to indicate the required signature(s) of persons other than that of the registered user**, the registered user shall retain the originally signed document in paper form for no less than three (3) years following the closing of the case**. **On request of the Court, U.S. Trustee, U.S. Attorney, or other party, the registered user shall produce the originally signed document(s) for review**. The failure to do so may result in the imposition of sanctions on the Court's own motion, or upon motion of the case trustee, U.S. Trustee, U.S. Attorney, or other party.

Federal Rule of Bankruptcy Procedure 9011(a) states:

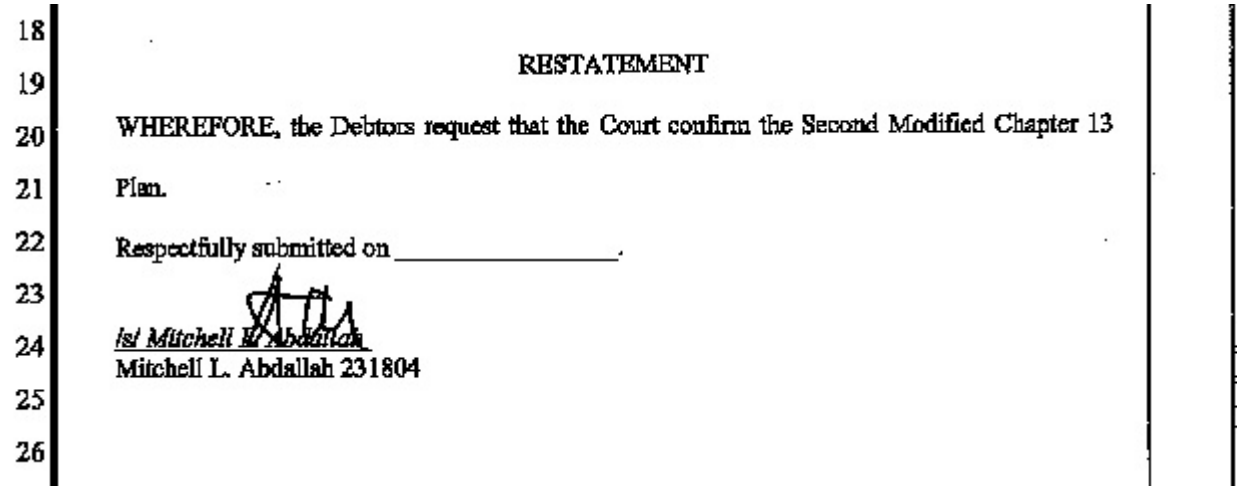
> **Signature**. Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, **shall be signed by at least one attorney of record in the attorney's individual name**. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. **An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party**.

Here, Trustee has requested that the Debtor's Counsel provide the originally signed document in paper form.

Debtor's counsel has filed as Exhibit A several physical form documents. Dckt. 169.

Reviewing the Exhibit, there are some anomalies which could put in question whether what was filed on June 17, 2019, is the same document as now presented to the court as Exhibit A. One example is the document identified as the Motion to Confirm. The Motion filed on June 17, 2019, has a

signature block as follows:



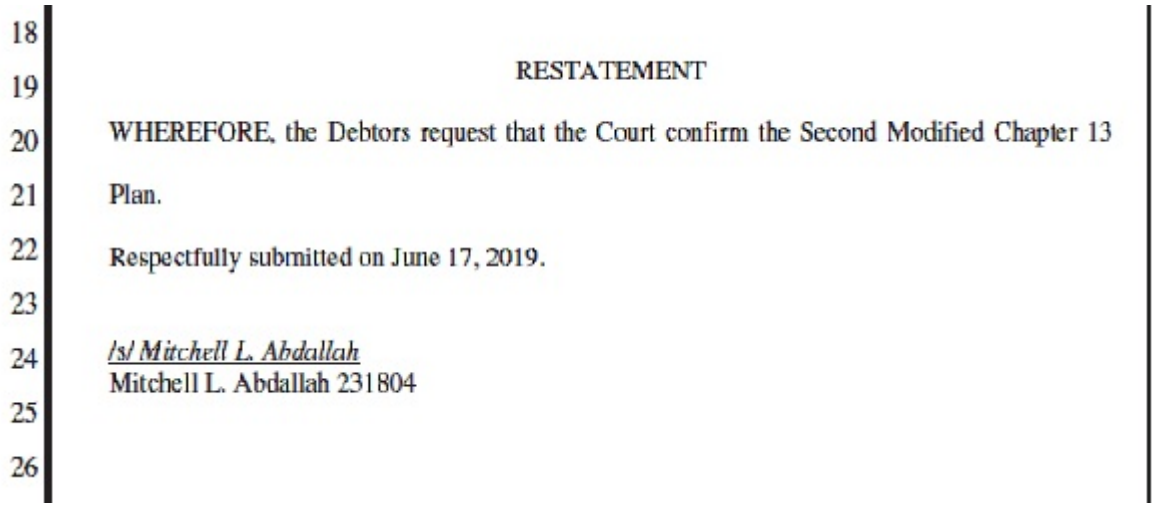
RESTATEMENT

WHEREFORE, the Debtors request that the Court confirm the Second Modified Chapter 13 Plan.

Respectfully submitted on _____.

/s/ Mitchell L. Abdallah
Mitchell L. Abdallah 231804

Dckt. 114 at 2. However, the Exhibit filed shows the signature block for this page to be formatted as follows:



RESTATEMENT

WHEREFORE, the Debtors request that the Court confirm the Second Modified Chapter 13 Plan.

Respectfully submitted on June 17, 2019.

/s/ Mitchell L. Abdallah
Mitchell L. Abdallah 231804

On one of these "identical" motions is a line after the "Respectfully submitted on" language, but on the other no such line exists. If the Motion that was filed is the same as the one signed, then there would be such a line on both. Additionally, one questions why there would be a "/s/ [signature]" on the original motion that is signed by counsel.

The same is true for the copies of the other "original pleadings" filed by Debtor.

At the hearing, **xxxxxxxxxxxxx**

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtors, Rodel and Mimsy Maulino ("Debtor"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Motion to Confirm the Modified Plan is **xxxxx.**

10. 18-25150-E-13 LBG-5 — RICHARD GREENE — Lucas Garcia — MOTION TO DISMISS CASE — 7-11-19 [130]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 11, 2019. By the court's calculation, 19 days' notice was provided. 14 days' notice is required.

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

The Motion to ~~Dismiss is xxxxxxxxxx~~.

The Debtor, Richard Sterling Greene, filed a Motion to Dismiss Case on July 11, 2019. Dckt. 130. The court has reviewed the Motion to Dismiss Case and the Declaration in support filed by Debtor. Dckt. 132.

Debtor provides testimony that he needs to dismiss the case in order to fund the interpleader action in state court over his interest in a partnership. Declaration ¶ 4, Dckt. 132. Debtor argues that due

to the uncertainty of the litigation, reorganization is not possible.

ENTERPRISE'S OPPOSITION

The Enterprise Group ("Enterprise") filed an Opposition on July 24, 2019. Dckt. 134. Enterprise argues the case should either be converted to one under Chapter 7, or dismissed with prejudice. In support of this argument, Enterprise asserts the following:

1. This case was filed in bad faith for the sole purpose of thwarting Enterprise's interpleader action in state court.

2. Debtor's petition included major errors and omissions regarding his assets and liabilities.

3. Debtor has caused significant delay to creditors by filing this case.

4. Debtor indicates in the Motion a possible intent to refile a Chapter 13 case, which could be used to further delay the interpleader action.

DISCUSSION

The authority for a Chapter 13 debtor to seek dismissal of a Chapter 13 case is provided in 11 U.S.C. § 1307(b), which states:

> "(b) On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable."

In enacting § 1307(b), Congress went so far as to state that the court "shall" dismiss the case when requested by the debtor.

The Ninth Circuit Court of Appeals addressed this issue in *Rosson v. Fitzgerald (In re Rosson)*, 545 F.3d 764 (9th Cir. 2008), in which the debtor sought to dismiss a Chapter 13 case rather than having it converted to one under Chapter 7. The Ninth Circuit has determined that even the election to dismiss a Chapter 13 case pursuant to 11 U.S.C. § 1307(b) ("shall" dismiss language of statute) is subject to the requirement that the election be in good faith. The Ninth Circuit found that it was not unreasonable for the bankruptcy judge to conclude that the Chapter 13 debtor's conduct in *Rosson* indicated that the dismissal was sought to "abscond with the funds" in the bankruptcy estate which could properly be disbursed to creditors. " In sum, it is clear from the record that the bankruptcy court acted "to prevent" what it reasonably perceived to be "an abuse of process." 11 U.S.C. § 105(a). " *Id.* at 447.

