UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

August 29, 2017, at 3:00 p.m.

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1. **16-24701-E-13 TJW-2** | **KHAMMAY/KHAMMAI PHOMMAVONGSA** | **MOTION TO CONFIRM PLAN 7-11-17 [73]**

Timothy Walsh

DEBTOR DISMISSED: 07/28/2017

JOINT DEBTOR DISMISSED: 07/28/2017

Final Ruling: No appearance at the August 29, 2017 hearing is required.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm Amended Plan having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is dismissed as moot, the case having been dismissed.

2. **14-32002-E-13 MJD-1** | **KAO SAECHAO AND MYHANH NGUYEN** **Matthew DeCaminada** | **MOTION TO MODIFY PLAN 7-25-17 [55]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 25, 2017. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(g) (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.

Kao Saechao and Myhanh Nguyen ("Debtor") seek confirmation of the Modified Plan to cure pre-filing mortgage arrears and repay a portion of the income taxes owed. Dckt. 58. The Modified Plan increases the amount of pre-filing mortgage arrears in § 2.08 and adjusts the ongoing monthly contract amount moving forward, adds the post-petition mortgage fees, expenses, and charges owed to Ditech Financial, LLC, adjusts the priority amounts owed to the Franchise Tax Board and Internal Revenue Service, and adjusts the amount of general unsecured non-priority claims. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on August 15, 2017. Dckt. 61. The Trustee alleges that the Plan violates 11 U.S.C. § 1325(b)(1), which provides:

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

The Trustee has not received the latest pay advice verifying Debtor's income at his current place of employment. Debtor's supplemental Schedule J also reduced from $1,320.00 to $1,075.00 for childcare and children's education costs, but Debtor does not provide supporting evidence for that expense. Dckt. 54. Additionally, the Plan proposes to change the monthly dividend payable on the Class 1 mortgage arrears to $90.78 effective in the tenth month. Debtor is currently in the thirty-second month of the plan, and the Trustee cannot retroactively change the monthly dividend. Thus, the court may not approve the Plan.

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 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.

3. 16-20602-E-13 SDH-5 | **THOMAS/SHANNON SHUMATE** **Scott Hughes** | **CONTINUED MOTION FOR COMPENSATION FOR SCOTT D. HUGHES, DEBTORS' ATTORNEY 7-12-17 [73]**

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 Not 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 July 12, 2017. By the court's calculation, 34 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition). The court shortens time for notice to 34 days.

The Motion for Allowance of Professional Fees has been set properly 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 Allowance of Professional Fees is denied without prejudice.

Scott Hughes, the Attorney ("Applicant") for Thomas Shumate and Shannon Shumate, the Chapter 13 Debtor ("Client"), makes a Request for the Additional Allowance of Fees and Expenses in this case.

Fees are requested for the period December 16, 2016, through June 28, 2017. Applicant requests fees in the amount of $1,800.00 and costs in the amount of $41.15.

Federal Rule of Bankruptcy Procedure 2002(a)(6) requires twenty-one days' notice of a hearing when the requested fees exceed $1,000.00. Local Bankruptcy Rule 9014-1(f)(1)(B) requires an additional fourteen days' notice for written opposition to be filed. That totals thirty-five days. Applicant provided thirty-four days' notice.

In light of there being only a one-day shortfall in the notice period, the court *sua sponte* shortens the time period for notice in this contested matter to thirty-four days.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on July 28, 2017. Dckt. 78. The Trustee notes that Applicant moves for additional fees at least partly because of preparing a modified plan and motion to confirm. The Trustee notes that no such plan and motion have been filed, however.

The attached invoice does not appear to include billing for the unfiled items, even though the Application mentions it, but the invoice does include $660.00 for e-mail correspondence between the Trustee and Client. *See* Exhibit B, Dckt. 76. In the Motion, the additional legal services are stated with particularity—pursuant to Federal Rule of Bankruptcy Procedure 9013—to be:

> "The specific work for which additional compensation is sought included the following: See Exhibit 'B.'"

Motion, p. 2:9–10; Dckt. 73.

Applicant then appears to try to combine a points and authorities with the Motion (a pleading that this court calls a "Mothorities"), in derogation of Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Documents. The motion, points and authorities, each declaration, and the exhibits (which may be combined into one exhibit documents) must be filed as separate documents.

In the Mothorities, Applicant states that the services provided and the benefit derived are:

A. "Counsel for the debtors has undertaken the following acts:"

1. "Prepared, filed and served a First Modified Plan"

2. "Prepared the Order confirming that plan with special language"

3. "Communicated with the debtors and the trustee regarding the trustee's multiple motions to dismiss"

4. "Appeared at a continued hearing on motion to dismiss with the debtor"

5. "Prepared Responses to Motions to Dismiss"

6. "worked with the trustee to make sure the delinquent payments were timely made and received by the trustee"

7. "Debtors' counsel also prepared this Fee Application."

Motion/Authorities, p. 6:7–14.

As pointed out by the Trustee, no First Modified Plan has been filed and no order confirming the plan with special language has been issued by the court. The Applicant is correct, the Trustee has filed multiple motions to dismiss, three within a seven-month period.

AUGUST 15, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on August 29, 2017. Dckt. 86.

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). An attorney must "demonstrate only that the services were reasonably likely to benefit the estate at the time rendered," not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). 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.

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the attorney exercise reasonable billing judgment?

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

Reasonable Billing Judgment

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

> (a) Is the burden of the probable cost of legal services disproportionately large in relation to the size of the estate and maximum probable recovery?

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

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

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

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

"No-Look" Fees

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

> (a) Compensation. Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c). The failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall signify that the attorney has opted out of Subpart (c). When there is an objection or when an attorney opts out, compensation shall be determined in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017, and any other applicable authority."
> . . .
> (c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.
>
> (1) The maximum fee that may be charged is $4,000.00 in nonbusiness cases, and $6,000.00 in business cases.
>
> (2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.
>
> (3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor's attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims

> filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6).

The Order Confirming the Chapter 13 Plan expressly provides that Applicant is allowed $4,000.00 in attorneys' fees, the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Dckt. 46. Applicant prepared the order confirming the Plan.

Lodestar Analysis

If Applicant believes that there has been substantial and unanticipated legal services that have been provided, then such additional fees may be requested as provided in Local Bankruptcy Rule 2016-1(c)(3). The attorney 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. For bankruptcy cases in the Ninth Circuit, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). "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 Cty. Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of a 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. Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis can be appropriate. *See In re Placide*, 459 B.R. at 73 (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

FEES AND COSTS & EXPENSES REQUESTED

Fees

Applicant has not provided a task billing analysis to the court, but a review of the raw invoice data provided by Applicant, shows that there are two main categories.

Motion to Dismiss: Applicant spent 5.0 hours in this category. Applicant reviewed two motions to dismiss this case, communicated with Client and the Trustee, and appeared at a hearing.

Motion for Allowance of Substantial and Unanticipated Professional Fees: Applicant spent 1.0 hour in this category. Applicant prepared the instant Motion.

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**
Scott Hughes, attorney	6.0	$300.00	$1,800.00
Total Fees for Period of Application			$1,800.00

Costs and Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $41.15 pursuant to this application. The attached invoice states that the fees were incurred from December 14, 2015, through October 12, 2016. Exhibit B, Dckt. 76.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Postage and PACER		$41.15
		$0.00
		$0.00
		$0.00
Total Costs Requested in Application		$41.15

FEES AND COSTS & EXPENSES NOT ALLOWED—WITHOUT PREJUDICE

No further pleadings have been filed since the August 15, 2017 hearing.

The unique facts surrounding the case, including handling two motions to dismiss the case, would usually raise substantial and unanticipated work for the benefit of the Estate, Debtor, and parties in interest. In the Motion, Applicant has not stated with particularity that the actions he took in this case were

substantial and unanticipated above compensation provided by the no-look fee. Applicant never uses the words "substantial" and "unanticipated."

Instead, Applicant pleads that "[t]he initial agreed upon fee is not sufficient to fully compensate the attorney for legal services rendered." Dckt. 73 at 2:5.5–6.5. Simply arguing that the no-look fee is inadequate does not convince the court that additional fees should be awarded. The no-look fee system ensures that attorneys—on average—receive adequate compensation for their cases, including when some cases require more work than simpler cases.

The Local Bankruptcy Rules are set up to give consumer counsel a clear path by which to choose a compensation method. Some attorneys advanced the attitude that the "no-look" fees were just an "initial retainer" that would be increased if the no-look election was not financially favorable to consumer counsel. That required, and continues to require, the courts to carefully review fee applications and for consumer counsel to clearly request additional fees as permitted by the Local Bankruptcy Rules and Plan: They must be stated with particularity and documented to be both "substantial" and "unanticipated" legal services.

Additionally, Applicant's Declaration reflects information that is not true. Applicant states that he "had to modify the plan and successfully had it approved by the court." Dckt. 75 at 4:5.5. No modified plan has even been filed with the court, however. Applicant may have forgotten to delete irrelevant language from a template, but the court notes that he makes multiple references in the Declaration to a non-existent modified plan. In separate paragraphs, Applicant references a modified plan, such as "I did not anticipate that I would have to modify the plan," "Counsel . . . [p]repared, filed and served a First Modified Plan; Prepared the Order confirming that plan with special language," and "I have not charged for much of my time including multiple e-mails and the preparation and approval of the First Modified Plan." *Id.* at 4:11.5, 4:24–25, and 5:6.5–8.

Possibly it was intended that such work would be done to address the reasons that Debtor has defaulted, and now continues (a motion to dismiss is pending) to default in the required plan payments.

The court denies the fees and costs requested without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Scott Hughes ("Applicant"), Attorney having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

4. **17-24002-E-13** **JOSE/ANGELA FLORES** **MOTION TO CONFIRM PLAN**
HLG-2 **Kristy Hernandez** **7-17-17 [24]**

Final Ruling: No appearance at the August 29, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 17, 2017. By the court's calculation, 43 days' notice was provided. 42 days' notice is required. FED. R. BANKR. P. 2002(b); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Plan is granted.

11 U.S.C. § 1321 requires Debtor to file a plan, which is then set for a confirmation hearing under 11 U.S.C. § 1324. Debtor has provided evidence in support of confirmation. The Chapter 13 Trustee filed a non-opposition on August 11, 2017. Dckt. 31. 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 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 July 12, 2017, is confirmed. Debtor's Counsel 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.

5. 17-23504-E-13 DPC-1 | **JOSEPH GAITHER** **Timothy Stearns** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 7-26-17 [30]**

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 26, 2017. By the court's calculation, 34 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 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection. At the hearing ----------.

The Objection to Confirmation of Plan is sustained.

David Cusick, the Chapter 13 Trustee, opposed confirmation of the Plan on the basis that Joseph Gaither ("Debtor") did not appear at the first meeting of creditors. Dckt. 30. After Debtor appeared at that meeting, the Trustee supplemented his Objection with the following grounds:

A. The Plan is not Debtor's best effort;

B. There is improper classification of debt;

C. The Plan fails the liquidation analysis; and

D. Debtor cannot make payments.

Dckt. 34.

The Trustee's objections are well-taken.

The Trustee alleges that the Proposed Chapter 13 Plan now before the court 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 the median income, and the Plan proposes plan payments for $580.00 for thirty-six months. The Plan term must be sixty months. Debtor is also no longer contributing $404.69 listed on Schedule I as a deduction for voluntary retirement, therefore that amount is additional income. Additionally, Debtor listed $534.04 on Schedule J for the payment of the Dodge Ram listed in Class 4 when it should be listed in Class 2 of the Plan. Thus, the court may not approve the Plan.

The Trustee argues that there is improper classification of debt for the 2014 Dodge Ram. It should be listed in Class 2 of the Plan, instead of Class 4 because the loan will mature prior to completion of the Plan in thirty-one months.

The Trustee opposes confirmation of the Plan on the basis that Debtor's plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). Debtor failed to file a Spousal Waiver and therefore is not entitled to the exemptions claimed on Schedule C and the non-exempt equity totaling $84,505.00. The Trustee states that while Debtor has reported non-exempt equity in the amount of $84,505.00, and Debtor is proposing a zero percent dividend to unsecured claims, additional equity exists. Also, Debtor has not explained how, under the proposed plan and the schedules filed under penalty of perjury, the unsecured claimants are entitled to a zero percent dividend when there may be upward of $84,505.00 in non-exempt equity.

