

The Trustee objects to the Debtor's use of the California exemptions after the filing of the spousal waiver required by California Code of Civil Procedure §703.140. California Code of Civil Procedure §703.140, subd. (a)(2), provides:

If the petition is filed individually, and not jointly, for a husband or a wife, the exemptions provided by this chapter other than the provisions of subdivision (b) are applicable, except that, if both the husband and the wife effectively waive in writing the right to claim, during the period the case commenced by filing the petition is pending, the exemptions provided by the applicable exemption provisions of this chapter, other than subdivision (b), in any case commenced by filing a petition for either of them under Title 11 of the United States Code, then they may elect to instead utilize the applicable exemptions set forth in subdivision (b).

(Emphasis added). The court's review of the docket reveals that the spousal waiver has not been filed.

However, on the Debtor's amended Schedule C, the Debtor claims exemptions under California Code of Civil Procedure § 704.

The Trustee objects on the grounds that the Debtor waived the ability to claim exemptions pursuant to California Code of Civil Procedure § 704. The Debtor may have already received some of the funds as to the claimed exemption, pursuant to a sale ordered by the court (Dckt. 114) of possibly \$40,000.00 or more. No closing statement has been provided to the Trustee.

DEBTOR'S OPPOSITION

The Debtor filed an opposition on July 19, 2016. Dckt. 125. The Debtor states that his counsel has prepared and sent to the Debtor for signatures a withdrawal of Spousal Waiver of Exemptions and shall file the withdrawal upon receipt.

DISCUSSION

A review of the docket shows that on July 26, 2016, Debtor Rudolph Jugoz and non-debtor spouse Elizabeth Jugoz filed a withdrawal of the Spousal Waiver (Dckt. 16) previously filed in this case. Dckt. 127.

Debtor commenced this bankruptcy case on September 5, 2013. On Schedule A Debtor lists owning one piece of real property - 10650 Calvine Road, stating the value was \$402,506.00. Dckt. 1 at 8. On Schedule C Debtor did not claim an exemption in the Calvine Road Property. *Id.* at 13-14. A waiver of exemptions was filed by Debtor's non-filing spouse. Dckt. 16. On Schedule D Debtor stated that the Calvine Property was encumbered by a deed of trust to secure a debt of \$402,506.00.

On March 17, 2016 (less than three years later) Debtor filed an Amended Schedule A/B in which he states that the value of the Calvine Road Property was \$615,000.00. Dckt. 82 at 2. No amended Schedule D has been filed, but Attachment A to Amended Schedule A/B lists the Calvine Property

encumbered by a lien security \$433,897.37. That amount of the debt is what is stated by Creditor as being owed when the case was commenced. Proof of Claim No. 9.

Debtor has filed an Amended Schedule C, asserting a \$175,000.00 exemption in the Calvine Road Property. A comparison of the exemptions upon which the Debtor has prosecuted this case, and the court confirmed a plan, and the new asserted exemptions are set forth in the chart below.

EXEMPTION	ORIGINAL SCHEDULE C Dckt. 1 at 13-14	SECOND AMENDED SCHEDULE C Dckt. 87 at 2-3
Calvine Road Property	None	\$100,000 C.C.P. § 704.730
Household Goods and Furnishings	\$2,500 C.C.P. § 703.140(b)(5)	\$2,500 C.C.P. § 704.020
Books, Art, DVD, CD	\$500 C.C.P. § 703.140(b)(3)	\$500 C.C.P. § 704.040
Firearms, Camera, and Camcorder	\$1,000 C.C.P. § 703.140(b)(5)	\$1,000 C.C.P. § 704.040
Clothing	\$2,500 C.C.P. § 703.140(b)	\$2,500 C.C.P. § 704.020
Wedding Rings, Rings, Jewelry	\$1,525 C.C.P. § 703.140(b)(4)	\$1,525 C.C.P. § 704.040
Safe Credit Union Checking	\$376 C.C.P. § 703.140(b)(5)	\$282.40 C.C.P. § 704.070
Safe Credit Union Savings	\$1.80 C.C.P. § 703.140(b)(5)	\$1.35 C.C.P. 704.070
Safe Credit Union	\$3,501 C.C.P. § 703.140(b)(5)	None
Lincoln Financial Sutter Health Retirement Account	\$67,708 C.C.P. § 703.140(b)(10)(E)	\$67,708 C.C.P. § 704.115(a)(1) & (2), (b)
Fidelity Sutter Health Retirement Account	\$36,203 C.C.P. § 703.140(b)(10)(E)	\$36,203 C.C.P. § 704.115(a)(1) & (2), (b)
2001 Toyota Tundra	C.C.P. \$5,100 § 703.140(b)(2) \$3,278 § 703.140(b)(5)	None

Animals	\$5,800 C.C.P. § 703.140(b)(5)	None
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On its face, this attempted change of exemptions has caused some assets of value to “disappear.”

Having filed the Second Amended Schedule C, Debtor then filed a Motion to Sell the Calvine Property. Dckt. 94. Debtor stated in the Motion:

- A. The sales price of the Calvine Property is \$615,000.00.
- B. Wells Fargo Bank, N.A. debt secured by the Calvine Property totals \$410,758.09.
- C. The real estate commission is \$30,750.00.
- D. A Preliminary Settlement Statement is provided as an exhibit.