In considering whether a debtor is acting in bad faith, "a bankruptcy judge must review the totality of the circumstances." *In re Eisen*, 14 F.3d 469, 470 (9th Cir. 1994). Under the "totality of the circumstances" test, the court examines whether the debtor misrepresented facts in his petition or plan, unfairly manipulated the Bankruptcy Code, or filed his Chapter 13 petition or plan in an inequitable manner. *Id.* Debtor's history of filings and dismissals is relevant in determination of "bad faith." *Id.*

As subsequently discussed by the Circuit in *Khan v. Barton (In re Khan)*, 846 F.3d 1058, 1065-1066 (9th Cir. 2017):

> The Debtors also assert that the bankruptcy court clearly erred when it found bad faith, and abused its discretion when it converted their Chapter 13 proceedings to Chapter 7 proceedings. We disagree. The bankruptcy court was required to and did consider "the totality of the circumstances." *Eisen v. Curry (In re Eisen)*, 14 F.3d 469, 470 (9th Cir. 1994) (*per curiam*) (internal quotation marks omitted). However, the Debtors point to the factors we outlined in *Leavitt*, 171 F.3d at 1224. Those are:
>
> > (1) whether the debtor misrepresented facts in his petition or plan, unfairly manipulated the Bankruptcy Code, or otherwise filed his Chapter 13 petition or plan in an inequitable manner;
> >
> > (2) the debtor's history of filings and dismissals;
> >
> > (3) whether the debtor only intended to defeat state court litigation; and
> >
> > (4) whether egregious behavior is present.
>
> *Id.* (citations, internal quotation marks, and brackets omitted)
> . . .
>
> [T]he Debtors do not appear to recognize that the factors are simply factors to consider and that not every one of them must be met. That rather blinds them to the overarching requirement that what matters is "the 'totality of the circumstances.'" *Eisen*, 14 F.3d at 470; *see also Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002) (a court must decide "'in the light of all militating factors'"). The BAP recognized that. *See Khan* I, 523 B.R. at 185. As the BAP put it: "Even if a debtor presents more than one purpose for filing, the third Leavitt factor does not fail to support cause if the other purpose also reflects bad faith. And, once again, the third factor is considered in a totality of the circumstances context." *Id*. at 186.

The Debtor commenced this bankruptcy a year ago in August of 2018. He has steadfastly argued that he has valuable assets that need to be protected under the bankruptcy laws and he would do so through a Chapter 13 plan. When the bankruptcy case was dismissed due to a stumble in getting all of the required documents filed at the start of the case, the court vacated the dismissal so Debtor could proceed with his necessary Chapter 13 case. Civil Minutes and Order, Dckts. 24, 25.

When facing opposition from the Chapter 13 Trustee to a proposed Chapter 13 Plan, the Debtor discussed unscheduled (but stated to have been disclosed assets) owned by his wife in Thailand. Response, Dckt. 53.

In response to the opposition filed by his “nemesis creditor,” Debtor discusses the ongoing dispute as to the value of his stated 8.94% interest in Enterprise. Dckt. 56. As is discussed in connection with the motion for relief from the stay by Enterprise to proceed with litigation to have the

Bankruptcy Estate's (the Debtor's which became property of the Bankruptcy Estate upon the commencement of this case). Enterprise and its other partners assert that the 8.94% partnership interest has a value of only $36,000, it having been terminated by the partnership, which the Debtor states it is worth $2,500,000.

The Debtor's "plan" was to have his bankruptcy "Plan" provide for selling the interest to a relative and circumvent the state court action to determine what interest in the partnership was property of the Bankruptcy Estate in this case.

The court denied Enterprise's initial efforts to have the stay modified, and have this court abstain from exercising the exclusive jurisdiction provided in 28 U.S.C. § 1334(3) over property of (and determination of what is) the bankruptcy estate. Civil Minutes and Order, Dckts. 68, 69. The court noted the Debtor's shortcomings in a Chapter 13 plan which merely sought to presumptively announce that the bankruptcy estate's interest in the partnership had a $2.5 Million value and terminate the litigation to determine such rights and interests, stating:

> **Hole in Proposed Plan Concerning Disputed Ownership**
>
> Debtor has now filed an amended proposed Chapter 13 plan. In the Additional Provisions of the First Amended Plan, Debtor provides for the sale of the partnership interest at issue. Dckt. 64 at 7. However, the proposed Amended Plan does not address the open dispute concerning of the rights of the Bankruptcy Estate and the Partnership. Merely because Debtor says it is in dispute does not mean that Debtor's conclusions are correct. The filing of a bankruptcy case does not deprive parties of their right to have disputes adjudicated and their property rights and interests protected.
>
> The court concludes that everyone will be better off starting with a new, clean motion. The parties can prepare credible, proper evidence, provide copies of the documents at issue, and how adjudicating the property rights, if any, of the bankruptcy estate in state court is consistent with the efficient administration of this bankruptcy case.

Civil Minutes, Dckt. 68.

Debtor then filed a Motion to Sell the partnership interest, rather than merely having it be a term of the new proposed Chapter 13 Plan. Motion, Dckt. 79. In ruling on the Motion to Sell, the court provides an extensive review of the partnership agreement and applicable California law. Civil Minutes, Dckt. 111. At the hearing, and in light of the court's discussion of applicable law, the Debtor concluded that the motion was "premature." *Id.*

Though the court made several references to and had pointed discussion about this court's exclusive jurisdiction over property of the bankruptcy estate and the court's ability to promptly and efficiently adjudicate those interests and rights in less than one year, including diligent discovery and trial, Debtor sought no such relief from this court.

Enterprise filed a new Motion for Relief From the Stay on May 20, 2019. Dckt. 102. The court summarizes the Debtor's opposition to the renewed Motion for Relief to be:

DEBTOR'S OPPOSITION

Debtor filed an Opposition on June 11, 2019. Dckt. 115. Debtor argues the State Court Litigation is attempting to take away the Debtor's interest in the partnership based on a disputed notice of cash call by the partnership, and that the attempt should be seen as a repossession of property.

Debtor argues further (1) the state court is not an adequate venue to determine whether the Debtor's partnership interest is property of the Estate; (2) relief should not be granted because Debtor has an offer for the sale of the partnership interest; (3) Debtor has a quasi-trustee right to exercise the ability to unwind the action as the filing of the bankruptcy was within 14 days of the filing of the interpleader that purports to divest him of his 8.94 percent partnership interest.

Civil Minutes, Dckt. 122.

In ruling on the Motion for Relief and considering the Debtor's Opposition and conduct in this case, the court stated:

In a hearing on Debtor's first Motion To Sell the partnership interest, the court in denying the motion provided an extensive review of Bankruptcy and California partnership law. Civil Minutes, Dckt. 110.

The facts of this Contested Matter are fairly straight forward. The Debtor, prepetition, violated a default provision of his partnership agreement which triggered a right to buyout. Because the Debtor will receive less for his partnership interest through a buyout than he otherwise would (either by selling his right to profits and losses, which is the only transferable part of the partnership interest (Cal. Corp. Code § 16502), or by retaining the interest and collecting future dividends), he is desperately grasping at whatever other legal options he has.

These options have included attempting to assume the contract pursuant to 11 U.S.C. § 365, attempting to sell the interest to family members, and now attempting to use bankruptcy avoidance powers.

Movant's position has been constant through each motion–Movant seeks only to determine its rights under the partnership agreement in the State Court Litigation already commenced for that purpose.

Debtor has not presented good cause to deny relief here, where there is obviously good cause for granting relief.

Debtor argues state court is not an adequate venue. This argument is not well-taken. The California courts are perfectly apt at interpreting California contracts and partnership agreements pursuant to California law. Moreover,

> Debtor has not actually proposed resolving the matter in state court, instead proposing several ancillary litigation ideas which might skirt around Debtor's default in the partnership agreement.
>
> Debtor knowing that the dispute exists could have chosen to litigate the issue in this bankruptcy court. However, Debtor has not taken any action to so do. Debtor's response consists of little more than, "no, let's not determine the estate's interest in the partnership, I say it's mine, let's just go with that."
>
> Finally, as the court noted at the hearing on the Motion To Sell, Debtor's partnership interest, whatever that may be, is perfectly saleable. Debtor can sell all his interest in the partnership, which interest would later be subject to a determination in state court.
>
> Granting relief herein will allow the parties to determine their rights in the appropriate forum, eliminating the significant delay Debtor has caused in trying to come up with an "out."

Civil Minutes, Dckt. 122 at 3-4.

Debtor now argues that with the apparent "surprise" that he must litigate the rights and interests in the partnership which he asserts he owns, and now the bankruptcy Estate owns, he needs to "free up his income streams and possibly need[s] to borrow money or sell assets to fund that litigation." Opposition, Dckt. 130. But this has been known since the case was filed. If Debtor needs to borrow, the Bankruptcy Code gives a Chapter 13 debtor, exercising the rights of a trustee, the ability to obtain special borrowing orders and giving lenders rights and protections not available to the "normal" lender providing someone financing.