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor lists Debtor's son's college tuition as $1,100.00 per month on Schedule J starting Fall 2017. Debtor will cease child support when Debtor's son graduates from high school in June 2017. Debtor plans to resume monthly payments to the Internal Revenue Service at $200.00 per month. Debtor's current monthly net disposable income on Schedule J is listed at $610.15, but with the additional expenses, Debtor will not be able to make the plan payments. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

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

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

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

6.	**17-24007-E-13** **DPC-1**	**ANTHONY SIPPIO** **Kristy Hernandez**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **7-26-17 [22]**

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 26, 2017. By the court's calculation, 34 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 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection. At the hearing ----------.

The Objection to Confirmation of Plan is sustained.

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

A. Debtor has made no plan payments;

B. Debtor failed to appear at the First Meeting of Creditors;

C. Plan relies on pending motions to value; and

D. Spousal Waiver not filed.

TRUSTEE'S STATUS REPORT

The Trustee filed a Status Report on August 21, 2017. Dckt. 46. The Trustee states that Debtor remains delinquent in the amount of $4,300.00 through July 2017, and the next plan payment of $4,300.00 is due on August 25, 2017.

The Trustee asserts that the other issues have been resolved. Debtor appeared at the continued Meeting of Creditors on August 17, 2017. The Motions to Value Secured Claim of Wells Fargo and Key Bank were granted by the Court at the hearing held on August 15, 2017. Lastly, Debtor filed a Spousal Waiver on August 17, 2017.

DISCUSSION

The Trustee's remaining objection is well-taken. The Trustee asserts that Debtor is $4,300.00 delinquent in plan payments, which represents one month of the $4,300.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

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

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

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

7. **16-20408-E-13** **BRUCE/BERNICE WATSON**
PGM-2 **Peter Macaluso**

MOTION TO SUBSTITUTE BERNICE M. WATSON FOR BRUCE G. WATSON AS SUCCESSOR-IN-INTEREST, MOTION TO WAIVE THE 11 U.S.C. S1328 REQUIREMENT FOR DEBTOR BRUCE G. WATSON AND/OR MOTION FOR EXEMPTION FROM FINANCIAL MANAGEMENT COURSE
7-19-17 [45]

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—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 July 19, 2017. By the court's calculation, 41 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). 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 Substitute is granted.

Joint Debtor, Bernice Watson, seeks an order approving the motion to substitute Joint Debtor for the deceased Debtor, Bruce Watson. This motion is being filed pursuant to Federal Rule of Bankruptcy Procedure 7025.

Debtor filed for relief under Chapter 13 on January 26, 2016. On April 26, 2016, Debtor's Chapter 13 Plan was confirmed. Dckt. 26. On December 8, 2016, Debtor Bruce Watson passed away. Joint Debtor asserts that she is the lawful successor and representative of Debtor.

Pursuant to Federal Rule of Bankruptcy Procedure 1004.1, Joint Debtor requests authorization to be substituted 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. A Suggestion of Death was filed on January 4, 2017. Dckt. 31. Joint Debtor is the spouse 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.

In support of the Motion, Joint Debtor and Joint Debtor's counsel have provided an extensive declaration by Joint Debtor. Dckt. 47. The testimony includes the following (identified by paragraph number used in the Declaration):

> "4. I am the successor in interest to Bruce G. Watson, as defined in Section 377.11 of the Code of Civil Procedure, and succeed to their interest in the above-entitled proceeding.
>
> 9. An inventory and appraisement of the personal property in the decedent's estate is specified on Schedule B of the bankruptcy petition.
>
> 12. I did not receive any life insurance proceeds from the death of my husband. I did receive a one time payment from CalPers in the amount of $400.00.
>
> 15. As of the death of my husband, the combined income of $7,057.00, and combined expenses $6,556.55 has changed.
>
> 16. While my gross income has stayed the same at $6,176.00, I have increased my tax deductions so my net income has decreased to $3,630.11.
>
> 19. I also get survivor's benefits of $1,512.52, from which my health insurance payment for Blue Shield is deducted. Therefore, I have removed this as an expense on Schedule J. After taxes, my net income from this benefit is $1,266.14.
>
> 20. [detailed description of changes to expenses]
>
> 25. In closing let me state that my husband negotiated the change from $1,374.00/mo (100%) to a new payment of $500.00 (50% and extending it to 5 more years, we had paid 3 ½ years already). Now that he has passed, I have moved back to 100% repayment and you have decided to decline my motion to continue without him. This is deplorable on your behalf. I am a widow at the age of 48, trying to continue and get this debt behind me and you are forcing me to continually relive the fact that my husband passed and thus not allowing me to just pay my bill and get on with my life. I feel like I am being punished for being a widow."

Declaration, Dckt. 47.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on August 15, 2017. Dckt. 50. The Trustee does not oppose the Motion.

DISCUSSION

Federal Rule of Bankruptcy Procedure 1016 provides that, in the event a debtor passes away in a 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 (In re 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 incorporates Federal Rule of Civil Procedure 25, which provides that "[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 representative. 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:

> 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. 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 . . . .**

(emphasis added); *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. BANKR. 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 of 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.

Denial of Prior Motion

This is Debtor's second motion requesting the present relief. The prior motion was filed on April 12, 2017. Dckt. 33. In denying that prior motion without prejudice, the court provided a clear discussion of the shortcomings and what precluded granting of the prior motion. Civil Minutes, Dckt. 41. The first issue was that Debtor failed to comply with the requirement under Federal Rule of Civil Procedure 25(a) and Federal Rule of Bankruptcy Procedure 7025 for filing the motion within ninety days of the death, and failed to request pursuant to Federal Rule of Bankruptcy Procedure 9006(a) that the court retroactively grant relief for the late filing for excusable neglect. The Notice of Death was filed in this case on January 4, 2017. Dckt. 31.

The court also noted that Joint Debtor failed to provide any grounds upon which the court could make the necessary determinations that the case, with the death of one debtor, could continue to be administered.

Continued Non-Compliance with Federal Rule of Bankruptcy Procedure 1016

Here, Bernice Watson 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. This addresses the court's second substantive issue.

However, the present Motion was not filed within the ninety-day period specified in Federal Rule of Bankruptcy Procedure 1016, following the filing of the Suggestion of Death, however. Dckt. 31. The Notice of Death was filed on January 4, 2017, and this Motion was filed on July 19, 2017.

What Debtor has done is file a second "Notice of Death" on July 19, 2017. Dckt. 45. It appears that Debtor's strategy is to hope the court "forgets" that the actual Notice of Death was filed in January 2017 and be led into thinking that there was no prior, promptly filed Notice of Death. If the court were so deluded, upon discovering the misleading document, then it "must" dismiss this bankruptcy case as required by Federal Rule of Civil Procedure 25(a).

Though Debtor makes no attempt to have relief granted pursuant to Federal Rule of Bankruptcy Procedure 9006(a) to "fix" the problem of the stale Motion, the court "infers" in the Motion that Debtor is requesting that the court extend the ninety-day time period so that the current Motion, filed 196 days after the Notice of Death, is timely.

While no grounds are stated in the Motion, and while the relief is not requested in the Motion, the court notes that in Debtor's detailed declaration she testifies to the stresses and burdens that go with the loss of a spouse. Such could lead to missing the ninety-day deadline for filing the Motion to substitute Joint Debtor in this case. The court cannot identify any prejudice caused by the delay.

The court extends, retroactively, for excusable neglect shown, the time period in which the present Omnibus Motion may be filed through and including July 31, 2017. The present Motion is therefore "timely" filed.

Granting of Motion to Substitute Joint Debtor, Continue in the Administration of this Bankruptcy Case, and Waiver the Post-Petition Education Requirement for the Deceased Debtor

Though continuing in the shortcoming on the timeliness of this Motion, Joint Debtor has provided the court with evidence sufficient for her to be substituted in this case in the placed of Deceased Debtor, to allow administration of this Chapter 13 case to continue (Federal Rule of Bankruptcy Procedure 1016), and to waive the post-petition educational requirements for Deceased Debtor.

However, the court does not waive the requirements for Joint Debtor, as the personal representative of Deceased Debtor, to make the required certifications due under 11 U.S.C. § 1328. No basis has been provided for Joint Debtor being unable to make such certifications.

Continued Administration

While granting the relief requested and allowing the case to proceed, the court does not make any orders with respect to modifying the confirmed plan in this case. In the Motion, it is stated that Debtor will "voluntarily" increase the Plan payments to $900.00 per month from the required $500.00 per month in the confirmed plan. That appears to be based on a determination by Debtor that under the true and accurate finances as now disclosed, the Bankruptcy Code requires that such an increase be made. (Presumably that may have been the result of communications with the Chapter 13 Trustee and a stated intention of the Trustee to seek to modify the Plan once he was provided to accurate financial information.)

The testimony under penalty of perjury by Debtor indicates that the statement of a "voluntary" increase in payment in the Motion may not be accurate. The statements under penalty of perjury in her declaration include statements that:

> "[m]y husband negotiated the change from $1,374.00/mo (100%) to a new payment of $500.00 (50% and extending it to 5 more years, we had paid 3 ½ years already).
>
> " Now that he has passed, I have moved back to 100% repayment."
>
> "you [presumably the court] have decided to decline my motion to continue without him."
> "This is deplorable on your [presumably the court's] behalf."
>
> "I am a widow at the age of 48, trying to continue and get this debt behind me"
>
> "you [presumably the court] are forcing me to continually relive the fact that my husband passed"
>
> "thus not allowing me to just pay my bill and get on with my life."
>
> " I feel like I am being punished for being a widow."

Declaration ¶ 25, Dckt. 47.

Though represented by counsel, it appears that Joint Debtor does not appreciate some of her obligations, as established by Congress in the Bankruptcy Code, and the role of the court. This may well be further evidence of the stress accompanying the death of a spouse. If Debtor has "voluntarily" decided to double her Plan payments, that is her choice. The court has not ordered it. If it is something that the Bankruptcy Code requires her to do to obtain the benefits under Chapter 13, she is merely fulfilling her legal obligations. Presumably, **she has done so on the advice of her counsel.**

In reviewing the Civil Minutes from the prior motion, the closest that the court can find to any comments about payments are the questions raised about Debtor's unexplained significant increase in expenses. The concern was that the increases were unexplained, something that Debtor could easily rectify, if the expenses were accurate, in the subsequent motion and declaration in support thereof.

It is unfortunate that Joint Debtor, who is represented by very experienced consumer counsel, believes that the court is "deplorable" for fairly and even handedly applying the law. (Presumably, given that the Declaration has been prepared by counsel subject to the certifications of Federal Rule of Bankruptcy Procedure 9011, Joint Debtor's counsel concurs in this testimony he filed with the court.) The court appreciates the loss suffered by Joint Debtor, but that (as her counsel well knows) cannot be a basis for unwriting the Bankruptcy Code as enacted by Congress and stitching together a special code for Joint Debtor. Though the court can, and has, "stretched the law" in inferring a request for the retroactive extension of time for "excusable neglect" and has overridden the mandatory dismissal of this bankruptcy case as to Deceased Debtor, this Joint Debtor must (even if having to do so is a painful reminder of her loss) fulfill her obligations under the Bankruptcy Code.

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, Bernice Watson, as the spouse of the deceased party and as the successor's heir and lawful representative, may continue to administer the case on behalf of the deceased debtor, Bruce Watson. The court grants the Motion to Substitute Party.

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 Bernice Watson is substituted as the successor-in-interest to Bruce Watson 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 requirement for completion of debtor's post-petition educational course for the deceased debtor Bruce Watson is waived.
>
> **IT IS FURTHER ORDERED** that the requested for waiver of 11 U.S.C. § 1328 Certification provided for the deceased Debtor Bruce Watson is denied.