The Preliminary Settlement Statement lists the net proceeds, after payment of all costs and expenses, was to be \$149,662.52. Exhibit B, Dckt. 97.

The Motion to Sell was set for hearing pursuant to an order shortening time. Dckt. 103. In the order, the court notes that Debtor was attempting to claim, under penalty of perjury, an enhanced homestead exemption of \$175,000. The Order also addresses a lack of accuracy and lack of truthful statements in the Motion for Order Shortening Time.

In the findings of fact and conclusions of law, stated in the Civil Minutes (Dckt. 113), granting the Motion to Sell, include the following:

- A. “The Trustee calculates that approximately \$76,000.00 of the proceeds would be sufficient to conclude the Debtors plan at 100% to all filed and allowed claims (with the Creditor being paid through the sale.)”
- B. “In paragraph 6 of the Motion, the Debtor states that The sale of the Property will net proceeds for the benefit of creditors beyond the current claim of exemptions of the Debtor. Dckt. 94, 6.”
- C. “Then, in paragraph 10, the Debtor states Upon the close of escrow and the short sale, all proceeds will be paid according to the Settlement Statement (HUD-1). Dckt. 94, 10.”
- D. “Just in the three-page motion, the Debtor fails to accurately state the type of sale.”
- E. “A review of the Settlement Statement discloses that rather than being a short sale, there will be approximately \$149,662.52 of net sales proceeds after paying the secured

claims and closing costs.”

In the order approving the sale, Dckt. 114, the court required the following:

- A. “From the Net Sales Proceeds after payment of the above authorized liens and expenses, the first \$75,000.00 shall be disbursed to the Chapter 13 Trustee directly from the sale escrow. The Chapter 13 Trustee shall hold said funds, subject to any claim of exemption of Debtor which may be asserted in excess of the monies disbursed to Debtor in the following paragraph, pending further order of this court or as provide din [sic] a modified plan.”
- B. After payment of the \$75,000.00 to the Trustee, the balance of the net sales proceeds were authorized to be disbursed to Debtor directly from escrow.

Part of the Trustee’s Objection is that Debtor has not provided the Trustee with the actual closing statement and disclosed how much Debtor received from the sale.

ADDITIONAL BRIEFING

The Trustee’s Objection raises the issue of whether the Debtor, now three years in this case, can jump shift to a different set of exemption, change the rules, and possibly divert monies of the plan estate from creditors. Issues of judicial estoppel, estoppel, or other state and federal law principles could possibly apply in the court determining what exemptions can now be claimed in this bankruptcy case. The apparent missing assets, for which exemptions are no longer claimed, my render it impossible for Debtor to now claim a different set of exemptions.

The court sets the following supplemental briefing schedule:

- A. On or before August 16, 2016, the Chapter 13 Trustee shall file and serve Supplemental Pleadings addressing the grounds and legal authorities by which Debtor should not be allowed to change his exemptions.
- B. On or before August 30, 2016, Debtor shall file and serve Responses to the Trustee’s Supplemental Pleadings.
- C. On or before September 7, 2016, the Chapter 13 Trustee shall file and serve Replies, if any, to the Debtor’s Responses.
- D. The continued hearing will be conducted at 3:00 p.m. on September 20, 2016.

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

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

The Objection to Exemptions filed by the Trustee having been presented

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

IT IS ORDERED that Objection is continued to 3:00 p.m. on September 20, 2016.

IT IS FURTHER ORDERED that:

- A. On or before August 16, 2016, the Chapter 13 Trustee shall file and serve Supplemental Pleadings addressing the grounds and legal authorities by which Debtor should not be allowed to change his exemptions.
- B. On or before August 30, 2016, Debtor shall file and serve Responses to the Trustee's Supplemental Pleadings.
- C. On or before September 7, 2016, the Chapter 13 Trustee shall file and serve Replies, if any, to the Debtor's Responses.

Final Ruling: No appearance at the August 2, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 8, 2016. By the court's calculation, 55 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Amended Plan is granted.

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

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

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

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

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

submit the proposed order to the court.

3. [14-28410](#)-E-13 **KEVIN/SHANNON SECRIST** **MOTION TO MODIFY PLAN**
MOH-1 **Michael Hays** **6-20-16 [29]**

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 20, 2016. By the court's calculation, 43 days' notice was provided. 35 days' notice is required.

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

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

Kevin and Shannon Secrist ("Debtor") filed the instant Motion to Confirm on June 20, 2016. Dckt. 29.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on July 19, 2016. Dckt. 39. The Trustee opposes confirmation on the following grounds:

1. The Debtor has not submitted Supplemental Schedules I and J.

2. The Debtor failed to cite in the Motion the correct legal basis of 11 U.S.C. § 1329.

DISCUSSION

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

The Trustee's objections are well-taken.

First, to address the more substantive objection, the Debtor filed a supplemental Schedules I and J on July 22, 2016. Dckt. 42. A review of the Debtor's supplemental Schedules appear to be reasonable and consistent with the financial reality described by the Debtor in their declaration. Therefore, the Trustee's first objection is overruled.