Enterprise opposes the Motion, providing a detailed analysis of the law, facts, and events that have transpired in this case. Opposition, Dckt. 134. Enterprise seeks to have the Motion denied and the Debtor suspended in the limbo of this Chapter 13 case. If Debtor is unable to propose and prosecute a confirmable plan, such "limbo" could be perceived as a state court litigation strategy to neuter Debtor's ability to prosecute the rights and interests of the Bankruptcy Estate.

The Opposition foresees a new bankruptcy case filed if this one is dismissed. That is not unreasonable though, as Debtor has only filed this case and has not demonstrated that he is a serial filer. Additionally, if a new case were filed, it would be assigned to the judge who has this case, as is the court's standard policy to avoid the inadvertent appearance of judge shopping.

Enterprise suggests that if the court grants the Motion and dismisses the case, it should be with prejudice pursuant to 11 U.S.C. § 109(g) and § 349(a). A dismissal with "prejudice" as provided in 11 U.S.C. § 349(a) "merely" means that the debts which could have been discharged in this case are never dischargeable. Such relief does not prohibit the filing of future cases. The facts and circumstances of this case do not warrant such extraordinary relief (which Debtor would perceive as a forfeiture of such rights).

With respect to 11 U.S.C. § 109(g), that provision does not grant the power to a bankruptcy judge to impose an injunction prohibiting future bankruptcy case filings:

> (g) Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if—
>
> (1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or
>
> (2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

These are statutory grounds imposed by Congress, not "mere" equitable powers of the court to issue injunctions. While such power does exist pursuant to the inherent powers and the reservoir of powers granted in 11 U.S.C. § 105(a), such relief is requested and such powers exercised through adversary proceedings. Fed. R. Bankr. P. 7001.

The court is faced with a dilmeia. Debtor has demonstrated an inability to prosecute, defend, and have determined the rights and interests of the Bankruptcy Estate with respect to the Estate's interests in the partnership. Even at this late juncture and with relief from the stay granted, the Debtor could prosecute a plan that includes the adjudication of these rights, specifies how Debtor will proceed, and reimposes a stay of the state court litigation if the Debtor is seeking that determination in federal court. But the Debtor has forsaken such action to preserve the rights and interests he asserts exist for the Bankruptcy Estate.

If the court concludes, as Enterprise argues, that the Debtor has not manifested good faith in the year long prosecution of this case and such conduct warrants there not being a dismissal, then the court needs to consider other alternatives. One would be to convert the case to one under Chapter 7. This would effectively give Enterprise what it seeks, the opportunity to have the rights and interests of the Bankruptcy Estate to be considered, advanced, and litigated (if necessary) by an independent, experienced fiduciary for the Bankruptcy Estate who would be represented by knowledgeable and experienced bankruptcy and business litigation counsel.

For Debtor, a Chapter 7 trustee, while at a cost, could do the best job to assert and recover what Debtor asserts are extraordinarily valuable rights and return (even after the expense of administration) a large surplus from the Bankruptcy Estate to Debtor.

However, if the court were to convert the case to one under Chapter 7, it would necessarily include vacating, on an interim basis, the order modifying the stay for the state court litigation to allow the Chapter 7 trustee to determine whether any dispute exists, if so whether it can be promptly settled, or that litigation, whether in state or federal court, would be required. If the court were not to do this as part of the conversion order, Enterprise could expect that an experienced Chapter 7 trustee and counsel would immediately seek such relief.

At the hearing, **xxxxxxxxxxxxxxxxxxxx**

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

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

The Motion to Dismiss the Chapter 13 case filed by the Debtor, Richard Sterling Greene ("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 is xxxxxxxxxxxxx.

11.	**18-27720-E-13** **TLW-4**	**DAVID RYNDA** **Tracy Wood**	**MOTION TO AVOID LIEN OF DAVID HICKS** **5-21-19 [217]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor on May 21, 2019. By the court's calculation, 70 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid Judicial Lien is XXXXXXXXX.

This Motion requests an order avoiding the judicial lien of creditor David Hicks ("Creditor") against property of the debtor, David Jerome Rynda ("Debtor") commonly known as 9436 Windrunner Ln, Elk Grove, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $73,387.16. Exhibit D, Dckt. 217. [FN. 1.] An abstract of judgment was recorded with Sacramento County on December 15, 2015, that encumbers the Property.

PRIOR MOTIONS TO AVOID LIEN

This is the third Motion filed seeking to avoid the lien of Creditor. See Dckts. 141, 185. At the hearing on the First Amended Motion To Avoid Lien, the court noted service and substantive deficiencies in the Motion, and Debtor accepted dismissal without prejudice of that Motion. Civil Minutes, Dckt. 200.

In filing this motion, the service deficiency was address by Debtor providing notice by U.S. mail to Creditor. Proof of Service, Dckt. 220. However, the substantive issues stated by the court previously as follows were not addressed:

GROUNDS STATED IN MOTION AND DEBTOR'S DISPUTED INTEREST IN THE PROPERTY

The Motion states with particularity (Fed. R. Bankr. P. 9013) the following grounds upon which the requested relief is based:

1. As shown in Schedule A of the filed case, the Debtor has an interest in the Property. Motion ¶ 3, Dckt. 185.

2. Debtor asserts the value of the Property is $399,334.00 at the time of filing. *Id.*, ¶ 4.

3. Debtor has claimed an exemption in the amount of $175,000.00 in the Property. *Id.,* ¶ 5.

4. Creditor's judicial lien impairs the $124,864.28 exemption claimed by the Debtor. *Id.*, ¶ 10.

What the Motion leaves out is that Debtor's interest in the Property is disputed. On February 11, 2019, Debtor filed a Complaint seeking declaratory relief, quiet title, and objection to relief from stay filed by the defendant, Elina M. Machado ("AP Defendant"). *Rynda v. Machado et al*, Bankr. E.D. Cal. No. 19-02023, Complaint, Dckt. 1.

Debtor has not explored what if any effect the outcome of this Adversary Proceeding would have on the present Motion.

Total Liens on the Property

The Motion states that the total superior liens on the Property above the Creditor's judicial lien total $376,082.56. However, it is unclear whether Debtor is running through the correct calculations here.

Debtor has amended Schedule D twice since filing this case on December 12, 2018.

Debtor's first Schedule D was filed December 26, 2018. Dckt. 12.

Debtor listed the following secured claims:

Creditor	Claim Amount	Type of Lien	Other Info
Erika Leyva	$10,000.00	DOT	(Debtor paying since 2014 but not obligated) Incurred 11/30/18
Erika Leyva	$15,000.00	DOT	(Debtor paying since 2014 but not obligated) Incurred 11/30/18
John J. Rynda	$100,000.00	DOT	(Debtor paying since 2014 but not obligated) Incurred 11/30/18
Lakeside Community Owner's Association	$3,618.44	Assessment Lien	(Debtor paying since 2014 but not obligated) Incurred 8/24/2017
Ocwen Loan Servicing, LLC	$169,552.45	DOT	(Debtor paying since 2014 but not obligated)
U.S. Department of Housing and Urban Dev	$66,903.08	DOT	(Debtor not obligated and not paying)

Debtor filed the First Amended Schedule D on January 27, 2019. Dckt. 39. There, Debtor removed statements that he was paying on certain loans since 2014 although not obligated. The First Amended Schedule also changes the amount owing to Lakeside Community Owner's Association to $4,731.00., and clarifies the claim of Ocwen Loan Servicing, LLC was incurred in 2014.

Debtor filed a Second Amended Schedule D on February 16, 2019. Dckt. 94. The Second Amended Schedule adds the following claim:

Consolidated Utilities Billing & Service	$2,642.47	Statutory Lien	Incurred 2014-2018

Debtor states in the Motion that all the liens listed on Second Amended Schedule D are superior to the Creditor's lien. Dckt. 185. Debtor totals the liens to be $376,082.56.

However, at a glance it is clear that the judgment lien of Consolidated Utilities Billing & Service is junior, and would be avoided first in a 11 U.S.C. § 522(f) avoidance action.

Additionally, several of the secured claims (including a $100,000.00 DOT apparently held by a family member) are stated on Schedule D to have been incurred or the lien given in 2018, less than a month before filing the bankruptcy case. Such secured claims would appear to be fraudulent conveyances or preferential transfers that the Chapter 13 Debtor has the fiduciary duty of a trustee to avoid for the benefit of the bankruptcy estate and creditors pursuant to 11 U.S.C. §§ 547 and 548. [FN. 1]

FN. 1. If there are avoidable transfers, whether as a preference or a fraudulent conveyance, such transfers are "preserved" for the benefit of the bankruptcy estate and creditors pursuant to 11 U.S.C. § 551. Avoided transfers, such as an avoided transfer in the form of a deed of trust, come ahead of a homestead exemption, just as would the consensual deed of trust.

Review of Claims Filed

No proofs of claims have been filed by:

Erika Leyva;

John J. Rynda;

U.S. Department of Housing and Urban Dev;

or

Consolidated Utilities Billing & Service.