8. **17-24109-E-13** **HERBERT GOMEZ** **OBJECTION TO DISCHARGE BY**
DPC-1 **Gabriel Libermann** **DAVID P. CUSICK**
7-17-17 [13]

Final Ruling: No appearance at the August 29, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on July 17, 2017. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

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

The Objection to Discharge is sustained.

David Cusick, the Chapter 13 Trustee ("Objector"), filed the instant Objection to Debtor's Discharge on July 17, 2017. Dckt. 13.

Objector argues that Herbert Gomez ("Debtor") is not entitled to a discharge in the instant bankruptcy case because Debtor previously received a discharge in a Chapter 7 case.

Debtor filed a Chapter 7 bankruptcy case on May 16, 2014. Case No. 14-25193. Debtor received a discharge on September 2, 2014. Case No. 14-25193, Dckt. 12.

The instant case was filed under Chapter 13 on June 21, 2017.

11 U.S.C. § 1328(f) provides that a court shall not grant a discharge if a debtor has received a discharge "in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter." 11 U.S.C. § 1328(f)(1).

Here, Debtor received a discharge under 11 U.S.C. § 727 on September 2, 2014, which is less than four years preceding the date of the filing of the instant case. Case No. 14-25193, Dckt. 12. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), Debtor is not eligible for a discharge in the instant case.

Therefore, the Objection is sustained. Upon successful completion of the instant case (Case No. 17-24109), the case shall be closed without the entry of a discharge, and Debtor shall receive no discharge in the instant case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Discharge filed by David Cusick, the Chapter 13 Trustee, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to Discharge is sustained, and upon successful completion of the instant case, Case No. 17-24109, the case shall be closed without the entry of a discharge.

9. **16-25610-E-13** **PAUL FERNANDES** **CONTINUED MOTION TO CONFIRM**
HLG-3 **Kristy Hernandez** **PLAN**
6-5-17 [94]

APPEARANCE OF
BONNI S. MANTOVANI, ESQ.
ONE OF THE MULTIPLE ATTORNEYS OF RECORD FOR WELLS FARGO BANK, N.A. IN THIS BANKRUPTCY CASE REQUIRED FOR THIS HEARING

TELEPHONIC APPEARANCE PERMITTED

THE COURT DOES NOT REQUIRE THE APPEARANCES OF:
LEE S. RAPHAEL,
CASSANDRA J. RICHEY,
MELISSA VERMILLION,
ANNA LANDA,
AND DIANA TORRES-BRITO,
THE OTHER ATTORNEYS IDENTIFIED AS COUNSEL FOR WELLS FARGO BANK, N.A. IN THIS CONTESTED MATTER

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on June 6, 2017. By the court's calculation, 56 days' notice was provided. 42 days' notice is required. FED. R. BANKR. P. 2002(b); 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 granted.

Paul Fernandes ("Debtor") seeks confirmation of the Amended Plan because there was a change to his finances and because he proposes to pay Nationstar Mortgage LLC its pre-petition arrears in equal monthly payments. Dckt. 94. The Amended Plan proposes payments of $2,900.00 for eight months, followed by $5,629.00 for fifty-three months, plus a lumpsum of $10,000.00 in the second month. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on June 29, 2017. Dckt. 105. The Trustee asserts that Debtor is $5,629.00 delinquent in plan payments, which represents one month of the $5,629.00 plan payment. According to the Trustee, the Plan in § 1.01 calls for payments to be received by the 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 Trustee also argues that Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). The Trustee states that the Additional Provisions potentially require the Trustee to issue manual checks each month without good cause. He notes that the plan provisions require a monthly payment to unsecured claims, which requires the Trustee to calculate the monthly payment for each claim each month. The Trustee argues that Debtor has failed to specify what monthly amount each claim would receive, leaving it to the Trustee to determine. The provisions also call for a specific payment for the Trustee's fees, which contradicts 28 U.S.C. § 586(e). Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

OPPOSITION OF WELLS FARGO BANK, N.A.

Wells Fargo Bank, National Association, as Trustee for the Holders of the Banc of America Mortgage Backed Securities, Inc. Mortgage Pass-Through Certificates, Series 2004-E, its assignees and/or successors in interest filed an Opposition on July 13, 2017. Dckt. 108. Wells Fargo Bank, N.A. holds a senior lien against Debtor's real property located at 3136 Sceptre Drive, Rocklin, California. Wells Fargo Bank, N.A. argues that it opposes a plan that will not pay arrears until confirmation. FN.1.

FN.1. The court finds this argument, that the Plan is objectionable because the required plan payments will not begin to paid until the Plan, providing for such payments, is confirmed to be "interesting." Possibly this is in the nature of a "motion" for adequate protection or relief from the stay, with WFBNA arguing that the cure payments on the arrearage cannot begin until the Plan is confirmed and for a year now Debtor has been unable to confirm a plan. The arrearage cure payments are being held by the Chapter 13 Trustee, and

if the court is willing to grant relief from the stay, then a year into this case adequate protection requires an order authorizing such relief is proper.

But WFBNA has not filed such a motion requesting such relief. If it did, then such would be in a motion for relief from the stay, not in an opposition to motion to confirm/motion to dismiss/motion for relief from stay combined pleading. See Federal Rule of Bankruptcy Procedure 9014, which does not join the provisions of Federal Rule of Civil Procedure 18 and Federal Rule of Bankruptcy Procedure 18 allowing persons to join multiple claims for relief in one complaint, but which is not incorporated into Contested Matter practice by Federal Rule of Bankruptcy Procedure 9014.

Wells Fargo Bank, N.A. does not believe that there will be a confirmable plan in this case and argues that delayed payments to it is equivalent to unfair treatment causing Wells Fargo Bank, N.A. "to bear the inherent risk of default." *Id.* at 3:10–11.

Improper Additional Relief Requested by Wells Fargo Bank, N.A.

Buried in the "Opposition" is a separate request (read as a "motion") that the court dismiss this case for cause if the Chapter 13 Plan is not confirmed. The Motion before the court is for confirmation of a Chapter 13 Plan, not a motion to dismiss. This request for relief by order of the court fails on several grounds. As WFBNA well knows, relief in the form of an order must be sought by motion (or "application" when specially authorized) from the court. FED. R. BANKR. P. 9013. Federal Rule of Bankruptcy Procedure 1017(f) requires that a request for dismissal of a Chapter 13 case "shall be on motion filed and served as required by Rule 9013." An "order" is not requested by burying it in one line in an opposition to someone else's motion.

A motion to dismiss must be served on all parties in interest. Federal Rule of Bankruptcy Procedure 1017(a) requires that the motion be served as provided in Federal Rule of Bankruptcy Procedure 2002, which governs motions served on all parties in interest. Here, the "motion" buried in the Opposition was merely served on Debtor, Debtor's counsel, the Chapter 13 Trustee, and the U.S. Trustee—not all parties in interest. This is clearly deficient, even if a "motion" to dismiss could be joined with and hidden in the Opposition.

Possibly the "confusion" in the relief requested in the Opposition arises from too many attorneys working on one file. Here, listed on the pleadings as the attorneys working on this matter are:

LEE S. RAPHAEL, ESQUIRE, #180030
CASSANDRA J. RICHEY, ESQUIRE #155721
MELISSA VERMILLION, ESQUIRE #241354
BONNI S. MANTOVANI, ESQUIRE, # 106353
ANNA LANDA, ESQUIRE #276607
DIANA TORRES-BRITO, ESQUIRE #163193

It may be this is a composite pleading in which each had an idea that was then rolled upon into one document by clerical staff.

DEBTOR'S REPLY

Debtor filed a Reply on July 24, 2017. Dckt. 110. Debtor asserts that he is no longer delinquent on plan payments.

AUGUST 1, 2017 HEARING

At the hearing, the court continued the hearing to 3:00 p.m. on August 29, 2017. Dckt. 112. The court ordered Debtor to file a supplemental pleading by August 15, 2017, stating all of the proposed amendments to address the oppositions. Additionally, the court ordered Wells Fargo Bank, N.A. to file a supplemental pleading by August 15, 2017, identifying the legal, statutory, and rule basis for requesting dismissal of a Chapter 13 case as part of an opposition to motion to confirm.

SUPPLEMENTAL BRIEF FILED BY WELLS FARGO BANK, N.A.

Wells Fargo Bank, N.A. filed a Supplemental Brief on August 7, 2017. Dckt. 116. Wells Fargo Bank, N.A. argues that Local Rule 2017-1(c) allows all attorneys within a firm to participate in an action and appear on matters. To Wells Fargo Bank, N.A., that means that listing various counsel on pleadings is a way to inform the court that any one of the listed attorneys may, or may not, be appearing in the Contested Matter. Wells Fargo Bank, N.A. argues that listing six attorneys on its opposition does not cause confusion about request for dismissal of this case.

Regarding the request for dismissal of this case, Wells Fargo Bank, N.A. states that the request was included in the opposition because "Debtor has been unable to propose a confirmable plan" in this case. *Id.* at 3:5–6. Specifically, Wells Fargo Bank, N.A. argues that the court's language from the May 9, 2017 hearing (for a prior plan confirmation) that not accelerating an arrearage payment to Wells Fargo Bank, N.A. was not in good faith emboldened Wells Fargo Bank, N.A. to include the dismissal request for the latest plan that, once again, does not accelerate arrearage payments. *See id.* at 3:6–18.5. Wells Fargo Bank, N.A. believes that the court (when direction by Wells Fargo Bank, N.A.) could exercise discretion under 11 U.S.C. § 105 to dismiss the case.

The court instructed Wells Fargo Bank, N.A. to provide the legal authority relied upon for requesting dismissal as part of an opposition to a motion to confirm a plan, and in the Supplemental Brief, Wells Fargo Bank, N.A. argues several times that the court has miscontrued how Wells Fargo Bank, N.A. presented its arguments. *See, e.g.*, *id.* at 4:15 ("Contrary to this Court's view that the dismissal request was 'buried' in the Opposition, [Wells Fargo Bank, N.A.'s] counsel placed the conditional relief of dismissal in bold type within the caption of the Opposition as well as in the prayer."). To avoid Wells Fargo Bank, N.A. believing that the court has misconstrued its legal basis stated in the Supplemental Brief, the court quotes the language exactly, as follows:

> "Section 105(a) makes 'crystal clear' the court's power to act *sua sponte* where no party in interest or the United States trustee has filed a motion to dismiss a bankruptcy case." Tennant v. Rojas (In re Tennant), 318 B.R. 860, 869 (9th Cir. BAP 2004); In re Brown, 399 B.R. 162, 165 (Bankr. W.D. Va. 2009) ("A bankruptcy court may dismiss a chapter 13 case sua sponte. . .pursuant to sections 105(a) and

> 1307(c) of the Bankruptcy Code." A bankruptcy court may never employ Section 105(a) to "contravene the express provisions of the Code." Law v. Siegel, ___ U.S. ___, 134 S.Ct. 1188, 1197 (2014); Alternative Fuels, 789 F.3d at 1149. But where the proposed action is not expressly circumscribed and instead is in harmony with other provisions of the Bankruptcy Code as well as its overriding purpose, Section 105(a) provides a bankruptcy court with power to act.

Id. at 4:5–14.

Finally, Wells Fargo Bank, N.A. states that no punitive measures should be taken against it for requesting dismissal and requests that the case be dismissed if Debtor does not confirm a plan or if another reason prevents funds being released to Wells Fargo Bank, N.A..

DEBTOR'S SUPPLEMENTAL DECLARATION

Debtor, through counsel, filed a Supplemental Declaration on August 14, 2017. Dckt. 119. Debtor's Counsel reports that Debtor has conferred with the Trustee and with Wells Fargo Bank, N.A. and has reached an agreement about language to be used in an order confirming the Plan, which satisfies both objections from the Trustee and Wells Fargo Bank, N.A. *See* Exhibit A, Dckt. 120.

TRUSTEE'S RESPONSE

The Trustee filed a Response on August 21, 2017. Dckt. 122. The Trustee states that he no longer opposes confirmation.