As to the Trustee's second objection, the court is surprised that Debtor's counsel, who appears regularly before this court, failed to comply with Fed. R. Bankr. P. 9013 and Local Bankr. R. 9014-1(d) which requires legal citation and pleading with particularity. This court has stressed on numerous occasions over the past six years the importance of properly pleading in the moving papers.

The Trustee has stated this as failing to cite to 11 U.S.C. § 1329. While the motion is not a points and authorities, the current motion fails to state grounds upon which relief can be granted pursuant to 11 U.S.C. § 1329. Taken on its face, the Motion is nothing more than telling the court Debtor suffered the expenses of taking unplanned plane trips, for unstated purposes. The Motion does tell the court to read a declaration and assembly whatever grounds the court might think would be proper to be asserted in the Motion. In short, the Motion is little more that a statement of "I, the Debtor, need to modify the plan, so court, you just modify it."

The Declaration, Dckt. 31, does contain information which could properly be stated by Debtor's counsel as grounds in the Motion. But counsel chose not to state such grounds.

In response to the Trustee's Opposition, counsel for Debtor prepared a "Declaration" for Debtor to provide personal knowledge (Fed. R. Evid. 601, 602) testimony under penalty of perjury. Dckt. 46. In starting the declaration, Debtor states that some unstated parts of the Declaration on merely on information and belief, not personal knowledge. No basis is given for Debtor to testify under penalty of perjury as to "facts" for which they have no personal knowledge.

However, much of the Declaration does appear to be facts and statements which would have to be of Debtor's personal knowledge, not merely fed to them by someone else.

What is clear is that Debtor has suffered, and is continuing to suffer, from significant life events causing monetary and emotional challenges. Failing to confirm the Modified Plan would cause what should have been otherwise unnecessary confusion and heartache. In light of the testimony, the court concludes that proper grounds exist to confirm a modified plan.

Therefore, upon review of the plan, updated budget being filed, and no further objections remaining, the modified Plan complies with 11 U.S.C. §§ 1322, 1325(a) and 1329 and is confirmed.

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

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

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

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

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 18, 2016. By the court's calculation, 45 days' notice was provided. 42 days' notice is required.

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

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

Hoa Thai Nguyen ("Debtor") filed the instant Motion to Confirm the Amended Plan on June 18, 2016. Dckt. 66.

TRUSTEE'S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a non-opposition to the instant Motion on June 23, 2016.

PARKVIEW WEST HOMEOWNERS ASSOCIATION'S OPPOSITION

Parkview West Homeowners Association ("Creditor") filed an opposition to the instant Motion on July 19, 2016. Dckt. 76. The Creditor asserts that the Debtor's plan fails to provide for the full pre-petition arrearage owed because it does not include the interest rate of 12% as mandated by the agreement. Specifically, the Creditor asserts that the Covenants, Conditions and Restrictions explicitly states that the

interest rate for the arrears is 12%. The Debtor's proposed plan provides for a 0% interest rate on arrears.

DISCUSSION

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

The creditor has filed a timely proof of claim in which it asserts a 12% interest on pre-petition arrearages. The Plan does not propose to cure these arrearages since it only proposes an interest rate of 0.00%. Because the Plan does not provide for the surrender of the collateral for this claim, the Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments. *See* 11 U.S.C. §§ 1322(b)(2), (b)(5) & 1325(a)(5)(B). Because it fails to provide for the full payment of arrearages, the plan cannot be confirmed.

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

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

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

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

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

5. [15-26620-E-13](#) **KEVIN/DEBRA JOHNSON**
DPC-2 **Paul Bains**

**CONTINUED MOTION TO DISMISS
CASE
5-25-16 [68]**

Final Ruling: No appearance at the August 2, 2016 hearing is required.

The Chapter 13 Trustee having filed an ex parte motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rule of Bankruptcy Procedure 9014 and 7041 for the court to dismiss without prejudice the Motion to Dismiss the Bankruptcy Case, the ex parte motion being consistent with the opposition filed to the Motion, and good cause appearing, **the court dismisses without prejudice the Chapter 13 Trustee's Motion to Dismiss the Bankruptcy Case.**

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

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

A Motion to Dismiss the Bankruptcy Case having been filed by the Chapter 13 Trustee, the Chapter 13 Trustee having filed an ex parte motion to dismiss the Motion without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, dismissal of the Motion being consistent with the opposition filed, and good cause appearing,

IT IS ORDERED that the Motion to Dismiss the Bankruptcy Case is dismissed without prejudice.

Final Ruling: No appearance at the August 2, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 21, 2016. By the court's calculation, 42 days' notice was provided. 35 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Opposition having been filed, the court will address the merits of the motion at the hearing. 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 court's decision is to grant the Motion to Confirm the Modified Plan.

Kevin and Debra Johnson ("Debtor") filed the instant Motion to Confirm the Modified Plan on June 21, 2016. Dckt. 77.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on July 19, 2016. Dckt. 92. The Trustee opposes confirmation on the following grounds:

1. The plan is not the Debtor's best efforts. The Debtor's supplemental Schedules I and J indicate a monthly net income of \$6,246.00. The plan only proposes \$4,425 per month beginning in month 11 with no less than 0% dividend to unsecured creditors.

Debtor's plan is not their best efforts. The Debtor has not explained why they are proposing a plan payment that is \$1,821.00 less than their monthly net income.