Other than the Schedules, Debtor offers no evidence of these obligations, the liens relating thereto, or their respective priority as to Debtor's interest in the Property. It may be that the liens encumber interests, if any, of other persons in the property and not the Debtor's interest that is property of the bankruptcy estate.

Id.

DISCUSSION

Failure to Comply With Local Rules

Debtor filed the Motion to Avoid Judicial Lien and Exhibits in this matter as one thirty-three page electronic document. That is not the practice in the Bankruptcy Court. "Motions, notices,

objections, responses, replies, declarations, affidavits, other documentary evidence, exhibits, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." LOCAL BANKR. R. 9004-2(c)(1).

These document filing rules exist for a very practical reason. Operating in a near paperless environment, the motion, points and authorities, declarations, exhibits, requests for judicial notice, and other pleadings create an unworkable electronic document for the court (some running hundreds of pages). It is not for the court to provide secretarial services to attorneys and separate an omnibus electronic document into separate electronic documents that can then be used by the court.

Debtor also filed the present Motion with DCN "TLW-4." That DCN was also used for two other motions. *See* Dckts. 162, 190. Local Bankruptcy Rules require the use of a new Docket Control Number with each motion. LOCAL BANKR. R. 9014-1(c). Here, the moving party failed to use a Docket Control Number. That is not correct.

Additionally, the Notice of Motion filed is somewhat unclear. The Notice states:

> PLEASE TAKE FURTHER NOTICE THAT pursuant to Local Bankruptcy Rule 9014-1(f)(2) regarding opposition.

Notice, Dckt. 218(emphasis in the original). However, the contents of the Notice go on to state opposition to the Motion must be in writing filed 14 days before the hearing (the procedure provided for by 9014-1(f)(2)).

Not complying with the Local Bankruptcy Rules is grounds for an appropriate sanction. LOCAL BANKR. R. 1001-1(g), 9014-1(c)(l). In this bankruptcy case, counsel for Debtor has regularly failed to comply with the Local Rules.

At the hearing, xxxxxxxxxxxxxx.

Lien Avoidance

As discussed above, at the prior hearing several issues were raised by the court that do not appear to have been addressed, including the disputed ownership of the Property, the correct 11 U.S.C. § 522(f) lien avoidance calculation, and the possibility that several of the liens on the Property are avoidable transfers that the Debtor and Debtor's counsel must prosecute for the benefit of the bankruptcy Estate.

Since the prior hearing, Proofs of Claim, Nos. 9 and 10 were filed for creditors Erika Leyva and John Rynda, respectively. The Leyva claim is asserted in the amount of $25,000.00, with the deed of trust recorded on November 30, 2018. The Rynda claim is asserted to be in the amount of $100,000.00, with the deed of trust recorded on November 30, 2018.

But Erika Leyva has not filed the proof of claim–it has been Debtor's counsel. While a debtor may file a proof of claim when a creditor fails to do so, such is generally only when it is a secured or disputed claim and the bankruptcy estate can gain from such claim and adjudication of rights.

Attached to Proof of Claim No. 9 is a copy of a deed of trust that was recorded on November

30, 2018. Proof of Claim No. 9, p. 4. The obligation secured is identified in the deed of trust as a $10,000 promissory note. A second deed of trust is also attached, which has a recording date of November 30, 2018, and the obligation secured is identified as a $15,000 promissory note. *Id.* at 9. No copies of either of the two promissory notes are included with Proof of Claim No. 9.

In Part 2 Section 8 of Proof of Claim No. 9, Debtor provides no information as to the basis for the asserted obligation. In describing the deed of trust, it is stated that the deed of trust having a recording date of November 30, 2018 is to "[e]nsure repayment of loans made to Debtor totaling $25,000 in July and August of 2018."

The loan antedates the recording date by four months.

Proof of Claim No. 10 in the amount of $100,000 was filed by Debtor for John Rynda. A deed of trust with a recording date of November 30, 2019, for which the obligation is identified as a $100,000 promissory is attached. No copy of the promissory note is attached to Proof of Claim No. 10.

The basis of the obligation stated by Debtor on Proof of Claim No. 10 that was filed for John Rynda is:

> "Creditor incurred $100,000 in debt assisting Debtor to purchase shares of Rynda's #1 Insurance, Corp from Carolina Rynda's Ch. 7 Trustee's auction sale on behalf of Debtor in 2009. Debtor is liable to creditor for reimbursement, and therefore executed a note and deed of trust once Debtor found a way to record his interest in his home at 9436 Windrunner Ln, Elk Grove, CA 95758 just prior to filing his bankruptcy."

Proof of Claim No. 10, Part 2 Section 8, p. 2.

This statement by Debtor under penalty of perjury states/admits/discloses that the obligation upon which this claim arose was in 2009, an obligation that antedates the filing of this case by nine years. It is also curious that a purported creditor with a purported six figure claim does not file a proof of claim or appear to protect the purported six figure claim and rights.

A review of the court's files does not disclose any adversary proceedings filed to avoid these liens, which when avoided would be preserved for the benefit of the bankruptcy Estate. Additionally, there appears to be at least one facially obvious affirmative defense to the obligation asserted in Proof of Claim No. 10.

At the hearing, xxxxxxxxxxxxxx.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by David Rynda ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is XXXXXXXXXX.

12. 18-27720-E-13 TLW-5 | **DAVID RYNDA** | **Tracy Wood** | **MOTION TO CONFIRM PLAN** | **5-21-19 [213]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on May 22, 2019. By the court's calculation, 69 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is denied.

The debtor, David Jerome Rynda ("Debtor"), seeks confirmation of the Amended Plan. The Amended Plan provides for payments of $1,987.00 for 1 month, $2,197.19 for 1 month, and $2,470.52 for 58 months. Amended Plan, Dckt. 216. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on July 9, 2019. Dckt. 225. Trustee argues Debtor is $1,814.35 delinquent in plan payments under the proposed plan, and notes that the plan contains a summary of state court litigation in the additional provisions.

MACHADO'S OPPOSITION

Elina Machado filed an Opposition on July 16, 2019. Dckt. 228. Machado argues:

1. Debtor is delinquent in plan payments.

2. Debtor includes a statement regarding litigation in the plan.

3. The plan was not proposed in good faith because it does not provide specific courses of action in the event Debtor loses or wins in the dispute of ownership of real property.

4. Debtor is paying the claims of Erika Leyva and John Rynda $100.00 monthly.

DISCUSSION

The Chapter 13 Trustee asserts that Debtor is $1,814.35 delinquent in plan payments, which represents less than one month of the $2,470.52 plan payment. Before the hearing, another plan payment will be due. According to the Chapter 13 Trustee, the Plan in § 2.01 calls for payments to be received by the Chapter 13 Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

The court has raised, in the hearings on motions to avoid the lien of David Hicks, that creditors Erika Leyva and John Rynda had liens recorded on the eve of bankruptcy. Such secured claims would appear to be fraudulent conveyances or preferential transfers that the Chapter 13 Debtor has the fiduciary duty of a trustee to avoid for the benefit of the bankruptcy estate and creditors pursuant to 11 U.S.C. §§ 547 and 548.

Where those claims are treated as a Class 1 and receiving monthly payments, this plan potentially discriminates against other unsecured creditors. 11 U.S.C. § 1322(b)(1).

At the hearing, **xxxxxxxxxxxxxx**

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

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

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

appearing,

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

13. **17-22333-E-13 JCW-1** **THOMAS WARREN** **Lucas Garcia**

CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY
5-24-19 [71]

SELECT PORTFOLIO SERVICING, INC. VS.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, interested parties, and parties requesting special notice on May 24, 2019. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

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

The Motion for Relief from the Automatic Stay is xxxxxxxxxxx.

Select Portfolio Servicing, Inc., servicing agent for U.S. Bank National Association, as trustee, on behalf of the holders of the Home Equity Asset Trust 2005-4 Home Equity Pass Through Certificates, Series 2005-4 ("Movant") seeks relief from the automatic stay with respect to the debtor, Thomas Edward Warren's ("Debtor"), real property commonly known as 11563 Quartz Drive Unit 3, Auburn, California (the "Property"). Movant has provided the Declaration of Kendall Proeun to

introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Kendall Proeun Declaration provides testimony that Debtor has not made 8 post-petition payments, with a total of $1,715.39 in post-petition payments past due.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be $30,735.56, as stated in the Kendall Proeun Declaration, while the value of the Property is determined to be $78,000.00, as stated in Schedules B and D filed by Debtor.

CHAPTER 13 TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response on June 11, 2019. Dckt. 78. Trustee notes Debtor is delinquent $6,521.00 under the confirmed plan, and that there is a pending motion to dismiss the case.