DISCUSSION

Misinterpretation of Local Bankruptcy Rule 2017-1(c)

Local Bankruptcy Rule 2017-1(c) governs appearances by attorneys within an organization, including a law firm. The rule allows an attorney in that law firm to participate in a matter "if another person employed or retained by the same law firm . . . is attorney of record in the action." LOCAL BANKR. R. 2017-1(c). However, Local Bankruptcy Rule 2017-1(c) does not govern who are "attorneys of record" in the bankruptcy case or adversary proceeding. That issue is expressly addressed in Local Bankruptcy Rule 2017-1(b)(2) [emphasis added] which states that "**Appearance of an attorney of record is made:**"

A. "(A) By Signing and filing an initial document;

B. (B) **By Causing the attorney's name to be listed in the upper left hand corner of the first page of the initial document**;

C. (C) By physically appearing at a court hearing in the matter, formally stating the appearance on the record, and then signing and filing a confirmation of appearance within seven (7) days; or

D. (D) By filing and serving on all parties a substitution of attorneys as provided in Subpart (h) of this Rule."

By listing six attorneys in the upper left hand corner of its Opposition, **Wells Fargo Bank, N.A. has affirmatively stated** to the court and all other parties in interest **that each of the six attorneys is an attorney of record for this case**, not just that one, or some of them, may choose to appear at a hearing, but "do not rely on them being an attorney of record in this case." The uncertainty as to who is an attorney of record is confusing for the court, for Debtor, and for all other interested parties.

The court is concerned, in light of the above clear language of Local Bankruptcy Rule 2017-1(b)(2), how Wells Fargo Bank, N.A. and its attorneys of record in this case are asserting that it is overruled by Local Bankruptcy Rule 2017-1(c) that only permits other attorneys in a law firm, who had not theretofore appeared as counsel of record, to appear in the case without filing of a substitution of attorney. Wells Fargo Bank, N.A. affirmatively argues that notwithstanding having six attorneys appear as attorney of record, such listing "does not necessarily mean that all counsel will be actively involved in every pleading filed."

Wells Fargo Bank, N.A.'s direction that "If this is a practice with which this Court has an issue, it should be addressed squarely so that should this Court have instructions it wishes to impart on counsel about this practice, it can do so . . ." ignores the point—when Wells Fargo Bank, N.A. affirmatively has six attorneys appear as counsel of record, there is uncertainty about who is the "real" counsel of record. It also ignores that this court, **as a District-Wide Rule**, has "addressed" what is required and the effect of listing attorneys of the law firm on pleadings. The court is at a loss of what else could be done to "instruct" Wells Fargo Bank, N.A. and the six attorneys as to the effect of listing attorneys on a pleading.

Wells Fargo Bank, N.A. admits that these six attorneys of record are not really involved in the case, stating, "Listing the counsel on pleadings does not necessarily mean that all counsel will be actively involved in every pleading filed." Supplemental Brief, p. 2:15–16, Dckt. 116. The court finds fallacious the contention of Wells Fargo Bank, N.A. that "The fact that six different counsel [of record] [who may have no involvement with the bankruptcy case] are listed on the Opposition does not mean that it has caused any 'confusion' about the operative conditional request for dismissal that was included in the Opposition." *Id.*, p. 2:21–23. Some obvious "confusion" includes:

A. Who is the "correct" attorney of record on whom pleadings for Wells Fargo Bank, N.A. should be served?

B. Who should opposing counsel contact to communicate with the "real" attorney of record for the "committee of attorneys" appearing as attorneys of record for Wells Fargo Bank, N.A.?

C. Who are the "correct" attorneys of record responsible for addressing defects in pleadings and the conduct of the representation of Wells Fargo Bank, N.A. in this case?

D. Who are the "correct" attorneys of record responsible for any Rule 9011 sanctions in this case? The court could well imagine the incredulous responses from Lee S.

Raphael, Cassandra J. Richey, Melissa Vermillion, Bonni S. Mantovani, Anna Landa, and Diana Torres-Brito upon receiving notice that they were being sanctioned as attorneys of record based on the conduct of one of the other attorneys of record.

E. Who are the "correct" attorneys of record overseeing the prosecution of the case for Wells Fargo Bank, N.A.?

Well Fargo Bank, N.A.'s and its multiple attorneys' of record protestations not withstanding, the contention that listing six attorneys on the pleading does not make all of them counsel of record is clearly inconsistent with the plain language of the Local Bankruptcy Rules. It is also inconsistent with the Local Rules of the District Court as to what constitutes appearance of record for counsel. E.D. CAL. LOCAL RULE 182. (Not surprisingly, Local Bankruptcy Rule 2017-1 is modeled after, and expressly tracks the language of the District Court Local Rule.)

Inadequacy of 11 U.S.C. § 105(a) as Ground for Requesting Dismissal

Wells Fargo Bank, N.A.'s legal authority for being able to bundle a request for case dismissal into an opposition to confirmation of a plan is non-existent. The only legal authority is the "holy grail" of § 105(a), which both the Supreme Court and appellate courts have addressed as not being a basis for parties to get the court to do whatever the parties want, irrespective of the law. FN.2.

FN.2. The legal determination that 11 U.S.C. § 105(a) is not a free-floating authorization for a judge to do "whatever seems right" had been addressed by many courts prior to *Law v. Siegel*. Examples of such include: *In re Lloyd*, 37 F.3d 271 (7th Cir. 1994) (not granting the court "free-floating discretion" to create rights outside of the Bankruptcy Code); *In re Fesco Plastics Corp.*, 996 F.2d 152 (7th Cir. 1993) (court may not employ its equitable powers to achieve result not contemplated by the Code); *United States v Sutton,* 786 F.2d 1305 (5th Cir. 1986) (court's power must be exercised consistent with the provisions of the Bankruptcy Code).

Instead, Wells Fargo Bank, N.A. merely provided the court with language that a court is able to dismiss a bankruptcy case *sua sponte*. Such a proceeding for the court "*sua sponte*" ("Upon his own responsibility; of his own motion," Ballentine's Law Dictionary) is not present in this matter, though. The court has not given any indication that a *sua sponte* dismissal may occur. What the court is considering is whether to grant the motion to confirm the Plan. Wells Fargo Bank, N.A. is the party who wants dismissal, and Wells Fargo Bank, N.A. is the party that was ordered to provide legal authority for its request. It appears that Wells Fargo Bank, N.A.'s argument is that Wells Fargo Bank, N.A. can act *sua sponte* for the court. Wells Fargo Bank, N.A. failed to support its request for dismissal.

As a basis for the court, at the direction of Wells Fargo Bank, N.A. acting "*sua sponte*," one of the provisions that Wells Fargo Bank, N.A. cites is from *Law v. Siegel* declaring that a bankruptcy court cannot use 11 U.S.C. § 105(a) in violation of express Code language. Dckt. 116 at 4:9–11. Wells Fargo Bank, N.A. argues that when an action—such as dismissal—is in harmony with the Code and is not expressly prohibited, then the court is able to act under Section 105(a).

What Wells Fargo Bank, N.A., and Wells Fargo Bank, N.A.'s multiple attorneys of record ignore (or affirmatively withhold from the court) are the express statutory provisions of 11 U.S.C. § 1307 providing for the dismissal of a Chapter 13 case. Dismissal of a Chapter 13 case is not left to the vagaries of the "fill-in" provisions of 11 U.S.C. § 105(a).

Congress has provided for the debtor dismissing a Chapter 13 case in 11 U.S.C. § 1307(b). For creditors (such as Wells Fargo Bank, N.A. in this case), Congress provides in 11 U.S.C. § 1307(c) that such creditors may request, after notice and a hearing, that the court dismiss the Chapter 13 case. Such a "request" by a creditor (such as Wells Fargo Bank, N.A.) must be made by a motion. FED. R. BANKR. P. 9013. There is no provision for Wells Fargo Bank, N.A. and its counsel to "overrule" Congress, vitiate 11 U.S.C. § 1307(c) as it applies to Wells Fargo Bank, N.A., and have the bankruptcy court act "*sua sponte*" as directed by Wells Fargo Bank, N.A. and its multiple attorneys of record.

Of interest to this matter, is the Bankruptcy Appellate Panel ruling in *Nelson v. Meyer (In re Nelson)*. 343 B.R. 671 (B.A.P. 9th Cir. 2006). (Unfortunately, it appears that Wells Fargo Bank, N.A. and the six attorneys of record appearing in this case did not find this decision of the Bankruptcy Appellate Panel when preparing its Supplemental Brief.) In that published decision, the Bankruptcy Appellate Panel found the statutory basis for converting or dismissing a Chapter 13 case to be 11 U.S.C. § 1307(c). Under it, the court must conduct a "two-step determination," to determine both whether "cause" exists and whether conversion or dismissal is in the "best interests of creditors and the estate." *Id.* at 674–75. Additionally, the court must provide the debtor the opportunity and consider whether such opportunity be permitted, to file an amended plan. *Id.*

It is true that 11 U.S.C. § 1307 does not address the court's power, *sua sponte*, to dismiss a bankruptcy case. While the court has the power to do so, it must do so in compliance with the requirements of Due Process. The court has not done so in this case. The court has not specified the grounds, if any, the court believes exist upon which a *sua sponte* dismissal would be proper. No such grounds having been stated by the court, Debtor has not been afforded the opportunity to address such issues, present its arguments and evidence, and be given its day in court on the grounds stated in an order to show cause for dismissal. FN.3.

FN.3. See discussion of proper exercise of *sua sponte* powers of the court by Moore's Federal Practice - Civil § 11.22 Initiation of Sanctions, which includes:

> "The court initiates the Rule 11 sanctions process by issuing an order to show cause that directs the attorney, law firm, or party to be sanctioned to demonstrate why the rule has not been violated. **An order to show cause is required** not only by the express terms of Rule 11, but also **by the dictates of due process** (see § 11.23[3]). Accordingly, any sua sponte sanction ordered without a prior order to show cause is fatally defective and must be set aside. Moreover, an order to show cause must itself be adequate, which requires that the order specifically describe the conduct at issue and direct the party or attorney to demonstrate why that conduct does not violate the rule."

As stated in the above cited § 11.23[3] of Moore's Federal Practice:

> "The parties and attorneys must receive both proper notice and a reasonable opportunity to respond before the trial court may impose sanctions under Rule 11. It is not sufficient to provide a sanctioned party or attorney an opportunity to convince the court to set aside sanctions after they have been imposed. The mere existence of Rule 11 does not satisfy the notice requirements, nor does the fact that the alleged violator knew or should have known that sanctions were being considered."

Rather, it is Wells Fargo Bank, N.A., Lee S. Raphael, Cassandra J. Richey, Melissa Vermillion, Bonni S. Mantovani, Anna Landa, and Diana Torres-Brito who state that they are directing the court to *sua sponte* dismiss the case for whatever reason they state the case should be dismissed.

Wells Fargo Bank, N.A. and the Multiple Attorneys' of Record Failure to Address the Requirement for a Counter-Motion as Specified in Local Bankruptcy Rule 9014-1(i)

In arguing that Wells Fargo Bank, N.A. can request (or instruct the court to act "*sua sponte*" at the direction of Wells Fargo Bank, N.A. and its attorneys) that the bankruptcy case be dismissed as part of its opposition, Wells Fargo Bank, N.A. and its six attorneys of record ignore not only Federal Rule of Bankruptcy Procedure 9013 but also Local Bankruptcy Rule 9014-1(i), which governs the procedural requirements for seeking relief through a countermotion to a Contested Matter already before the court. Local Bankruptcy Rule 9014-1(i) states:

> Any counter motion or other motion related to the general subject matter of the original motion set for hearing pursuant to this Local Rule [9014-1] may be filed and served no later than the time opposition to the original motion is required to be filed. In the event a counter or related motion is filed by the responding party, the judge may continue the hearing on the original and all related motions so as to give the responding and moving parties reasonable opportunity to serve and file oppositions and replies to all pending motions. No written opposition need be filed to any related matter unless the matter is continued by the Court. Nothing herein shall be construed to require the filing of a counter or related motion.

Wells Fargo Bank, N.A. appears to assert that it and its attorneys of record are not bound by the Local Bankruptcy Rules that it, and its attorneys of record, demand be enforced against others. This further highlights the inadequacy of Wells Fargo Bank, N.A.'s arguments, further raising the specter of violating the Federal Rule of Bankruptcy Procedure 9011 certifications made by Wells Fargo Bank, N.A. and Wells Fargo Bank, N.A.'s numerous attorneys "appearing" in this Contested Matter.