2. The Debtor's modified plan proposes to add post-petition arrears to class 1, but does not indicate in what amount. The Trustee's records reflect there is currently an ongoing mortgage principal due of \$6,655.62, which is composed of two payments at \$2,198.52 and one payment of \$2,258.58. Debtor's mortgage payment increased to \$2,258.58 effective June 2016 pursuant to creditors Notice of Mortgage Payment Change filed May 4, 2016. Debtor is currently \$15,500.00 delinquent under the confirmed plan.

Section 6.01; Section 2.08 states the “monthly post-petition arrears payment to America’s Servicing Company = \$135.52”, but does not state the amount to be added.

DEBTOR’S RESPONSE

The Debtor filed a response on July 19, 2016. Dckt. 95. The Debtor responds as follows:

1. The Debtor has \$1,801.00 of Social Security income per month and Debtors are not required to contribute that portion of their income for the purposes of funding their Chapter 13 Plan.
2. The Debtor proposes the following language to be added to the order confirming:

“Monthly post-petition arrears payment to America’s Servicing Company = \$135.52; in total, the post-petition arrears claim to be added to the First Modified Plan is \$6,776.00”

TRUSTEE’S REPLY

The Trustee filed a reply on July 22, 2016. Dckt. 97. The Trustee states that the Debtor’s response and proposed language in the order confirming resolves the Trustee’s objections.

DISCUSSION

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

The Trustee’s objections having been resolved, the parties agreeing on the proposed language to add to the order confirming, and upon the court’s independent review of the plan, the modified Plan complies with 11 U.S.C. §§ 1322, 1325(a) and 1329 and is confirmed.

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

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

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

IT IS ORDERED that the Motion is granted, Debtor’s Chapter 13 Plan filed on June 21, 2016 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan with the additional language,

Monthly post-petition arrears payment to America’s Servicing Company = \$135.52; in total, the post-petition arrears claim to be added to the First Modified Plan is \$6,776.00,

Dckt. 101. The Trustee responds as follows:

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

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

JULY 19, 2016 HEARING

At the hearing, the court continued the hearing to 3:00 p.m. on August 2, 2016. Dckt. 108.

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

DISCUSSION

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

11 U.S.C. § 1325(a)(4) states:

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

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

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

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

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

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

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

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

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

8. [12-40834-E-13](#) **DAVID/SHELLIE FISCHER**
CA-7 **Michael Croddy**

**CONTINUED MOTION FOR
COMPENSATION BY THE LAW OFFICE
OF CRODDY & ASSOCIATES, P.C.
FOR MICHAEL D. CRODDY, DEBTORS'
ATTORNEY(S)
6-28-16 [108]**

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

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

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

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

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

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

The Motion for Allowance of Professional Fees is allowed as Second Interim Fees and continued to 3:00 p.m. on December 20, 2016, for consideration of final approval of fees in this bankruptcy case.

Michael D. Croddy, the Attorney ("Applicant") for David Wayne Fischer and Shellie Jean Fischer the Debtor in Possession ("Client"), makes a First Interim Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period November 1, 2012 through July 19,

2016. Applicant requests fees in the amount of \$6,975.00.

TRUSTEE'S OPPOSITION

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

1. The Movant only provided 14 days notice when FRBP 2002(a)(6) requires 21 days notice of a motion for compensation.

2. Various discrepancies exist between the motion and the record. The Caption of the Motion indicates this is the First Interim Application for Fees when a review of the record reveals that this is not the first fee application in this case. Applicant previously requested fees of \$5,042.90 by Motion filed January 22, 2013. Dckt. 32. That Motion sought fees for work performed from November 1, 2012 through January 22, 2013. The fees were granted by Civil Minute Order dated March 1, 2013. Dckt 48. The instant Motion further states on Page 2, lines 18-23 that prior to the filing of the case, Applicant received fees of \$5,923.90 and no further fees have been allowed by this court. The Trustee's records indicate that Applicant was paid \$5,042.90 by Trustee check #667106 on May 31, 2013, the disbursement of the fees awarded by the Order dated March 1, 2013.

3. The Debtor has a pending motion to modify. Dckt 95 and 103. Both motions may depend on the Schedule I which includes a detail, "property management income listed above assumes 75% occupancy on \$1,838.50=\$1,379.63," present in the latest Schedule I filed June 21, 2016, and in the original Schedule I filed November 30, 2012. Dckt. 102 and 1.

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

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

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

(A) the time spent on such services;

(B) the rates charged for such services;

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

title;

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

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

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

Further, the court shall not allow compensation for,

(I) unnecessary duplication of services; or

(ii) services that were not--

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

(II) necessary to the administration of the case.

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

Benefit to the Estate

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

(a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?

(b) To what extent will the estate suffer if the services are not rendered?

(c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate

enforcing rights and obtaining benefits including multiple motions to value and multiple motions to confirm. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

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

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

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

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

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

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

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

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

JULY 19, 2016 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on August 2, 2016 so the Applicant can file and serve Supplemental Pleadings on or before July 26, 2016.

DISCUSSION

A pleading titled “Counsel’s Reply to Trustee’s Objection was filed on June 27, 2016. Dckt. 131. The subtitle to this document is “Declaration and Reply.” It appears that Counsel has “short-cut” filing a proper response, giving the court a supplemental points and authorities, making arguments and citing legal authorities, and rolling in some testimony into one hybrid document. As provided in Local Bankruptcy Rule 9004-1 and the Revised Guideline for Preparation of Documents; Section III, A; requires that they be filed as separate documents.