JUNE 25, 2019 HEARING

At the June 25, 2019 hearing, the court continued the hearing to provide Debtor's Counsel the opportunity to address the deficiencies in the evidence (or lack thereof) provided in support of Debtor's sister's assertion that Debtor is legally incompetent. The court is considering referring the case to Adult Protective Services for the appointment of both a personal representative and recommended appointment of a conservator. The court is also considering the issuance of an order to show cause as to why Debtor's sister and counsel should not pay all of the costs and expenses of a conservator and personal representative out of the Debtor's remaining assets. The court is also considering referral of this case to the U.S. Attorney and the Federal Defender for the Eastern District of California for recommendations as to the available resources for incompetent parties in federal judicial proceedings.

DECLARATION IN RESPONSE TO MOTION FOR RELIEF FROM AUTOMATIC STAY

On July 7, 2019 Debtor's Counsel filed a Declaration in response to Select Portfolio Servicing's motion for relief from automatic stay. Dckt. 83. The Declaration states the following:

A. Peter Macaluso was retained as Debtor's Counsel on July 1, 2019.

B. Debtor's Counsel has drafted a Declaration of Susan Rose and a Declaration for the attending Doctor to sign, attesting to Debtor's "condition". Debtor's Counsel anticipates a Motion for Omnibus/Nomination of Representative will be filed prior to the continued hearing on the matter, and requested this matter be further continued.

C. The Property of Debtor has been listed for sale and a Motion to Employ Realer will be filed on or before the continued hearing date. Exhibit A, Dckt. 84

JULY 16, 2019 HEARING

At the July 16, 2019 hearing, the court again continued the hearing to allow for the appointment of a personal representative. Civil Minutes, Dckt. 90.

SUPPLEMENTAL RESPONSE

A Supplemental Response to the Motion was filed July 23, 2019. Dckt. 99. The Response states a Motion for Omnibus Relief Upon Incapacitation of Debtor was filed, along with a Motion To Employ realtor to market Debtor's property.

MOTIONS TO EMPLOY AND FOR OMNIBUS RELIEF

Since the July 16 hearing, a Motion to Employ Michael Snell as a real estate broker (Dckt. 91) was filed , and granted on July 22, 2019. Dckt. 93.

On July 23, 2019, a Motion For Omnibus Relief Upon Incapacitation of Debtor was filed. Dckt. 94. The Motion For Omnibus Relief seeks to substitute Susan Rose as successor-in-interest, waive the requirement of 11 U.S.C. § 1328 for Debtor, and for the Chapter 13 case to proceed as though Debtor were not incapacitated.

In support of the proposition that Debtor lacks capacity, the Omnibus Motion states the following:

1. As stated in the declaration of Susan Rose, the debtor is being cared by a care facility as directed by Susan Rose, after executing the power of attorney.

2. As states in the declaration of Susan Rose, the location is presently in Los Angeles, but upon the sale of the real property is intended to be used to move the debtor to Fresno to be closer to his sisters.

3. As stated in the declaration of Susan Rose, the deceasing [sic] ability of the debtor to care for himself.

4. As stated in the declaration of Susan Rose, the preceding year the debtor has been removed from his home, relocated to a Fresno care home, and now to a care home in Los Angeles.

5. As stated in the declaration of Susan Rose, the debtor does not have the capacity to manage his own affairs, and resist fraud or undue influence.

While the Omnibus Motion references a declaration of Debtor's current doctor, no declaration is on file currently.

The Declaration of Susan Rose presents some odd testimony–which testimony is purported to be within Rose's personal knowledge. Some of the peculiar testimony is as follows:

1. The intent of this document is to comply with and serve as an Affidavit under California Probate Code Section 13100 and pursuant to California Code of Civil Procedure §377.32(a). Declaration ¶ 1, Dckt. 97.

Here, Rose is referencing code sections which she almost certainly does not have personal knowledge of.

California Probate Code § 13100 relates to the estate of a decedent - a dead person. California Code of Civil Procedure § 377.32(a) also relates to a decedent's - dead person's - successor. Here, we are presented with the reasonably "simple" issue of appointing a successor in interest when there is an incompetent or deceased debtor as provided in Federal Rule of Civil Procedure 25, Federal Rules of Bankruptcy Procedure 1016 and 7025.

2. I am the successor in interest to Thomas Edward Warren, as defined in Section 377.11 of the Code of Civil Procedure, and succeed to their interest in the above-entitled proceeding. *Id.*, ¶ 4.

Here, Rose offers her legal conclusion that she is a successor in interest as defined by Section 377.11 of the Code of Civil Procedure. This is not credible personal knowledge testimony from someone without a legal education.

3. No other person has a superior right to commence the above-entitled proceeding or to be substituted for Thomas Edward Warren in the above-entitled proceeding. *Id.*, ¶ 4.

This is another legal conclusion without explanation.

4. The current gross fair market value of the **decedent**'s real and personal property in California, excluding the property described in the California Probate Code Section 13050, does not exceed $150,000.00. *Id.*, ¶ 7(emphasis added).

Here, Rose concludes that Debtor has died. Since Debtor has not actually passed away (as reflected in all other pleadings), this testimony further demonstrates Rose is testifying as to things not within her personal knowledge. Or, Rose possibly did not read the declaration she signed.

Also here, Rose is providing her lay opinion as to the value of Debtor's property. While the owner of property is deemed to have competency to make such expert testimony, it is unclear what basis Rose has to make such testimony.

5. An inventory and appraisement of the personal property in the **decedent's** estate is specified on Schedule B of the bankruptcy petition. *Id.*, ¶ 8(emphasis added).

Again Rose addresses Debtor as "decedent."

6. A description of the property to be paid, transferred, or delivered to the undersigned under the provisions of California Probate Code Section

> 13100 are included in the previously filed Chapter 13 petition, amendments, and Chapter 13 plan.
>
> The undersigned requests that the described property be paid, transferred, or delivered to the undersigned. *Id.*, ¶¶ 9-10.

Here Rose addresses herself as "the undersigned."

DISCUSSION

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because "cause" is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff'd sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments that have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

INCOMPETENCY OF DEBTOR

This court has been barraged with ineffective attempts by Debtor's sister, Susan Rose, and Debtor's attorney to have a personal representative appointed due to Debtor being mentally incompetent. *See* Civil Minutes, Dckt. 64, for discussion of latest efforts. This has been sought notwithstanding Debtor's sister asserting that the Debtor was legally competent to sign a post-petition power of attorney in favor of the sister on September 27, 2018.

On Schedule A/B Debtor, to the extent he was competent when the case was filed, states that the property securing Movant's claim has a value of $78,000.00. Dckt. 11 at 3. Movant's claim is only $30,000, meaning that this incompetent debtor is looking at losing $50,000 because his sister and counsel cannot prosecute a motion for appointment of a personal representative.

As discussed in the Civil Minutes (Dckt. 64) referenced above, the court was not impressed with the two line expert "to whom it may concern" note (not testimony) from a person identified as an "MD" that the Debtor "is not capable of making complex, legal and financial decisions. . . ." Dckt. 62 at 2. This could be said of many "least sophisticated consumer debtors" who seek relief in the bankruptcy court.

In her latest Declaration (Dckt. 54) Debtor's sister testifies under penalty of perjury that the Debtor was "released to my [Sister's] care" in the summer of 2018. Declaration ¶ 3; Dckt. 54. She continues to testify that while in her "care," Debtor's sister noted a deterioration in the Debtor's mental

health. *Id.*, ¶¶ 4, 5.

Because of his deteriorating mental health, Debtor's sister took him to an attorney to obtain a power of attorney in favor of the sister. She testifies that both she and the attorney concluded that Debtor had sufficient competency to give the power of attorney so his sister could act for him in his legal and financial dealings. *Id.*, ¶¶ 6, 7.

With the power of attorney, sister owes fiduciary duties to Debtor. Debtor's counsel owes duties to his client.

Unfortunately, sister and Debtor's counsel, in fulfilling their duties to the Debtor, have only given the court "sister wants to" and "here is a two line note (not expert testimony under penalty of perjury) saying Debtor cannot handle complex legal matters" explanations. While the court has no doubts about Debtor's counsel's ethics, the rules and fulfilling of duties cannot be selectively applied and counsel be given a pass because "he's a good guy."

In reality Debtor's sister and counsel have given the court nothing more than, "sisters says put her in charge, you don't need to see the debtor, you don't need any expert testimony, just give the sister the keys to the Debtor's kingdom."

Now the court sees that Debtor's case is crumbling and those responsible for, and having fiduciary duties to, Debtor are allowing Debtor's rights, interests, and property to be lost.

Though a simple motion, supported by simple expert (independent) doctor testimony, presented by a special counsel (whose credibility on this issue had not been squandered as it has by Debtor's current counsel) to show this is all on the up and up, could have been filed to get a personal representative appointed, none has been done.