Proposed Order Confirming

As part of the Supplemental Declaration, Debtor proposed an order confirming to resolve the parties' oppositions. The Order Confirming provides:

The Chapter 13 plan filed on June 05, 2017 of the above-named Debtor has been transmitted to all creditors, and it has been determined after notice and opportunity for hearing that Debtor's Plan satisfies the requirements of 11 U.S.C. section 1325.

Therefore, **IT IS ORDERED** that the Plan is confirmed.

IT IS FURTHER ORDERED that:

1. Debtor shall immediately notify, in writing, the Clerk of the United States Bankruptcy Court and the Chapter 13 Trustee of any change in Debtors' address;

2. Debtor shall immediately notify the Chapter 13 Trustee in writing of any termination, reduction of, or other change in the employment of Debtor; and

3. Debtor shall appear in Court whenever notified to do so by the Court.

IT IS FURTHER ORDERED that the attorney's fees for Debtor's attorney in the full amount of $4,000.00 are approved, $1,500.00 of which was paid prior to the filing of the petition. The balance of $2,500.00, provided that the attorney and Debtor have complied with Local Bankruptcy Rule 2016-1(c), shall be paid by the trustee from plan payments at the rate specified in the confirmed plan. Debtor's attorney will seek the Court's approval by complying with Local Bankruptcy Rule 2016-1(c).

IT IS FURTHER ORDERED that the Trustee has paid $25,728.43 to the ongoing payment to Nationstar Mortgage LLC, to date. The $18,816.94 of this was paid through month 8 (2 payments of $2,406.98 followed by 6 payments of $2,303.83.) The $6,911.49 has been paid after month 8, (3 payments of $2,303.83.) Other than the trustee fees, no other disbursements have been made. The debtor has paid $50,087.00 through July 31, 2017, and a $21,244.47 balance is on hand available for distribution to creditors.

IT IS FURTHER ORDERED that the plan payment shall be paid as follows:

1) Trustee fees shall be paid as allowed by statute.

2) After confirmation, unsecured claims shall be paid monthly the sums listed below;

Becket & Lee LLP shall receive a monthly dividend of $56.28

Capitol One Bank	shall receive a monthly dividend of $104.08
Resurgent Capital	shall receive a monthly dividend of $31.73
Financial Credit	shall receive a monthly dividend of $41.69
Midland Funding	shall receive a monthly dividend of $22.38
Capital One Bank	shall receive a monthly dividend of $57.81
Portfolio Recovery	shall receive a monthly dividend of $36.60

3) Any remaining funds may be paid on a monthly basis to Nationstar Mortgage on its pre-petition arrears claim.

AUGUST 29, 2017 HEARING

At the hearing, the parties clarified whether the proposed payments to unsecured claims are for the remaining fifty-two months of the Plan or whether they are for paying unsecured claims, according to the amounts in the filed proofs of claim, at an accelerated rate to be cured before the Plan completes. The parties advised the court that **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 Confirm the Amended Chapter 13 Plan 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 Debtor's Amended Chapter 13 Plan, filed on June 5, 2017, is confirmed.
>
> **IT IS FURTHER ORDERED** that:
>
> 1. Debtor shall immediately notify, in writing, the Clerk of the United States Bankruptcy Court and the Chapter 13 Trustee of any change in Debtors' address;
>
> 2. Debtor shall immediately notify the Chapter 13 Trustee in writing of any termination, reduction of, or other change in the employment of Debtor; and
>
> 3. Debtor shall appear in Court whenever notified to do so by the Court.

IT IS FURTHER ORDERED that the attorney's fees for Debtor's attorney in the full amount of $4,000.00 are approved, $1,500.00 of which was paid prior to the filing of the petition. The balance of $2,500.00, provided that the attorney and Debtor have complied with Local Bankruptcy Rule 2016-1(c), shall be paid by the trustee from plan payments at the rate specified in the confirmed plan. Debtor's attorney will seek the Court's approval by complying with Local Bankruptcy Rule 2016-1(c).

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Capital One Bank	shall receive a monthly dividend of $57.81
Portfolio Recovery	shall receive a monthly dividend of $36.60

3) Any remaining funds may be paid on a monthly basis to Nationstar Mortgage on its pre-petition arrears claim.

10. 16-28316-E-13 FF-6 | **SHARRY STEVENS-GOREE** **Paul Bindra** | **MOTION TO VALUE COLLATERAL OF SANTANDER CONSUMER USA 7-21-17 [66]**

Final Ruling: No appearance at the August 29, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditor, and Office of the United States Trustee on July 21, 2017. By the court's calculation, 39 days' notice was provided. 28 days' notice is required.

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

The Motion to Value Collateral and Secured Claim of Santander Consumer USA ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $8,639.00.

The Motion filed by Sharry Stevens-Goree ("Debtor") to value the secured claim of Santander Consumer USA ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2012 Honda Accord ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $8,639.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The lien on the Vehicle's title secures a purchase-money loan incurred on March 8, 2012, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $13,663.50. 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 $8,639.00, 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 Sharry Stevens-Goree ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of Santander Consumer USA ("Creditor") secured by an asset described as a 2012 Honda Accord ("Vehicle") is determined to be a secured claim in the amount of $8,639.00, 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 $8,639.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

11. 16-28316-E-13 FF-7 | **SHARRY STEVENS-GOREE** / **Paul Bindra** | **MOTION TO AVOID LIEN OF CITIBANK, N.A.** / **7-21-17 [71]**

Final Ruling: No appearance at the August 29, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditor, and Office of the United States Trustee on July 21, 2017. By the court's calculation, 39 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). 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 Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Citibank N.A. ("Creditor") against property of Sharry Stevens-Goree ("Debtor") commonly known as 156 Ritter Court, Fairfield, California ("Property").

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on August 15, 2017. Dckt. 90. The Trustee states Debtor reports the Property's value as $316,617.00 on Schedule A but is now relying upon a January 12, 2017 appraisal of $334,000.00. The Trustee notes that Debtor has claimed a $75,000.00 exemption and has listed four liens (including Creditor's judgment lien) against the Property, totaling $280,784.45. The Trustee does not oppose the Motion.

DISCUSSION

A judgment was entered against Debtor in favor of Creditor in the amount of $11,151.88. An abstract of judgment was recorded with Solano County on April 24, 2012, that encumbers the Property.

Pursuant to Debtor's Amended Schedule A, the subject real property has an approximate value of $334,000.00 as of the date of the petition. Dckt. 55. The unavoidable consensual liens that total $269,632.57 as of the commencement of this case are stated on Debtor's Amended Schedule D. *Id.* Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the amount of $75,000.00 on Amended Schedule C. *Id.*

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of the judicial lien impairs Debtor's exemption of the real property, and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

An order (not a minute 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 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 judgment lien of Citibank N.A., California Superior Court for Solano County Case No. FCM118787, recorded on April 24, 2012, Document No. 201200038261, with the Solano County Recorder, against the real property commonly known as 156 Ritter Court, Fairfield, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

12. **17-23517-E-13** **STACY TUCKER** **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK**
DPC-2 **Mary Ellen Terranella** **7-3-17 [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 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, 2017. By the court's calculation, 29 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 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection. At the hearing ----------.

The Objection to Confirmation of Plan is sustained.

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

A. Delinquency,

B. Failure to Attend First Meeting of Creditors,

C. Failure to File Tax Returns, and

D. Plan Exceeds Sixty Months.

AUGUST 1, 2017 HEARING

At the hearing, the court continued the hearing to 3:00 p.m. on August 29, 2017. Dckt. 21.

TRUSTEE'S SUPPLEMENT

The Trustee filed a supplement to his Objection on August 21, 2017. Dckt. 24. The Trustee states that Debtor is no longer delinquent and that she appeared at the continued meeting of creditors, which itself was continued to September 14, 2017, for Debtor to file her taxes.

The Trustee states that the remaining issues are Debtor's failure to file tax returns for four years preceding the petition, and the Plan exceeds sixty months still because of the Internal Revenue Service ("IRS") claim (Claim No. 2) that has not been amended.

RULING

The Trustee's objections are well-taken. Since the August 1, 2017 hearing, the status of this case appears to rely upon Debtor filing tax returns and the IRS possibly reducing its claim.

The Trustee states that on June 21, 2017 the IRS filed Claim #2 indicating that Debtor has not filed tax returns during the four-year period preceding the filing of the Petition, specifically for the years 2008–16.

Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to the Trustee, the Plan will complete in ninety-nine months due to a priority tax claim by the IRS of $26,692.89 filed on June 21, 2017. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

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

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

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

13. **17-20220-E-13** **WILLIAM/FAYE THOMAS** **OBJECTION TO CLAIM OF ROBERT S. PUTNAM, CLAIM NUMBER 12**
HLG-4 **Kristy Hernandez** **7-21-17 [29]**

Final Ruling: No appearance at the August 29, 2017 hearing is required.

The Objection to Claim is dismissed without prejudice.

Debtor having filed a Notice of Withdrawal, which the court construes to be an Ex Parte Motion to Dismiss the pending Objection on August 25, 2017, Dckt. 65; no prejudice to the responding party appearing by the dismissal of the Objection; Debtor having the right to request dismissal of the objection pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041; and the dismissal being consistent with the opposition filed by Creditor; the Ex Parte Motion is granted, Debtor's Objection is dismissed without prejudice, and the court removes this Objection from the calendar.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim filed by Debtor having been presented to the court, Debtor having requested that the Objection itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, Dckt. 65, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Claim is dismissed without prejudice.

14. **17-22224-E-13 MET-2** | **LARRY/ELIZABETH RIZZIO** **Mary Ellen Terranella** | **MOTION TO VALUE COLLATERAL OF ONEMAIN FINANCIAL SERVICES, INC. 7-26-17 [54]**

Final Ruling: No appearance at the August 29, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, and Office of the United States Trustee on July 26, 2017. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Motion to Value Collateral and Secured Claim of OneMain Financial Services, Inc. ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $9,875.00.

The Motion filed by Larry Rizzio and Elizabeth Rizzio ("Debtor") to value the secured claim of OneMain Financial Services, Inc. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2005 Chevrolet Silverado 1500 and a 2012 Hyundai Elantra ("Vehicles"). Debtor seeks to value the Vehicles at replacement values as of the petition filing date of $4,975.00 for the Chevrolet and $4,900.00 for the Hyundai, a total of $9,875.00. 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).

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on August 15, 2017 stating that he does not oppose the Motion. Dckt. 60.

RULING

The lien on the Vehicle's title secures a non-purchase-money loan incurred on April 11, 2016, to secure a debt owed to Creditor with a balance of approximately $17,244.73. 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 $9,875.00, 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 Larry Rizzio and Elizabeth Rizzio ("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 OneMain Financial Services, Inc. ("Creditor") secured by assets described as a 2005 Chevrolet Silverado 1500 and a 2012 Hyundai Elantra ("Vehicles") is determined to be a secured claim in the amount of $9,875.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicles is $9,875.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

15. 17-24229-E-13 DEBORAH LEONEL
DPC-1 Steven Alpert

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
8-1-17 [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 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 August 1, 2017. 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 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection. At the hearing ----------.

The Objection to Confirmation of Plan is sustained.

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

A. Deborah Leonel ("Debtor") misclassified a claim; and

B. Debtor did not file the Plan in good faith.

DISCUSSION

The Trustee's objections are well-taken.

The Trustee argues that the secured claim of American Honda Finance should be paid by the trustee in Class 2 of the Plan. Debtor listed the claim as Class 4 with a monthly contract payment of $480.00 per month. The balance of the loan is listed on Schedule D as $23,000.00. The Trustee asserts that the claim will be paid in full prior to conclusion of the sixty-month plan proposed and should be provided for in Class

2 of the Plan. The Trustee also notes that Debtor claimed she was making payments to American Honda Finance at the First Meeting of Creditors on July 27, 2017, but there is no evidence of such in the Statement of Financial Affairs.