In the “DeclaPly” (the combined declaration and reply) counsel argues/testifies that the court should reject the Trustee’s contention that inadequate notice was given of the Motion. (By continuing the hearing, the court has rectified any such notice issue, if it exists.) The DeclaPly states that the motion was filed on June 28, 2016 and the hearing was set for July 19, 2016. Dckt. 131, p.1:23-25. Counsel computes there being exactly 21 days notice provided.

While Counsel references the filing date, the court notes that the Certificate of Service states that the motion and supporting pleadings were actually served on June 28, 2016. Dckt. 112. That results in there being 2 days for notice in June and 19 days in July, for a total of 21 days. Fed. R. Bankr. P. 9006(a)(1). In addition, Federal Rule of Bankruptcy Procedure 9006(f) provides for adding three additional days when service is by mail.

The DeclaPly then addresses the following points:

- A. This is a Final Fee Application and it appears from the DeclaPly that the reference to it being a First Interim Application was a typographical error.

- B. Counsel has not received a retainer, with the Debtor providing only \$281.00 for the filing fee.
- C. Counsel has been paid \$5,042.90 in fees and \$281.00 for reimbursement of the filing fee. Counsel also gave Debtor a \$600.00 “professional credit.”
- D. By the current Final Application Counsel seeks an additional \$6,975.00 in compensation for the period January 23, 2013 through July 19, 2016.
- E. In this Final Application Counsel requests that the court:
 - 1. Approve \$12,450.00 in fees and \$448.90 in costs for the period January 23, 2013 through July 19, 2016;
 - 2. Apply the \$600.00 professional credit, \$5,042.90 paid previously by the Chapter 13 Trustee, and the \$281.00 received for payment of the filing fee.

In the DeclaPly, Counsel notes that this is the first time he has sought fees by opting out of taking a set fee in a Chapter 13 case. This may have led to the confusion in how he seeks to have the fees determined.

For the period November 1, 2012 through January 22, 2013, the court has allowed \$5,923.90 in fees and costs, with \$5,042.90 to be paid through the Chapter 13 Plan. Civil Minutes, Dckt. 44. The court findings include that Counsel reported having received \$881.00 prior to the Chapter 13 case. *Id.*

This Final Application seeks not only final approval of the prior interim fees (11 U.S.C. § 331, L.B.R. 2016-1), but additional fees and costs. The additional fees and costs are for the period January 23, 2013 through July 19, 2016.

Counsel has provided a task billing analysis, which included all of the fees from the start of the case. Though this could be confusing, the detail provided by Counsel makes separating out the out of period charges a relatively simple task for the court. (Since this is Counsel’s first opt-out billing, it is not inappropriate for the court to do this, though Counsel should not count on it occurring in future cases.)

The Total Fees of \$12,450.00 and Costs of \$448.90 (page 8 of Exhibit C) are broken down as follows:

- a. Prior to January 23, 2013
 - i. Fees.....\$5,100.00
 - ii. Costs.....\$ 448.90
- b. January 23, 2013 through July 19, 2016
 - i. Fees.....\$7,350.00
 - ii. Costs.....\$ 0.00

For the First Interim Fee Motion, the court stated that Counsel requested \$5,923.00 in fees and costs (the ruling not breaking out the two amounts), that Counsel reported that \$881.00 was received prior to filing the case. On the time and charges record (Exhibit C, Dckt. 34), the fees are stated to be \$5,475.00 and the expenses are \$448.90, generating total fees and costs of \$5,923.00.

The court allowed the \$5,923.00 in fees, then allowed for the \$881.00, and authorized the Chapter 13 Trustee to pay \$5,042.90 through the Chapter 13 Plan. Civil Minutes, Dckt. 44. With respect to the \$881.00, it appears that such amount was not received, but consists of \$281.00 received and a “professional discount” of \$600.00 given by Counsel.

The Chapter 13 Trustee has disbursed \$5,042.90 pursuant to the prior order and nothing remains to be paid for the fees and costs allowed in the First Interim Application.

Based on the prior First Interim Application allowing fees in the amount of \$5,475.00, there can be only \$6,975.00 in fees relating to the Second and Final Fee Application period. Counsel confirms this in the DeclaPly.

FURTHER POSSIBLE FEES IN CASE

While stating that this is a “Final” Fee Request, Counsel may not fully appreciate the significance of such an order. If entered, then counsel could not seek any further fees for work done in this case for Debtor. There is pending the continued hearing on the Motion to Modify the Plan. The hearing was continued to allow Debtor to file updated financial information to show the Chapter 13 Trustee, Parties in Interest, and the court that the plan is feasible. Civil Minutes, Dckt. 129. On July 25, 2016, a Supplemental Schedule I was filed. Dckt. 124. Whether this resolves the issues, the court does not pre-determine.

However, it demonstrates that Counsel is continuing to provide legal services to Debtor. Further compensation may be appropriate. However, those fees will likely be quite modest, and the cost and expense of having a further “Final” motion may exceed those fees in getting the case concluded.