OMNIBUS MOTION

In reviewing the Omnibus Motion set for hearing in August 2019, the court has grave concerns. At the prior Motion To Appoint Representative (Dckt. 52), the court was presented only with testimony of Debtor's sister Rose and a power of attorney. The Omnibus Motion presents essentially the same, if not less, information. At the hearing on the Motion to Appoint Representative, the court stated the following:

> Here, there is no allegation that Debtor lacks capacity to represent himself. From the evidence presented, it appears Sister determined Debtor's mental state was declining and convinced Debtor to give Sister power of attorney (though Debtor had capacity enough for the grant of power of attorney to be valid). Dckt. 54. Sister now seeks to represent Debtor in this bankruptcy case, in what appears to be a precautionary rather than necessary measure.
>
> No evidence is presented as to Debtor's mental state, such as an expert medical opinion. Sister does not explain what qualifications she has to assess Debtor's mental state.

Civil Minutes, Dckt. 59.

The court still has not been presented with expert medical testimony. Rose and her counsel seem to argue that the court should look to the facts suggesting incapacity over a medical conclusion. However, the court has not been provided with any facts as to Debtor's condition.

The first time the court was alerted to potential capacity issues was at a hearing on Trustee's Motion to Dismiss the case on October 10, 2018 (very nearly a year ago). Civil Minutes, Dckt. 49. In nearly a year's time, the court has essentially only been presented with the following information:

1. Debtor had a dispute with his home care provider which resulted in his arrest.

2. Debtor was released to the custody of Susan Rose, his sister.

3. Susan Rose concluded that Debtor lacked capacity.

4. Debtor then, while not having capacity, signed a durable power of attorney.

5. Debtor is, in the professional opinion of a medical doctor (based on an unexplained evaluation technique), not capable of making complex, legal and financial decisions due to his (unexplained) medical condition.

The court has at each hearing since October 2018 insisted on being presented with evidence enough to make a determination of Debtor's possible incapacity. Despite the court's guidance and insistence, the Debtor's counsel and Rose's counsel again seem to be coming up short.

Continuance or Denial of Motion

Given Debtor's stated incompetency, the court cannot issue an effective order against him. Movant consented to a continuance of this hearing rather than denial to avoid the cost and expense of having to file a new motion.

In light of the apparent equity cushion, continuing the hearing should not have a negative financial consequence on Movant.

At the hearing, **xxxxxxxxxxxxxxx**

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 Relief from the Automatic Stay filed by Select Portfolio

Servicing, Inc., servicing agent for U.S. Bank National Association, as trustee, on behalf of the holders of the Home Equity Asset Trust 2005-4 Home Equity Pass Through Certificates, Series 2005-4 ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Motion for Relief From the Automatic Stay is **XXXXXXXXXXXX**.

14. **17-22333-E-13 DPC-2** **THOMAS WARREN** **Lucas Garcia** **CONTINUED MOTION TO DISMISS CASE 9-10-18 [40]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on September 10, 2018. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

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

The Motion to Dismiss is XXXXXXXXXX.

David Cusick ("the Chapter 13 Trustee") seeks dismissal of the case on the basis that Thomas Warren ("Debtor") is $671.00 delinquent in plan payments, which represents slightly more than one month of the $650.00 plan payment. Before the hearing, another plan payment will have become due. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

The Chapter 13 Trustee argues further that Debtor is in material default under the Plan. Approximately $14,185.00 remains to be paid under the confirmed plan (excluding future monthly contract installment amounts), which would require 70 months of the $205.00 payment (net of Trustee fees and monthly contract installments). Debtor will complete the Plan in 86 months, not the 60 months proposed. Section 5.03 of the Plan makes that failure a breach of the Plan in addition to violating the Bankruptcy Code. Failure to resolve these issues puts Debtor in material default of the confirmed Plan. *See* 11 U.S.C. § 1307(c).

DEBTOR'S OPPOSITION

Debtor filed an Opposition to Trustee's Motion on September 26, 2018. Dckt. 44. In Debtor's Opposition, Debtor's counsel asserts:

> 1. Every reasonable effort has been made to fulfill the filing requirements of this case. There may have been delays, but these were not unreasonable or foreseeable.
>
> 2. The debtors live-in Roommate who contributes all of her income to the household (her name is Lori Childe), lost her IHSS income in June and was

unable to gain more income (from Disability) until early September.

a. Due to recuperating income payments sufficient to catch up will be submitted on or before this hearing.

3. Finally, the trustee raises the fact that their calculations project an over extension of the plan time frame. This calculation has not been confirmed by counsel and will also take reviewing of all claims in further detail to ensure that no objections to claim or portion of claim needs to be filed.

Debtor requests the court deny this motion if Debtor becomes current, and allow for at least three weeks for a modified Chapter 13 Plan.

Debtor's Opposition is supported by the Declaration of Lori Childe, Debtor's roommate. Dckt. 45. Childe states she lost her IHSS income for service rendered to Debtor, but has since been approved for disability. Childe states further that a payment, using her disability and Debtor's social security income) will be made on or about October 6, 2018, which will be sufficient to cure all arrears that will have accrued by that time.

OCTOBER 10, 2018 HEARING

At the October 10, 2018, hearing Debtor's counsel reported that disagreement had broken out between Debtor and Ms. Childe, that her status as caregiver had been terminated, that she had not been paying rent, and that Debtor's sister (Susan Rose) had obtained counsel and was asserting that she now held the power of attorney for Debtor.

Debtor's counsel further reported that he now believed that Debtor's ability to prosecute this case on his own was impaired.

The court issued an Order continuing the hearing to November 14, 2018 and ordering the following parties to appear in person at the continued hearing:

1. Susan Rose, identified as Debtor's sister and current holder of a power of attorney;

2. Eric Jeppson, Esq., attorney for Ms. Rose;

3. Lori Childe, identified as Debtor's former care giver, holder of power of attorney, and roommate; and

4. Thomas Warren, the Debtor

Order, Dckt. 47. To be determined at the continued hearing is who the actual real party in interest is for the Debtor–whether it is the Debtor or a person with a power of attorney who must be appointed as a personal representative pursuant to Federal Rule of Civil Procedure 25 and Federal Rule of Bankruptcy Procedure 7025, 9014, and 1004.1.

Additionally, the court ordered that any supplemental pleadings be filed on or before October

30, 2018. *Id*.

NOVEMBER 14, 2018 HEARING

At the hearing counsel for the Debtor stated that he met with his client the morning of the hearing. Counsel believes that what appears to be his current condition, a personal representative under Rule is appropriate.

Counsel for the Debtor's sister reported that the sister concurs with the need for an appointment of a personal representative.

The court continued the hearing on the Motion to Dismiss to afford Debtor and his Counsel the opportunity to file a motion for appointment of a personal representative.

FEBRUARY 20, 2019 HEARING

At the hearing, the court continued the hearing to March 20, 2019 to be heard alongside the Debtor's Motion to Approve Nomination of Debtor's Representative.

MARCH 20, 2019 HEARING

At the March 20, 2019 hearing the court heard and denied Debtor's Motion to Approve Nomination of Debtor's Representative that was set for hearing that day. Civil Minutes, Dckt. 65. The court continued this hearing to afford Debtor one final opportunity to demonstrate the Debtor's competency impairment and obtain the appointment of a personal representative.

The denial of the Motion for Appointment of the proposed personal representative was due to the abject failure of the proposed personal representative and Debtor's counsel to present credible evidence of Debtor's mental health condition. The findings of the court from that denial include:

> At the insistence of the court, Debtor's counsel and the Proposed Personal Representative have been given the "opportunity" to provide the court with the necessary evidence of independent professional testimony for the court to make the competency determination. In its prior tentative ruling the court provided the above description of competency and determination thereof under applicable state law. However, the best that counsel and Proposed Personal Representative could produce was the following "To Whomever It May Concern" Doctor's Note:
>
> > To Whom It May Concern:
> >
> > Thomas Warren was seen in my office today. It is my professional opinion that my patient is not capable of making complex, legal and financial decisions due to his medical condition.
> >
> > Please feel free to contact my office, if you have any further questions.

Exhibit, Dckt. 62. The Note does not provide testimony under penalty of perjury.

Debtor's attorney has prepared a declaration for Proposed Personal Representative in which she purports to "authenticate" the Note, presumably as some attempt to make it admissible, credible evidence. At best, this is hearsay, in which the sister is purporting to repeat what is in the Note, which purports to be statements made out of court by the Doctor. FN. 1.

The deficiencies in the purported "Doctor's Note" are many. First, by it being generically added "To Whom It May Concern," it appears that the Doctor had no idea why he was being asked to consider the competency of the Debtor. The Doctor was not aware of the significance in what he was saying or that it would be used to limit the Debtor's ability to access the federal courts. One questions the validity of such a "medical opinion" that is written in such a way that it could be used for any and every purpose to limit or deprive the Debtor of rights.

Second, merely stating his conclusion that "my patient is not capable of making complex, legal and financial decisions due to his medical condition," without providing the information based on his professional training and experience is of little, if any, assistance to the court in making the necessary determination. See Fed. R. Evid. 702.