The Trustee believes that not all community property assets have been disclosed in the Plan, meaning it was not filed in good faith. Debtor recently separated from a marriage and admitted to transferring properties prior to filing.

A. Income

On the Statement of Financial Affairs, Debtor failed to report income of the non-filing spouse. Debtor's 2016 Tax Return showed that Debtor and Debtor's spouse had $15,630.00 in rental income in 2016, she but failed to report both the real property at 3808 N. 15th Ave, Phoenix, Arizona, and income.

B. Payments

On the Statement of Financial Affairs, Debtor reports no payments made during the ninety days prior to filing. Debtor's Plan provides post-petition payments to Caliber Home Loans at $985.00 per month and American Honda at $480.00 per month. Because Debtor has not made any payments, these claims may be in default and not adequately provided for in the Plan.

C. Transfers

On the Statement of Financial Affairs, Debtor reports no transfers. The Trustee has cause, through an internet search, to believe that Debtor may have transferred the Arizona real property as recently as April 10, 2017, and on August 20, 2016. At the First Meeting of Creditors, Debtor explained that she made transfers of properties that belonged to Debtor's spouse.

D. Bank Accounts

Debtor did not list two bank accounts on Schedule B. At the First Meeting of Creditors, Debtor stated to having a checking account at Bank of America and two checking accounts at Golden One Credit Union. On Schedule B, Debtor lists, but failed to identify one checking account at Golden one Credit Union with a balance of $250.00.

CONCLUSION

Therefore with so many instances of misfiling and failures to disclose material information, the Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The Objection is sustained, and the Plan is not confirmed.

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

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

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

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

16. **12-31030-E-13 MJG-2** | **JOSEPH/DORI AZZOLINO** **Matthew Gilbert** | **CONTINUED MOTION FOR HARDSHIP DISCHARGE** **6-19-17 [31]**

Final Ruling: No appearance at the August 29, 2017 hearing is required.

The Motion for Hardship Discharge is dismissed without prejudice.

Debtor having filed a "Withdrawal of Motion", which the court construes to be an *Ex Parte* Motion to Dismiss the pending Motion on August 22, 2017, Dckt. 54; no prejudice to the responding party appearing by the dismissal of the Motion; Debtor having the right to request dismissal of the motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041; and the dismissal being consistent with the opposition filed by the Trustee; the Ex Parte Motion is granted, Debtor's Motion is dismissed without prejudice, and the court removes this Motion from the calendar.

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

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

The Motion for Hardship Discharge filed by Debtor having been presented to the court, Debtor having requested that the Motion itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, Dckt. 54, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion for Hardship Discharge is dismissed without prejudice.

17. **17-23835-E-13** **AARON WILLIAMS** **MOTION FOR SUBSTITUTION AS THE REPRESENTATIVE AND MOTION FOR CONTINUED ADMINISTRATION MOTION FOR WAIVER OF POST-PETITION EDUCATION REQUIREMENT**
MRL-1 **Mikalah Liviakis**
7-26-17 [17]

Final Ruling: No appearance at the August 29, 2017 hearing is required.

The Motion to Substitute is dismissed without prejudice.

Debtor having filed a "Withdrawal of Motion", which the court construes to be an Ex Parte Motion to Dismiss the pending Motion on August 23, 2017, Dckt. 33; no prejudice to the responding party appearing by the dismissal of the Motion; Debtor having the right to request dismissal of the motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041; and the dismissal being consistent with the opposition filed by the Trustee; the Ex Parte Motion is granted, Debtor's Motion is dismissed without prejudice, and the court removes this Motion from the calendar.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Substitute filed by Debtor having been presented to the court, Debtor having requested that the Motion itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, Dckt. 33, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Substitute is dismissed without prejudice.

18. **17-23740-E-13** **ROBERT J/TENEKA JONES** **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK**
DPC-1 **Peter Macaluso** **7-11-17 [23]**

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 11, 2017. By the court's calculation, 35 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 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection. At the hearing ----------.

The Objection to Confirmation of Plan is sustained.

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

A. The Plan will not complete within sixty months because the Internal Revenue Service filed a claim for a higher priority claim than expected (from $8,000.00 to $22,038.90), as well as listing $1,501.93 in unsecured debt.

B. Debtor cannot make plan payments because the Plan relies upon motions to value secured claims and because Schedules I and J are inconsistent.

AUGUST 15, 2017 HEARING

At the hearing, the court continued the hearing to 3:00 p.m. on August 29, 2017. Dckt. 55.

DISCUSSION

No further pleadings have been filed since the August 15, 2017 hearing.

The Trustee's objections are well-taken. Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to the Trustee, the Plan will complete in sixty-nine months due to the Internal Revenue Service filing a claim for a higher amount than anticipated. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

A review of Debtor's Plan shows that it relies on the court valuing the secured claims of Golden 1 Credit Union and Travis County Credit Union. Those motions are set for hearing on August 29, 2017. Debtor has now dismissed those two Motions.

Finally, Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Schedule I lists combined monthly income of $4,284.34, but Schedule J lists $8,291.08 in income. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

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

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

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

19. 17-23740-E-13 ROBERT J/TENEKA JONES MOTION TO VALUE COLLATERAL OF
PGM-1 Peter Macaluso TRAVIS CREDIT UNION
7-29-17 [36]

Final Ruling: No appearance at the August 29, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on July 29, 2017. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

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

The Motion to Value Collateral and Secured Claim of Travis Credit Union ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $6,500.00.

The Motion filed by Robert Jones & Teneka Jones ("Debtor") to value the secured claim of Travis Credit Union ("Creditor") is accompanied by Debtor's declaration. FN.1. Debtor is the owner of a 2011 Honda Accord ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $6,500.00 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).

FN.1. The moving party is reminded that the Local Rules require the use of a new Docket Control Number with each motion. LOCAL BANKR. R. 9014-1(c). Here, the moving party reused a Docket Control Number. That is not correct. The Court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(l). For this contested matter, but for the sharp eye to the court's law clerk, this matter would have been removed from the calendar, the judge erroneously believing that the "withdrawal" of the motion with DCN: PGM-1 was intended for the motion with DCN: PGM-1 now before the court.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on August 15, 2017. Dckt. 49 or 50 (identical filings). The Trustee indicates that he does not oppose the Motion.

RULING

The lien on the Vehicle's title secures a purchase-money loan incurred on November 11, 2013, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $9,222.19. 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 $6,500.00, 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 Robert Jones & Teneka Jones ("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 Travis Credit Union ("Creditor") secured by an asset described as a 2011 Honda Accord ("Vehicle") is determined to be a secured claim in the amount of $6,500.00, 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 $6,500.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

20. 17-23740-E-13 PGM-2 | **ROBERT J/TENEKA JONES** **Peter Macaluso** | **MOTION TO VALUE COLLATERAL OF THE GOLDEN 1 CREDIT UNION 7-29-17 [43]**

Final Ruling: No appearance at the August 29, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on July 29, 2017. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

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

The Motion to Value Collateral and Secured Claim of Golden 1 Credit Union ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $8,000.00.

The Motion filed by Robert Jones and Teneka Jones ("Debtor") to value the secured claim of Golden 1 Credit Union ("Creditor") is accompanied by Debtor's declaration. FN.1. Debtor is the owner of a 2013 Chevrolet Malibu ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $8,000.00 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).

FN.1. The moving party is reminded that the Local Rules require the use of a new Docket Control Number with each motion. LOCAL BANKR. R. 9014-1(c). Here, the moving party reused a Docket Control Number. That is not correct. The Court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(l).

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on August 15, 2017. Dckt. 52. The Trustee does not oppose the Motion.

RULING

The lien on the Vehicle's title secures a purchase-money loan incurred on August 14, 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 $13,747.85. 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 $8,000.00, 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 Robert Jones and Teneka Jones ("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 Golden 1 Credit Union ("Creditor") secured by an asset described as a 2013 Chevrolet Malibu ("Vehicle") is determined to be a secured claim in the amount of $8,000.00, 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 $8,000.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

21. **17-23742-E-13** **CHRISTOPHER HANSON** **MOTION TO CONFIRM PLAN**
MC-1 **Muoi Chea** **7-13-17 [31]**

Final Ruling: No appearance at the August 29, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on July 13, 2017. By the court's calculation, 47 days' notice was provided. 42 days' notice is required. FED. R. BANKR. P. 2002(b); 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. Debtor has provided evidence in support of confirmation. The Chapter 13 Trustee filed a non-opposition on August 11, 2017. Dckt. 47. 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 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 July 13, 2017, is confirmed. Debtor's Counsel 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.

22. 17-20943-E-13 MARTHA RAMIREZ MOTION TO CONFIRM PLAN
PGM-1 Peter Macaluso 7-18-17 [75]

DEBTOR DISMISSED: 07/28/2017

Final Ruling: No appearance at the August 29, 2017 hearing is required.

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

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

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

The Motion to Confirm Amended Plan having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is dismissed as moot, the case having been dismissed.

23. 15-29850-E-13 JESUS/SANDY MARTINEZ MOTION TO MODIFY PLAN
TOG-4 Thomas Gillis 7-14-17 [44]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 14, 2017. By the court's calculation, 46 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(g) (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.

Jesus Martinez and Sandy Martinez ("Debtor") seek confirmation of the Modified Plan because there was a payment to the Franchise Tax Board that was not provided for in the previous plan. Dckt. 46. The Modified Plan will correct the following discrepancies: the first missed payment of $1,595.00, the $2,724.00 that was not provided for in the previous plan to the Franchise Tax Board, the higher unsecured claims of $2,352.00 instead of $2,100.00, and the Class 2 claim of Ocwen that was $66,310.61 instead of $69,000.00. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on August 15, 2017. Dckt. 60.

Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to the Trustee, the Plan will complete in sixty-nine months due to the proposed reduction in Debtor's plan payment from $1,595.00 to $1,326.00 and the fact that unsecured claims

total $4,789.08, not $2,352.00. The Trustee calculates that the Plan will complete timely if the plan payment remained at $1,595.00. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

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 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.

24. 17-22150-E-13 JAMES SMITH MOTION TO CONFIRM PLAN
MJD-2 Matthew DeCaminada 7-5-17 [56]

Final Ruling: No appearance at the August 29, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 5, 2017. By the court's calculation, 55 days' notice was provided. 42 days' notice is required. FED. R. BANKR. P. 2002(b); 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. Debtor has provided evidence in support of confirmation. The Chapter 13 Trustee filed a non-opposition on August 11, 2017. Dckt. 70. 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 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 July 5, 2017, is confirmed. Debtor's Counsel 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.

25.	**15-27951-E-13 WW-2**	**NICOLE KIMBROUGH Mark Wolff**	**CONTINUED OBJECTION TO NOTICE OF MORTGAGE PAYMENT CHANGE 5-25-17 [40]**

Final Ruling: No appearance at the August 29, 2017 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 May 25, 2017. By the court's calculation, 47 days' notice was provided. 28 days' notice is required.

The Objection to Notice of Mortgage Payment Change has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). 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 hearing on the Objection to Notice of Mortgage Payment Change is continued to 3:00 p.m. on September 12, 2017.

Nicole Kimbrough ("Debtor") objects to the Notice of Mortgage Payment Change issued on July 11, 2016, by CAM IX Trust ("Creditor"). Debtor believes that the escrow and escrow shortage amounts were increased incorrectly to include collection for pre-petition debts. Debtor argues that the monthly payment should be $805.63, comprised of $661.75 for principal and interest and $143.88 for escrow, effective August 1, 2016.

ORDER CONTINUING HEARING

On June 28, 2017, the court entered an order continuing the hearing on the Objection 3:00 p.m. on August 29, 2017, pursuant to parties' stipulated request for a continuance. Dckt. 57. The court also ordered that the deadline to object is August 22, 2017.

JULY 11, 2017 HEARING

The hearing having been continued to 3:00 p.m. on August 29, 2017, the court removed the matter from calendar. Dckt. 60.

JULY 11, 2017 NOTICE OF MORTGAGE PAYMENT CHANGE

Creditor filed a new Notice of Mortgage Payment Change on July 11, 2017. The Notice states that it is effective on August 1, 2017. Creditor appears to agree with Debtor's Objection because the Notice lowers total payments to $805.63, with $143.88 for escrow. An attached statement of anticipated escrow payments also shows that there is an escrow surplus of $4,748.52.