The court finds that the \$6,975.00 in fees for this Second Interim period of time is reasonable and provided value and benefit to the Debtor, the plan estate, and the bankruptcy estate.

Therefore, the court grants the motion and approves Second Interim Fees in the amount of \$6,975.00, and authorizes the Chapter 13 Trustee to pay such fees through the Chapter 13 Plan. The court further continues the hearing on the Final Approval of Fees to 3:00 p.m. on December 20, 2016. On or before December 1, 2016, Counsel shall file and serve a supplemental statement of additional attorneys’ fees and costs requested for the period July 20, 2016 through the end of the bankruptcy case, separate exhibits providing the billing records, and a separate declaration providing the necessary testimony to authenticate the exhibits and provide such factual evidence as appropriate. Oppositions to further fees and costs requested by Counsel shall be filed and served on or before December 15, 2016.

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

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

hearing.

The Motion for Allowance of Fees and Expenses filed by Michael Croddy (“Applicant”), Attorney for the Debtor in Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is Granted and fees in the amount of \$6,975.00 for the period January 23, 2013 through July 19, 2016, are approved as Second Interim Fees, and the Chapter 13 Trustee is authorized to pay such fees through the Chapter 13 Plan.

IT IS FURTHER ORDERED that the hearing on the Motion is continued to 3:00 p.m. on December 20, 2016, for consideration of final approval of the First and Second Interim Fees and any additional fees for the period July 20, 2016 through the end of the bankruptcy case.

IT IS FURTHER ORDERED that on or before December 1, 2016, Counsel shall file and serve a supplemental statement of additional attorneys’ fees and costs requested for the period July 20, 2016 through the end of the bankruptcy case, separate exhibits providing the billing records, and a separate declaration providing the necessary testimony to authenticate the exhibits and provide such factual evidence as appropriate. Oppositions to further fees and costs requested by Counsel shall be filed and served on or before December 15, 2016.

9. [15-29754-E-13](#) **REGIS/BARBARA URBAN**
SDH-1 **Scott Hughes**

**MOTION TO SUBSTITUTE PARTY
AND/OR MOTION TO WAIVE DEBTOR
EDUCATION AND CERTIFICATION
DOCUMENTS FOR ENTRY OF
DISCHARGE
6-30-16 [25]**

Final Ruling: No appearance at the August 2, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on June 30, 2016. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

The Motion to Substitute is granted.

Joint Debtor, Barbara Urban, seeks an order approving the motion to substitute the Joint Debtor for the deceased Debtor, Regis Urban. This motion is being filed pursuant to Federal Rule Of Bankruptcy Procedure 1004.1.

The Debtor filed for relief under Chapter 13 on December 22, 2015. On March 25, 2016, the Debtor's Chapter 13 Plan was confirmed. Dckt. 19. On June 7, 2016, Debtor Regis Urban passed away. The Joint Debtor asserts that she is the lawful successor and representative of the Debtor.

Pursuant to Federal Rule of Bankruptcy Procedure 1004.1, the Joint Debtor requests authorization to be substituting in for the deceased debtor and to perform the obligations and duties of the deceased party in addition to performing her own obligations and duties. The Suggestion of Death was filed on June 20, 2016. Dckt. 22. Joint Debtor is the wife of the deceased party and is the successor's heir and lawful representative. Joint Debtor states that she will continue to prosecute this case in a timely and reasonable manner.

Debtor Barbara Urban also requests that the court waive the requirement for the 11 U.S.C.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response to the instant Motion on July 18, 2016. Dckt. 30. The Trustee states that the Debtor is current under the confirmed plan. The Debtor's Motion and Declaration state the Debtor will be using life insurance proceeds to keep the plan current until the Debtor's residence is sold. Based on the current plan payment the insurance proceeds will fund the plan for approximately 10 months. The Debtor's Schedule I filed December 22, 2015 indicates the Debtor is receiving Social Security benefits.

DISCUSSION

Federal Rule of Bankruptcy Procedure 1016 provides that, in the event the Debtor passes away, in the case pending under chapter 11, chapter 12, or chapter 13 "the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." Consideration of dismissal and its alternatives requires notice and opportunity for a hearing. *Hawkins v. Eads*, 135 B.R. 380, 383 (Bankr. E.D. Cal. 1991). As a result, a party must take action when a debtor in chapter 13 dies. *Id.*

Federal Rule of Bankruptcy Procedure 7025 provides "[i]f a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representation. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed." *Hawkins v. Eads*, 135 B.R. at 384.

The application of Rule 25 and Rule 7025 is discussed in COLLIER ON BANKRUPTCY, 16TH EDITION, §7025.02, which states [emphasis added],

Subdivision (a) of Rule 25 of the Federal Rules of Civil Procedure deals with the situation of death of one of the parties. If a party dies and the claim is not extinguished, then the court may order substitution. **A motion for substitution may be made by a party to the action or by the successors or representatives of the deceased party.** There is no time limitation for making the motion for substitution originally. Such time limitation is keyed into the period following the time when the fact of death is suggested on the record. In other words, procedurally, **a statement of the fact of death is to be served on the parties in accordance with Bankruptcy Rule 7004 and upon nonparties as provided in Bankruptcy Rule 7005** and suggested on the record. The suggestion of death may be filed only by a party or the representative of such a party. The suggestion of death should substantially conform to Form 30, contained in the Appendix of Forms to the Federal Rules of Civil Procedure.