Third, this "medical opinion" merely states that the Debtor is not capable of making "complex, legal and financial decisions." Some would say that the average least sophisticated consumer who is a party in bankruptcy court every day might suffer from such "complex decision" limitation. The Doctor offers no indication as to what is meant by "complex" or whether Debtor, represented by independent counsel, is capable of making the normal and usual decisions in his bankruptcy case.

Fourth, there is only a general reference to "medical condition." This could be a permanent and significant cognitive impairment. Or it may be that Debtor is suffering from a temporary medical condition from which he could recover sufficiently in the near future. The Doctor fails to provide, or withholds, such critical information.

Fifth, the Doctor offers no statement of how he has come to this "Opinion," the examinations of the Debtor, and how such "Opinion" has been reached after providing adequate medical professional due diligence in conformity with the standards of practice.

The Doctor does not state how long the Debtor has been his "patient," his consultation with other doctors who have provided medical services to Debtor, or a review of Debtor's medical history. Rather, based on the Proposed Personal Representative's testimony, it is she who selected the Doctor who has issued this "To Whom It May Concern" Note.

. . .

> In her Supplemental Declaration (after the court did not grant the request for appointment of a personal representative), the Proposed Personal Representative qualifies her prior testimony, stating that Debtor could actually care for himself physically and carry on a conversation, but could become confused "from time to time" and could not keep schedule appointments. Supplemental Declaration, ¶ 3; Dckt 63. These statements under penalty of perjury are not consistent with the personal representative's prior statements under penalty of perjury.
>
> In the Supplemental Declaration the Proposed Personal Representative also states that she took the Debtor to an attorney to obtain a power of attorney. The attorney is not identified (though a law firm is named on the power of attorney). It is not stated whether the attorney was the Debtor's attorney or the Proposed Personal Representative's attorney.
>
> With respect to the Doctor's Note, the Proposed Personal Representative states that she selected a doctor who is 222 miles from Debtor's residence. Nothing is stated about Debtor's long time doctor(s) in the Auburn area where he has resided. In her Declaration, the personal representative states that Debtor was released to her custody in the Summer of 2018 after a law enforcement intervention. That was after this case was filed, and Debtor may have moved, may have new doctors, and may no longer reside in Auburn, California. But such testimony is not provided. And again, the Doctor issuing the "To Whom It May Concern" Doctor's Note does not disclose any investigation with prior doctors of Debtor or review of Debtor's medical history.

Civil Minutes, Dckt. 64.

In concluding the ruling and having identified serious shortcomings by those who owe fiduciary duties to the Debtor, including those seeking to be his personal representative, the court's findings and conclusions state:

> Debtor's counsel appeared at the hearing, advising the court that he recognized the shortcomings in the pleadings, but requested additional time to work with the proposed personal representative and the doctor who provided the Doctor's Note. Given that the matter has been continued and the evidence presented to be a generic one sentence Note" for which no testimony was provided, the court is reluctant to allow these three to proceed further.
>
> Rather than referring this matter to Adult Protective Services, the U.S. Attorney, and U.S. Trustee, Debtor's counsel was able to convince to allow the Debtor one more chance to have a representative appointed before bringing in Adult Protective Services.

Id. at 8. The court further noted that in light of the failures of these various persons to act to protect the rights of the Debtor:

> The court denies this Motion without prejudice to allow Debtor's sister, the proposed personal representative, to be considered for the position. However, Debtor must obtain special counsel who is experienced in federal court and comes with a solid reputation in this federal court. That attorney will be the one who will assemble the motion and supporting evidence for the appointment of a personal representative and then effectively prosecute such a Motion.
>
> Debtor's current counsel proposed going back to Dr. Zaheen to have her now provide for detailed testimony. The court finds that proposition untenable. The court finds the Doctor's credibility to be so compromised by providing a "To Whom It May Concern Note" that might be used for who knows what purpose to deprive the Debtor of his rights in this case, that Dr. Zaheen cannot be a witness to provide testimony to the court. (See discussion above of the "To Whom It May Concern" one sentence Note declaring the Debtor not competent.)

Id. at 9. To afford these various persons with fiduciary duties to the Debtor to step up and make sure that his rights and interests were not damaged/lost/forfeited, the court instructed the Clerk of the Court to Serve informational copies of the order and the Civil Minutes on:

> Rokhshana Zaheen, M.D.
> Community Medical Providers Medical Group
> Community Foundation CMP, Reedly North
> 748 Manning Ave
> Reedley, California 93654-2232
>
> and
>
> The Attorney Who Provided Legal Services to Thomas Warren
> Jeppson & Griffin, LLP
> 1478 Stone Point Drive, Ste 100
> Roseville, California 95661;
>
> each of whom have independent professional obligations to Thomas Warren, the Chapter 13 Debtor in this bankruptcy case.

Id.

Since March 20, 2019, the file in this case has become silent as to these various persons with duties to the Debtor, including his sister who sought to be appointed his personal representative.

This lack of action causes the court great concern.

Now, the creditor having a claim secured by Debtor's residence is seeking relief from the stay to foreclose. In the Motion for Relief, the basic allegations include: (1) Debtor's monthly payment is $237.07; (2) since the filing of this bankruptcy case Debtor has defaulted in payments totaling $1,715.39; and (3) the only legal basis for seeking the relief is that the Defaulted in post-petition payments - 11 U.S.C. § 362(d)(1) "for cause" grounds.

MAY 29, 2019 HEARING

At the May 29, 2019 hearing, the court continued the hearing to July 30, 2019 at 3:00 p.m. to allow the parties to submit evidence in support of their repeatedly unsubstantiated claims that Debtor is legally incompetent.

SUPPLEMENTAL RESPONSE

A Supplemental Response to the Motion was filed July 23, 2019. Dckt. 99. The Response states a Motion for Omnibus Relief Upon Incapacitation of Debtor was filed, along with a Motion To Employ realtor to market Debtor's property.

MOTIONS TO EMPLOY AND FOR OMNIBUS RELIEF

Since the July 16 hearing, a Motion to Employ Michael Snell as a real estate broker (Dckt. 91) was filed , and granted on July 22, 2019. Dckt. 93.

On July 23, 2019, a Motion For Omnibus Relief Upon Incapacitation of Debtor was filed. Dckt. 94. The Motion For Omnibus Relief seeks to substitute Susan Rose as successor-in-interest, waive the requirement of 11 U.S.C. § 1328 for Debtor, and for the Chapter 13 case to proceed as though Debtor were not incapacitated.

In support of the proposition that Debtor lacks capacity, the Omnibus Motion states the following:

1. As stated in the declaration of Susan Rose, the debtor is being cared by a care facility as directed by Susan Rose, after executing the power of attorney.

2. As states in the declaration of Susan Rose, the location is presently in Los Angeles, but upon the sale of the real property is intended to be used to move the debtor to Fresno to be closer to his sisters.

3. As stated in the declaration of Susan Rose, the deceasing [sic] ability of the debtor to care for himself.

4. As stated in the declaration of Susan Rose, the preceding year the debtor has been removed from his home, relocated to a Fresno care home, and now to a care home in Los Angeles.

5. As stated in the declaration of Susan Rose, the debtor does not have the capacity to manage his own affairs, and resist fraud or undue influence.

While the Omnibus Motion references a declaration of Debtor's current doctor, no declaration is on file currently.

The Declaration of Susan Rose presents some odd testimony–which testimony is purported to

be within Rose's personal knowledge. Some of the peculiar testimony is as follows:

> 1. The intent of this document is to comply with and serve as an Affidavit under California Probate Code Section 13100 and pursuant to California Code of Civil Procedure §377.32(a). Declaration ¶ 1, Dckt. 97.

Here, Rose is referencing code sections which she almost certainly does not have personal knowledge of.

> 2. I am the successor in interest to Thomas Edward Warren, as defined in Section 377.11 of the Code of Civil Procedure, and succeed to their interest in the above-entitled proceeding. *Id.*, ¶ 4.

Here, Rose offers her legal conclusion that she is a successor in interest as defined by Section 377.11 of the Code of Civil Procedure. This is not credible personal knowledge testimony from someone without a legal education.

> 3. No other person has a superior right to commence the above-entitled proceeding or to be substituted for Thomas Edward Warren in the above-entitled proceeding. *Id.*, ¶ 4.

This is another legal conclusion without explanation.

> 4. The current gross fair market value of the **decedent**'s real and personal property in California, excluding the property described in the California Probate Code Section 13050, does not exceed $150,000.00. *Id.*, ¶ 7(emphasis added).

Here, Rose concludes that Debtor has died. Since Debtor has not actually passed away (as reflected in all other pleadings), this testimony further demonstrates Rose is testifying as to things not within her personal knowledge. Or, Rose possibly did not read the declaration she signed.

Also here, Rose is providing her lay opinion as to the value of Debtor's property. While the owner of property is deemed to have competency to make such expert testimony, it is unclear what basis Rose has to make such testimony.

> 5. An inventory and appraisement of the personal property in the **decedent's** estate is specified on Schedule B of the bankruptcy petition. *Id.*, ¶ 8(emphasis added).