STIPULATION TO CONTINUE HEARING

On August 22, 2017, Debtor and Creditor submitted a Second Stipulated Request to Continue Hearing requesting that the hearing be continued to 3:00 p.m. on September 12, 2017. Dckt. 61. The parties report that they have reached a resolution that involves preparing an Amended Notice of Payment Change that retroactively adjusts payments as well as reallocating payments made by Debtor through the Chapter 13 Trustee. The parties state that reallocation is necessary because of an error on Debtor's part and because of an amended notice of payment change.

The parties are preparing a stipulation to resolve this Objection and request that the hearing be continued while they finalize and file that stipulation.

RULING

The parties having reported that they have reached a resolution that is being documented and having requested that the hearing be continued, the court continues the hearing to 3:00 p.m. on September 12, 2017.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Notice of Mortgage Payment Change filed in this case by Nicole Kimbrough, Chapter 13 Debtor, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Objection to Notice of Mortgage Payment Change is continued to 3:00 p.m. on September 12, 2017.

26.	**17-23560-E-13** **DPC-2**	**NICOLE MOSBY** **Pro Se**	**OBJECTION TO DISCHARGE UNDER 11 U.S.C. § 1328(F)** **7-19-17 [24]**

Final Ruling: No appearance at the August 29, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Office of the United States Trustee on July 19, 2017. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

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

The Objection to Discharge is sustained.

David Cusick, the Chapter 13 Trustee ("Objector"), filed the instant Objection to Debtor's Discharge on July 19, 2017. Dckt. 24.

Objector argues that Nicole Mosby ("Debtor") is not entitled to a discharge in the instant bankruptcy case because Debtor previously received a discharge in a Chapter 7 case.

Debtor filed a Chapter 7 bankruptcy case on August 16, 2016. Case No.16-25405. Debtor received a discharge on November 29, 2016. Case No. 16-25405, Dckt. 40.

The instant case was filed under Chapter 13 on May 26, 2017.

11 U.S.C. § 1328(f) provides that a court shall not grant a discharge if a debtor has received a discharge "in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter." 11 U.S.C. § 1328(f)(1).

Here, Debtor received a discharge under 11 U.S.C. § 727 on November 29, 2016, which is less than four years preceding the date of the filing of the instant case. Case No. 16-25405, Dckt. 40. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), Debtor is not eligible for a discharge in the instant case.

Therefore, the Objection is sustained. Upon successful completion of the instant case (Case No. 17-23560), the case shall be closed without the entry of a discharge, and Debtor shall receive no discharge in the instant case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Discharge filed by David Cusick, the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to Discharge is sustained, and upon successful completion of the instant case, Case No. 17-23560, the case shall be closed without the entry of a discharge.

27. 17-24960-E-13 DOUGLAS/VALERIE LUTES
PGM-1 Peter Macaluso

MOTION TO VALUE COLLATERAL OF FRANKLIN CREDIT
7-31-17 [8]

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,, Creditor, and Office of the United States Trustee on July 31, 2017. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The Motion to Value Collateral and Secured Claim of Franklin Credit Management Corporation ("Creditor") is denied.

The Motion to Value filed by Douglas Lutes and Valerie Lutes ("Debtor") to value the secured claim of Franklin Credit Management Corporation ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 3001 Tree Swallow Circle, Elk Grove, California ("Property"). Debtor seeks to value the Property at a fair market value of $387,000.00 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).

TRUSTEE'S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a Non-Opposition on August 15, 2017. Dckt. 19.

BOSCO'S OPPOSITION

Bosco Credit LLC, through its servicer Franklin Credit Management Corporation, ("Bosco") filed an Opposition on August 16, 2017. Dckt. 25. FN.1. Creditor argues that its claim is not wholly unsecured because it received a payoff quote from Wells Fargo Bank, N.A. ("Wells Fargo") (holder of the first deed

of trust) stating that Debtor owes $184,584.58 on the first deed, not the $434,698.00 claimed by Debtor. *See* Exhibit 5, Dckt. 28; Declarations Dckt. 26.

FN.1. Bosco filed the Opposition and Memorandum of Points and Authorities in this matter as one document. That is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." Revised Guidelines for the Preparation of Documents § (III)(A). Counsel is reminded of the court's expectation that documents filed with this court comply with the Revised Guidelines for the Preparation of Documents in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9004(a). Failure to comply is cause to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(l).

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.

Additionally, Bosco argues that Debtor has undervalued the Property. According to a Broker's Price Opinion Report, Bosco claims that the Property is worth $402,000.00 at fair market value. *See* Exhibit 1, Dckt. 28.

DEBTOR'S REPLY

Debtor filed a Reply on August 22, 2017. Dckt. 30. Debtor reveals that they calculated Wells Fargo's claim based upon a claim that Wells Fargo submitted in Case 11-42066 indicating a balance of $434,698.60.

Debtor acknowledges that there is a dispute about what amount was owed to Wells Fargo on July 28, 2017, but Debtor argues that Creditor's assertion that the claim is for $184,584.58 is inadmissible because it is based on hearsay. Debtor argues that Creditor's declarant has no personal knowledge of the underlying note, any transfer, Wells Fargo's claim (or potential claim), and Wells Fargo's loan records.

Because Debtor believes that Creditor has not presented any admissible evidence, Debtor requests that the court grant the Motion as presented.

DISCUSSION

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

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

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

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

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

Based upon the evidence presented, the court concludes that there is value in the collateral to at least partially secure Creditor's Claim. Debtor admits that Debtor intentionally used a claim balance for the Wells Fargo Bank, N.A. claim from a proof of claim filed almost six years ago in bankruptcy case number 11-42066. In providing this information, Debtor only let counsel make the argument, with Debtor failing, or being unwilling, to provide testimony as to how this stale proof of claim was part of a good faith, bona fide, honest representation to the court in this Contested Matter.

Ryan Butryn, a bankruptcy analysis with Franklin Credit Management, the loan servicer agent for Bosco Credit, LLC, testifies that Wells Fargo Bank, N.A. has documented in writing to Bosco Credit, LLC that there is only a $184,584.58 balance due on the claim secured by the senior deed of trust. Declaration ¶ 8, Dckt. 26. The written documentation sent by Wells Fargo Bank, N.A. to Bosco Credit, LLC is filed as Exhibit 5 (Dckt. 28) in Opposition to the Motion. A review of Exhibit 5 does show that it states that the "Total Amount Outstanding" on the obligation to Wells Fargo Bank, N.S. is $184,584.58. Multiple addresses are given for how and where the $184,584.58 "loan payoff" may be sent to Wells Fargo Bank, N.A. At the end of Exhibit 5 is a Loan Payment Coupon that states that the "TOTAL PAYOFF AMOUNT: $184,584.58" is "GOOD THROUGH 08-23-17."

It is telling that Debtor has not submitted a Declaration in response "admitting" that the debt to Wells Fargo Bank, N.A. is higher. Debtor does not submit a Declaration admitting that Debtor has seriously defaulted in the payments due on the Wells Fargo Bank, N.A. and that such obligation is nearly triple the amount that Wells Fargo Bank, N.A. has stated in a commercial transaction communication.

The court is confident that if Debtor had evidence that the obligation was greater than the $184,584.58 (such as a current mortgage statement or the 2016 year end mortgage statement), Debtor and Debtor's experienced consumer counsel would have presented it. If such simple evidence existed, Debtor's counsel would have presented with the Reply, not merely argue that "it cannot be."

Value of the Collateral

Debtor testifies under penalty of perjury that the collateral has a "Fair Market Value" of $387,000.00. Declaration ¶ 3, Dckt. 10. In that testimony, Debtor is careful to avoid stating that Debtor's testimony of "Fair Market Value" is actually the projected Net Sale Proceeds amount after costs of sale. This Net Proceeds of Sale, not Fair Market Value, "value" comes to light when reviewing Debtor's Schedule A/B in which Debtor states under penalty fo perjury that the Property has a Fair Market Value of $420,000.00, but Debtor reduces the "value of the portion" Debtor owns to $387,000 by subtracting $33,000 (8%) from the Fair Market Value. Schedule A/B, Dckt. 1 at 12.

The Ninth Circuit Court of Appeal addressed this point in 1995, and the Supreme Court gave its "concurrence" to the Ninth Circuit ruling that the 11 U.S.C. § 506(a) valuation is the Fair Market Value, not a net, after sales expenses value. In *Associates Commercial Corporation v. Rash*, 520 U.S. 953 (1007), the Supreme Court concluded, "In sum, under § 506(a), the value of property retained because the debtor has exercised the § 1325(a)(5)(B) 'cram down' option is the cost the debtor would incur to obtain a like asset for the same 'proposed . . . use.'" Here, Debtor admits that the "cost" to purchase the Collateral would be at least $420,000.00. See *Taffi v. United States (In re Taffi)*, 68 F.3d 306 (9th Cir. 1995) in which the Ninth Circuit foreshadows the soon-to-be-issued ruling of the Supreme Court in *Rash*.

Debtor's testimony and Schedules establish that the Collateral has a value of $420,000.00.

DENIAL OF MOTION

Debtor seeks to have the secured claim of Bosco Credit, LLC valued at $0.00, based on the senior lien securing an obligation in excess of the value of the collateral. However, the evidence presented establishes that there is value in the collateral for the Bosco Credit, LLC claim. The Collateral has a value of $420,000.00 (using Debtor's stated Fair Market Value) and the senior lien secures a claim of $184,584.58 owed to Wells Fargo Bank, N.A.

Debtor "opining" and Debtor's counsel arguing that "of course, the amount of what Debtor owes Wells Fargo Bank, N.A. on this claim in August 2017 must be the same as owed Wells Fargo Bank, N.A. in November 2011" is not supported by any credible evidence. Debtor offers nothing of substance to counter the evidence of the payoff demand evidence presented by Bosco Credit, LLC. As noted above, such evidence could easily be presented—if it actually existed. It not being presented is a strong showing that the contention by Debtor is false.

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 Douglas Lutes and Valerie Lutes ("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 Value the Secured Claim on Bosco Credit, LLC (secured by a second deed of trust against the real property commonly known as 3001 Tree Swallow Circle, Elk Grove, California) is denied. The court has determined that the Collateral has a value of $420,000.00 and is subject to a senior lien that secures a claim of less than ($200,000.00).

28. 16-25462-E-13 PGM-2 | **DAN/MEGHAN MILLER** | **Peter Macaluso** | **MOTION TO CONFIRM PLAN** | **7-14-17 [62]**

Final Ruling: No appearance at the August 29, 2017 hearing is required.

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

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 14, 2017. By the court's calculation, 46 days' notice was provided. 42 days' notice is required. FED. R. BANKR. P. 2002(b); 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 hearing on the Motion to Confirm the Amended Plan is continued to 3:00 p.m. on October 3, 2017.

Dan Miller and Meghan Miller ("Debtor") seek confirmation of the Amended Plan because they have surrendered property and have eliminated as many non-essential expenses as possible. Dckt. 64. The Amended Plan proposes plan payments of $2,075.00 beginning in June 2017 for fifty-one months to complete the Plan with 0.00% paid to unsecured claims. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on August 11, 2017. Dckt. 75. The pleading says that the Plan is feasible and that Debtor is current under it, but it also presents several grounds in opposition to confirmation.

The Trustee questions Debtor's ability to make plan payments under 11 U.S.C. § 1325(a)(6) because they have less income than reported on the schedules, leading to insufficient disposable income. Specifically, the Trustee notes that Debtor has not amended the income statement to reflect that co-debtor Dan Miller is no longer receiving $1,890.00 in unemployment benefits.

The Trustee also argues that the Plan is not Debtor's best effort because it does not propose an increase in plan payments beginning in month thirty-seven after car payments cease. The Trustee requests language in an order confirming that the plan payment increase to $480.00 for months 37–60.

Finally, the Trustee argues that the Motion has not been pleaded with particularity because Debtor does not explain in the Motion why an Amended Plan is being sought.