The motion for substitution must be made not later than 90 days following the service of the suggestion of death. Until the suggestion is served and filed, the 90 day period does not begin to run. In the absence of making the motion for substitution

within that 90 day period, paragraph (1) of subdivision (a) requires the action to be dismissed as to the deceased party. However, the 90 day period is subject to enlargement by the court pursuant to the provisions of Bankruptcy Rule 9006(b). Bankruptcy Rule 9006(b) does not incorporate by reference Civil Rule 6(b) but rather speaks in terms of the bankruptcy rules and the bankruptcy case context. Since Rule 7025 is not one of the rules which is excepted from the provisions of Rule 9006(b), the court has discretion to enlarge the time which is set forth in Rule 25(a)(1) and which is incorporated in adversary proceedings by Bankruptcy Rule 7025. Under the terms of Rule 9006(b), a motion made after the 90 day period must be denied unless the movant can show that the failure to move within that time was the result of excusable neglect. 5 The suggestion of the fact of death, while it begins the 90 day period running, is not a prerequisite to the filing of a motion for substitution. The motion for substitution can be made by a party or by a successor at any time before the statement of fact of death is suggested on the record. **However, the court may not act upon the motion until a suggestion of death is actually served and filed.**

The motion for substitution together with notice of the hearing is to be served on the parties in accordance with Bankruptcy Rule 7005 and upon persons not parties in accordance with Bankruptcy Rule 7004...

See also, Hawkins v. Eads, supra. While the death of a debtor in a Chapter 13 case does not automatically abate due to the death of a debtor, the court must make a determination of whether “[f]urther administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred.” Fed. R. Bank. P. 1016. The court cannot make this adjudication until it has a substituted real party in interest for the deceased debtor.

Local Bankruptcy Rule 5009-1(b) requires the filing with the court Form EDC3-190 Debtor’s 11 U.S.C. § 1328 Certificate. Local Bankr. R. 1016-1 permits a movant, in a single motion, to request for the substitution for a representative, the authority to continue the administration of a case, and waiver of post-petition education requirement for entry of discharge.

Here, Debtor Barbara Urban has provided sufficient evidence to show that administration of the Chapter 13 case is possible and in the best interest of creditors after the passing of the debtor. The Motion was filed within the 90 day period specified in Federal Rule of Bankruptcy Procedure 1016, following the filing of the Suggestion of Death. Dckt. 22. Based on the evidence provided, the court determines that further administration of this Chapter 13 case is in the best interests of all parties, and that Joint Debtor, Barbara Urban, as the wife of the deceased party and is the successor’s heir and lawful representative may continue to administer the case on behalf of the deceased debtor, Regis Urban. The court grants the Motion to Substitute Party.

Debtor Barbara Urban further requests that the court waive the requirement for the deceased Debtor, Regis Urban, from completing the post-petition debtor education as a condition of a discharge being entered for Mr. Urban’s interests and rights. The court waives the Debtor education requirement of 11 U.S.C. § 1328(g)(1).

Debtor Barbara Urban goes further, requesting that the court waive the requirement for the filing of “other documents” for a discharge to be entered for Deceased Debtor Regis Urban. No specific documents are identified and Debtor Barbara Urban fails to state any grounds that she, if she is competent to be the personal representative of the Deceased Debtor, that she cannot complete such “documents.” If Debtor Barbara Urban believes that she is not capable of fulfilling such obligations as the personal representative, then her counsel can so notify the court and the court can then dismiss the Chapter 13 case for Regis Urban. FN.1.

FN.1. In the Eastern District of California the “document” which Debtor Barbara Urban is attempting to avoid filing for the Deceased Debtor appears to be the “Debtor’s 11 U.S.C. § 1328 Certificate.” EDC 3-190. In this it is certified that the debtor seeking the discharge: (1) has not been required to make any alimony or support payments during the case, or if so required that payments have been made or are in default; (2) has not received a prior Chapter 7, 11, 12, or 13 discharge in specified periods prior to the commencement of the current case; and (3) that the debtor has not violated the requirements of 11 U.S.C. § 522(q). In this District it could not have been made easier for a debtor, or a competent personal representative of a deceased debtor, to confirm these basic requirements. When a request to waive this simple act for a personal representative is filed, the court has to question whether the Debtor and Debtor’s counsel are acting in good faith.

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 Substitute After Death filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and Barbara Urban is substituted as the successor-in-interest to Regis Urban and is allowed to continue the administration of this Chapter 13 case pursuant to Federal Rule of Bankruptcy Procedure 1016.

IT IS FURTHER ORDERED that the court waives the post-confirmation education requirement of 11 U.S.C. § 1328(g) for deceased Debtor Regis Urban is granted.

IT IS FURTHER ORDERED that the balance of the relief requested, including waiving the requirement for filing of all other documents by the Personal Representative Barbara Urban for the Deceased Debtor Regis Urban is denied.