Again Rose addresses Debtor as "decedent."

> 6. A description of the property to be paid, transferred, or delivered to the undersigned under the provisions of California Probate Code Section 13100 are included in the previously filed Chapter 13 petition, amendments, and Chapter 13 plan.
>
> The undersigned requests that the described property be paid,

transferred, or delivered to the undersigned. *Id.*, ¶¶ 9-10.

Here Rose addresses herself as "the undersigned."

DISCUSSION

OMNIBUS MOTION

In reviewing the Omnibus Motion set for hearing in August 2019, the court has grave concerns. At the prior Motion To Appoint Representative (Dckt. 52), the court was presented only with testimony of Debtor's sister Rose and a power of attorney. The Omnibus Motion presents essentially the same, if not less, information. At the hearing on the Motion to Appoint Representative, the court stated the following:

> Here, there is no allegation that Debtor lacks capacity to represent himself. From the evidence presented, it appears Sister determined Debtor's mental state was declining and convinced Debtor to give Sister power of attorney (though Debtor had capacity enough for the grant of power of attorney to be valid). Dckt. 54. Sister now seeks to represent Debtor in this bankruptcy case, in what appears to be a precautionary rather than necessary measure.
>
> No evidence is presented as to Debtor's mental state, such as an expert medical opinion. Sister does not explain what qualifications she has to assess Debtor's mental state.

Civil Minutes, Dckt. 59.

The court still has not been presented with expert medical testimony. Rose and her counsel seem to argue that the court should look to the facts suggesting incapacity over a medical conclusion. However, the court has not been provided with any facts as to Debtor's condition.

The first time the court was alerted to potential capacity issues was at a hearing on Trustee's Motion to Dismiss the case on October 10, 2018 (very nearly a year ago). Civil Minutes, Dckt. 49. In nearly a year's time, the court has essentially only been presented with the following information:

1. Debtor had a dispute with his home care provider which resulted in his arrest.

2. Debtor was released to the custody of Susan Rose, his sister.

3. Susan Rose concluded that Debtor lacked capacity.

4. Debtor then, while not having capacity, signed a durable power of attorney.

5. Debtor is, in the professional opinion of a medical doctor (based on an unexplained evaluation technique), not capable of making complex,

legal and financial decisions due to his (unexplained) medical condition.

The court has at each hearing since October 2018 insisted on being presented with evidence enough to make a determination of Debtor's possible incapacity. Despite the court's guidance and insistence, the Debtor's counsel and Rose's counsel again seem to be coming up short.

At the hearing, xxxxxxxxxxxxxx.

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

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

FINAL RULINGS

15.	**17-24484-E-13** **BB-3**	**MELISSA CHAMBERS** **Bonnie Baker**	**MOTION FOR DISBURSEMENT OF EXEMPT FUNDS CURRENT HELD BY THE U.S. TRUSTEE** **7-1-19 [111]**

Final Ruling: No appearance at the July 30, 2019 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 13 Trustee and Office of the United States Trustee on June 27, 2019. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

The Motion for Disbursement of Exempt Funds is granted.

The movant, Melissa Chambers ("Movant"), filed this Motion requesting disbursement of funds pursuant to this court's prior Order and a state law family court order, seeking approval of the distribution of her portion of the exempt residential sale proceeds held by the U.S. Trustee without the necessity of filing a motion to amend the plan. Movant requests the court authorize the disbursement so she may reinvest the proceeds into a new residential property. Declaration, Dckt. 113.

After a hearing on a prior filed Motion for Disbursement (Dckt. 98), the court issued an Order granting that motion and providing:

> **IT IS FURTHER ORDERED** that Jeffrey Ogilvie, counsel for movant, is authorized and shall disburse $31,339.18 as Debtor's interest in sale proceeds to David Cusick, the Chapter 13 Trustee, to be held subject to further order of the court determining the exempt portion of the monies received and the non-exempt

(if any) proceeds.

Order, Dckt. 110.

Debtor now seeks authorization to disburse the funds as exempt.

CHAPTER 13 TRUSTEE'S NONOPPOSITION

On July 15, 2019, the Chapter 13 Trustee, David Cusick ("Trustee"), filed his Response to the Motion. Dckt. 116. Trustee's Response stated the following:

A. Trustee received the exempt funds on March 18, 2019, in the amount of $31,339.18.

B. Debtor's Amended Schedule C exempted funds in the amount of $100,000.00 under California Code of Civil Procedure §704.730. Dckt. 35, at p. 12.

C. Debtor is current in monthly Plan payments.

DISCUSSION

The Debtor has claimed the $31,339.18 in sale proceeds as exempt under California Code of Civil Procedure §704.730 Trustee has filed a Response indicating non-opposition. Dckt. 116.

Based on the foregoing, the Motion is granted and the Trustee is authorized to disburse $31,339.18 to the Movant as her interest in sale proceeds.

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 Order Authorizing Disbursement Of Funds filed by the movant, Melissa Chambers ("Movant") having been presented to the court, upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion For Order Authorizing Disbursement Of Funds is granted and the Chapter 13 Trustee, David Cusick, is authorized to disburse $31,339.18 to Movant as her interest in homestead exempt sale proceeds of the former family residence.

16. 19-20075-E-13 SLE-5 — BENJAMIN/KRISTIE AVILA — Steele Lanphier — MOTION TO CONFIRM PLAN — 6-12-19 [75]

Final Ruling: No appearance at the July 30, 2019 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on June 12, 2019. By the court's calculation, 48 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The debtors, Benjamin Edward Avila and Kristie Lea Avila ("Debtor") have provided evidence in support of confirmation. The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response indicating non-opposition on July 15, 2019. Dckt. 81. The Amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Amended Chapter 13 Plan filed by the debtors, Benjamin Edward Avila and Kristie Lea Avila ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Debtor's Amended

Chapter 13 Plan filed on June 12, 2019, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee, David Cusick ("Trustee"),for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

17. **19-23292-E-13 DPC-1** **THOMAS PEARSON** **Peter Cianchetta** **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 7-3-19 [51]**

Final Ruling: No appearance at the July 30, 2019 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on July 3, 2019. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

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

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Subsequent to the filing of this Objection, Debtor filed an Amended Plan and corresponding Motion to Confirm on July 16, 2019. Dckts. 64, 67. Filing a new plan is a de facto withdrawal of the pending plan. The Objection is sustained, and the plan is not confirmed.

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

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

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

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

18.	**19-23292-E-13 AP-1**	**THOMAS PEARSON** **Peter Cianchetta**	**OBJECTION TO CONFIRMATION OF PLAN BY DEUTSCHE BANK TRUST COMPANY AMERICAS** **7-5-19 [55]**

Final Ruling: No appearance at the July 30, 2019 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on July 5, 2019. By the court's calculation, 25 days' notice was provided. 14 days' notice is required.

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

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

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Subsequent to the filing of this Objection, Debtor filed an Amended Plan and corresponding Motion to Confirm on July 16, 2019. Dckts. 64, 67. Filing a new plan is a de facto withdrawal of the pending plan. The Objection is sustained, and the plan is not confirmed.

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

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

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

19. 19-22954-E-13 DPC-1 — DAVID/NICOLE WILLS — David Foyil — OBJECTION TO CONFIRMATION OF PLAN BY DAVID P CUSICK — 6-24-19 [19]

Final Ruling: No appearance at the July 30, 2019 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on June 24, 2019. By the court's calculation, 36 days' notice was provided. 14 days' notice is required.

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

The hearing on the Objection is continued to August 13, 2019 at 3:00 p.m.

The Chapter 13 Trustee, David Cusick ("Trustee"), opposes confirmation of the Plan on the basis that the debtors, David Wills and Nicole Wills ("Debtor"), have not filed a motion to value collateral regarding the secured claim of Americredit Financial Services DBA GM Financial on a 2008 Mazda CX-9, therefore making the plan not feasible.

DEBTOR'S OPPOSITION

On July 16, 2019, Debtor filed Opposition to Trustee's Objection. Dckt. 32. Debtor's Opposition asserts that a Motion to Value Collateral on the Claim was filed on July 5, 2019.

DISCUSSION

A review of Debtor's Plan shows that it relies on the court valuing the secured claim of Americredit Financial Services DBA GM Financial. A Motion to Value Collateral was filed on July 5, 2019. Dckt. 25. Without the court valuing the claim, the Plan is not feasible. 11 U.S.C. § 1325(a)(6).

The court shall continue the hearing on the Motion to August 13, 2019 at 3:00 p.m. to be heard alongside the Motion To Value.

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

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

20. **19-22169-E-13 DPC-1** | **ELENA PEREZ GONZALEZ** **Pro Se** | **OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS** **6-18-19 [39]**

DEBTOR DISMISSED: 06/24/2019

Final Ruling: No appearance at the July 30, 2019 hearing is required.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Debtor's Claim of Exemptions having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is overruled as moot, the case having been dismissed.