10. [16-24265](#)-E-13 RICHARD AMUNDSEN
RWH-2 Ronald Holland

**MOTION TO VALUE SECURED
INTEREST OF TAX LIEN HELD BY
INTERNAL REVENUE SERVICE
7-5-16 [13]**

Final Ruling: No appearance at the August 2, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, and Office of the United States Trustee on July 5, 2016. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion to Value secured claim of Internal Revenue Service ("Creditor") is granted and the secured claim is determined to be in the amount of \$24,867.38 as stated by the Internal Revenue Service in Proof of Claim No. 1.

The Motion filed by Richard Amundsen ("Debtor") to value the secured claim of the Internal Revenue Service ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of various items of real personal property, described in Debtor's Schedules A and B ("Property"). The Debtor seeks to value the Personal Property at a replacement value of \$24,867.38 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See Fed. R. Evid. 701; see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

Creditor filed a Proof of Claim #1 on July 25, 2016. Creditor's Proof of Claim asserts that \$24,867.38 is secured by the Property, \$26,763.84 is an unsecured priority claim, and \$236,685.17 is an unsecured general claim.

DISCUSSION

The present Motion was filed on July 5, 2016.

On July 25, 2016, the Internal Revenue Service filed Proof of Claim No. 1 in this case, which

asserts claims in the following amounts:

- a. Secured Claim.....\$24,867.38
- b. Priority Claim.....\$26,763.84
- c. General Unsecured Claim.....\$236,685.17

As was recently disclosed, in filing proofs of claim the Internal Revenue Service will make its own § 506(a) calculation based on the assets of the Debtor and self-bifurcate the secured and unsecured portions of the claim. It appears that the Internal Revenue Service has done so in this case.

Upon review of the evidence and the statement of the secured claim amount of the Internal Revenue Service in Proof of Claim No. 1, the court determines the value of the secured claim to be \$24,867.38, with the balance to be treated as unsecured claims (whether priority or general unsecured).

The Motion is granted.

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

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

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

IT IS ORDERED that the Motion is granted and the secured claim of the Internal Revenue Service for which the collateral is the personal property of the Debtor has a value of \$24,867.38, with the balance of the claim to be provided for as unsecured claims (whether properly priority or general unsecured claims).

11. [15-28790-E-13](#)
TLA-2

BRIAN THRONBURG
Thomas Amberg

MOTION TO CONFIRM PLAN
6-16-16 [[57](#)]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 16, 2016. By the court's calculation, 47 days' notice was provided. 42 days' notice is required.

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

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

Brian Thronburg ("Debtor") filed the instant Motion to Confirm the Amended Plan on June 16, 2016. Dckt. 57.

TRUSTEE'S RESPONSE IN SUPPORT

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on June 24, 2016. Dckt. 65. The Trustee recommends confirmation of the plan and notes that the Debtor proposes to fund the plan through his retirement listed on Schedule C as not estate property.

The Trustee requests that the Motion be granted with specific authorization pursuant to Local Bankr. R. 3015-1(b)(1), allowing the Debtor to fund this plan through his 401k.

DISCUSSION

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

Local Bankr. R. 3015-1(b)(1) states:

The debtor shall not transfer, encumber, sell, or otherwise dispose of any personal or real property with a value of \$1,000.00 or more other than in the ordinary course of business without prior Court authorization. To obtain Court authorization, the debtor shall comply with LBR 3015-1(I).

In the instant case, the Debtor states that the proposed plan will pay 100% dividend to allowed unsecured claims. Dckt. 59. Furthermore, the Debtor states that he intends to make the payment using funds from his retirement account.

After review of the Motion, the response of the Trustee, and review of the proposed plan, the court is convinced that funding the plan through the Debtor's 401k is in the best interest of the estate and parties in interest.

Therefore, the amended Plan complies with 11 U.S.C. §§ 1322, 1323 and 1325(a) and is confirmed. Furthermore, the court authorizes the Debtor to use funds from the Debtor's 401k plan to fund the plan, pursuant to Local Bankr. R. 3015-1(b)(1).

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

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

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

IT IS ORDERED that the Motion is granted, Debtor's Chapter 13 Plan filed on June 16, 2016 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

IT IS FURTHER ORDERED that the Debtor is authorized to fund the plan through the use of the Debtor's 401k plan, pursuant to Local Bankr. R. 3015-1(b)(1).

Tentative Ruling:

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

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

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

The Motion to Dismiss is denied without prejudice.

David Cusick, the Chapter 13 Trustee, filed the instant Motion to Dismiss on June 8, 2016 Dckt. 52. The Trustee seeks dismissal because the Debtor has filed to file an amended plan and set for confirmation.

The Debtor filed a response on June 16, 2016. Dckt. 63. The Debtor states that he has filed an amended plan which proposes a 100% dividend to allowed creditors. The hearing on the Motion to Confirm is set for 3:00 p.m. on August 2, 2016. The Debtor requests a continuance to the Motion to Confirm hearing date.

JUNE 22, 2016 HEARING

At the hearing, due to the interconnectedness of the Motion to Dismiss and the Motion to Confirm, the court continued the instant Motion to 3:00 p.m. on August 2, 2016.

DISCUSSION

The Motion to Confirm and proposed modified plan complied with 11 U.S.C. §§ 1322, 1325, 1329 and was confirmed on August 2, 2016.

Therefore, with the Trustee's objection being resolved, the Motion to Dismiss is denied without prejudice.

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

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

hearing.

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

IT IS ORDERED that the Motion to Dismiss is denied without prejudice.