DEBTOR'S REPLY

Debtor filed a Reply on August 22, 2017. Dckt. 78. Co-Debtor Dan Miller reports that he has been employed and has begun receiving paychecks, the first of which contained net income of $856.32.

Because Debtor has not received a full month's pay yet, Debtor requests a forty-five day continuance to show feasibility of the plan payments and to file updated Schedules I and J.

RULING

According to the Trustee's calculations, Debtor forgot to eliminate the $1,890.00 from unemployment benefits that are no longer received, which lowers net disposable income to $185.00. Additionally, a Notice of Mortgage Payment Change was filed on August 11, 2017, that will increase escrow payments, raising the total monthly payment from $1,084.37 to $1,350.15.

At the April 25, 2017 hearing, the court expressed concern that Debtor has proposed "a slim budget" that does not seem capable of carrying them through to completion of a Plan. Dckt. 53. Even after amendments, Debtor now once again faces a reality where a plan may not feasible. Nevertheless, Debtor becoming employed and receiving paychecks indicates that the financial condition may have improved enough to confirm a plan.

Debtor requests a continuance, and the court agrees that a continuance will be beneficial to determine if Debtor's changed circumstances support the proposed plan. Clearly, Debtor and Debtor's counsel are working hard to try to confirm a feasible plan in this case. The hearing is continued to 3:00 p.m. on October 3, 2017.

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 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 hearing on the Motion to Confirm the Amended Plan is continued to 3:00 p.m. on October 3, 2017.

29.	**17-23662-E-13 DPC-1**	**JOSE ESPINO AND MICHEL REYES** **Thomas Gillis**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **7-26-17 [43]**

Final Ruling: No appearance at the August 29, 2017 hearing is required.

The Chapter 13 Trustee having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Objection to Confirmation was dismissed without prejudice, the matter is removed from the calendar, and the Chapter 13 Plan filed on May 31, 2017, 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.

30. **17-23464-E-13 MET-2** **JOSEPHINE MELONE**
Mary Ellen Terranella

CONTINUED MOTION TO VALUE COLLATERAL OF BOSCO CREDIT II, LLC TRUST SERIES 2010-1
6-9-17 [25]

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—Continued Hearing.

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 June 9, 2017. By the court's calculation, 18 days' notice was provided. 14 days' notice is required.

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

The court set a briefing schedule and set the matter for continued hearing on August 15, 2017.

The Motion to Value Secured Claim of Bosco Credit II, LLC Trust Series 2010-1 ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $59,572.01.

The Motion to Value filed by Josephine Melone ("Debtor") to value the secured claim of Bosco Credit II, LLC Trust Series 2010-1 ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 1049 Star Lilly Court, Vacaville, California ("Property"), which is rental property owned by Debtor. Debtor seeks to value the rental property at a fair market value of $550,000.00 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).

TRUSTEE'S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a Non-Opposition on June 13, 2017. Dckt. 30.

CREDITOR'S OPPOSITION

Creditor filed an Opposition on June 20, 2017. Dckt. 38. Creditor notes that Debtor "significantly reduces the value of the Property based upon necessary repairs to the pool and pond." *Id.* at 3:15–16. Creditor states that it is owed $143,119.90, as of the petition filing date. Creditor opposes the Motion on the ground that it has not had an opportunity to conduct an appraisal, and Creditor requests that the court continue the hearing on the Motion approximately forty-five days to allow time for an appraisal to be conducted.

JUNE 27, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on August 15, 2017, to allow Creditor to conduct an appraisal and for parties to consider the economic reality of a second deed of trust position. Dckt. 44.

CREDITOR'S SUPPLEMENTAL OPPOSITION

Creditor filed a Supplemental Opposition on August 2, 2017. Dckt. 59. FN.1. Creditor states that it conducted an appraisal of the house, which concluded that the Property is worth $623,000.00.

FN.1. Creditor filed the Supplement Opposition and Exhibits in this matter as one document. That is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." Revised Guidelines for the Preparation of Documents § (III)(A). Counsel is reminded of the court's expectation that documents filed with this court comply with the Revised Guidelines for the Preparation of Documents in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9004(a). Failure to comply is cause to deny a party's requests. LOCAL BANKR. R. 1001-1(g), 9014-1(l).

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.

Creditor also argues to the court that a debtor may not utilize 11 U.S.C. § 506(a) when another person is a form of joint owner for the property securing a claim to be valued. Dckt. 59 (citing *In re Rodriguez*, 156 B.R. 659, 660 (Bankr. E.D. Cal. 1993)). Creditor argues that Armando Leyva was the only person to execute the note for the Property, with Debtor not being part of that credit transaction.

AUGUST 15, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on August 29, 2017, to allow time for the parties to try to resolve any disputes. Dckt. 71.

APPLICABLE LAW

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

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

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

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

PROOF OF CLAIM FILED

The court has reviewed the Claims Registry for this bankruptcy case. Proof of Claim No. 2-1 appears to be the claim at stake.

DISCUSSION

No further pleadings have been filed since the August 15, 2017 hearing.

The first deed of trust secures a claim with a balance of approximately $548,427.99, according to Proof of Claim 3-1. Creditor's second deed of trust secures a claim with a balance of approximately $143,119.90.

Determination That The Property Is Not Debtor's Principal Residence

In Creditor's related Objection to Confirmation, Creditor alleges that Debtor's plan impermissibly modifies its claim secured only by an interest in Debtor's primary residence in violation of 11 U.S.C. § 1322(b)(2). Dckt. 50.

On the Petition, Debtor states that she lives at 1740 Newark Lane, Suisun City, California. Dckt. 1. On the Statement of Financial Affairs, she also discloses that she lived at the Property from December 2005 to February 2015 and then moved to 2367 Main Street, Apt. 101, Ferndale, Washington, from February 2015 through May 2017. *Id.* That disclosure is consistent with Debtor's prior case, No. 14-29966, filed on October 6, 2014, in which she disclosed that she lived at the Property at the time of filing and also received rental income from it. Case No. 14-29966, Dckt. 1.

Debtor's Declaration with the Motion states that the Property is her rental property and has been since the filing of this case. Dckt. 27. What neither Creditor nor Debtor has addressed is the legal determination of when a property is deemed a debtor's primary residence—whether that time is upon signing a loan note, filing a bankruptcy case, or confirming a Chapter 13 plan. That determination could impact whether Debtor could move to value Creditor's secured claim under 11 U.S.C. § 506(a).

The Bankruptcy Appellate Panel for the Ninth Circuit has addressed the precise question of when to determine a debtor's principal residence for purposes of 11 U.S.C. § 1322(b)(2). *See Benafel v. One West Bank, FSB (In re Benafel)*, 461 B.R. 581 (B.A.P. 9th Cir. 2011). After studying trends in case law, the Bankruptcy Appellate Panel held that 11 U.S.C. § 1322(b)(2) should be analyzed using the petition date to determine a debtor's principal residence. *Id.* at 588.

The *Benafel* court summarized its research into the issue and concluded that using the petition date reflected the majority trend. *See id.* at 589–90 (citing *In re Christopherson*, 446 B.R. 831, 835 (Bankr. N.D. Ohio 2011); *In re Baker*, 398 B.R. 198, 203 (Bankr. N.D. Ohio 2008); *Wells Fargo Bank, N.A. v. Jordan (In re Jordan)*, 330 B.R. 857, 860 (Bankr. M.D. Ga. 2005); *In re Leigh*, 307 B.R. 324, 331 (Bankr. D. Mass. 2004); *In re Bosch*, 287 B.R. 222, 226 (Bankr. E.D. Mo. 2002); *In re Schultz*, No. 00-10581-JMD, 2001 Bankr. LEXIS 1319 (Bankr. D. N.H. July 12, 2001); *In re Larios*, 259 B.R. 675 (Bankr. N.D. Ill. 2001); *In re Donahue*, 221 B.R. 105, 111 (Bankr. D. Vt. 1998); *In re Howard*, 220 B.R. 716, 718 (Bankr. S.D. Ga. 1998); *In re Lebrun*, 185 B.R. 665 (Bankr. D. Mass. 1995); *In re Wetherbee*, 164 B.R. 212, 215 (Bankr. D. N.H. 1994); *In re Chruchill*, 150 B.R. 288, 289 (Bankr. D. Me. 1993); *In re Boisvert*, 156 B.R. 357, 359 (Bankr. D. Mass. 1993); *In re Dinsmore*, 141 B.R. 499, 505–06 (Bankr. W.D. Mich. 1992); *In re Amerson*, 143 B.R. 413, 416 (Bankr. S.D. Miss. 1992); *In re Groff*, 131 B.R. 703, 706 (Bankr. E.D. Wis. 1991)). Since *Benafel*, other courts have adopted the petition date as the appropriate to determine a debtor's principal residence. *See, e.g.*, *Utzman v. Suntrust Mortg., Inc.*, No. 15-cv-04299-RS, 2016 U.S. Dist. LEXIS 26341, at *26 (N.D. Cal. Mar. 1, 2016); *TD Bank, N.A. v. Landry (In re Landry)*, 479 B.R. 1, 7 (D. Mass. 2012); *In re Montiel*, No. 14-44784, 2017 Bankr. LEXIS 1797, at *8, 16 (Bankr. W.D. Wash. June 28, 2017); *In re Schayes*, 483 B.R. 209, 215 (Bankr. D. Ariz. 2012).

This court finds persuasive the petition date analysis as the appropriate date to determine whether the property at issue constitutes Debtor's principal residence for purposes of the 11 U.S.C. § 1332(b)(2). Using that date, the court finds that Debtor's principal residence on May 22, 2017, was 1740 Newark Lane, Suisun City, California. The Property was not Debtor's principal residence on the petition date, which means that the anti-modification provisions of 11 U.S.C. § 1322(b)(2) do not apply to prevent Debtor from moving to value Creditor's claim against the Property under 11 U.S.C. § 506(a).

Creditor's Appraiser Is More Persuasive Than Debtor's Owner Valuation

While the court has Debtor's personal opinion of value for the Property being $500,000, the court finds the expert testimony presented by Creditor to be more persuasive—as a starting point. Laurie Hawes provides her testimony as a licensed real estate appraiser. Declaration, Dckt. 60. The testimony of an expert as to specialized knowledge, experience, and information is permitted to assist the finder of fact making the required factual findings. FED. R. EVID. 701, 702. The expert is not the "finder of fact" but assists the court as the actual "finder of fact."

Ms. Hawes's expert opinion is that the Property has a value of $623,000.00. Dckt. 60. Attached as Exhibit 2 to the Declaration is a detailed appraisal report (using the standard Uniform Residential Appraisal Report format). In the Report, Ms. Hawes provides six comparable properties, making adjustments for all the properties.

In her Declaration, Debtor makes a downward adjustment in her valuation of $25,000.00, testifying that: (1) the pool is cracked and needs to be replastered, (2) because it is a rental property Debtor needs to put a fence around the pool (but does not testify as to why that has not been previously done if it is "needed" for rental property), and (3) the pond must be removed because it is stagnant. Declaration ¶ 8, Dckt. 27.

In her Declaration, Ms. Hawes does not expressly address these specific repairs identified by Debtor. Ms. Hawes does not provide testimony as to the extent that she physically inspected the Property, limiting her testimony to a general "I observed and inspected the interior and exterior of the home . . . ." Declaration ¶ 11, Dckt. 60.

As part of her Appraisal Report, Ms. Hawes includes pictures of the Property (but does not testify that she took the pictures). There is one picture of the pool and one of the spa. While the pool appears to need a cleaning, the court cannot tell from the picture the extent of any of the asserted necessary replastering. Dckt. 60 at 24.

Ms. Hawes has included a picture of the pond, which appears to be a fetid body of water that needs to be cleaned. *Id.* at 25. The court cannot tell what needs to be "removed" in connection with the pond as testified to by Debtor in her Declaration.

In light of the direct testimony that repairs to the pool are necessary and that work must be done on the pond, and Ms. Hawes not clearly and expressly addressing such in her declaration and Appraisal Report, the court concludes that Ms. Hawes's valuation of $623,000.00 is more credible but that it needs to be adjusted for the repairs and cleaning testified to by Debtor. It appears that Debtor overstates what needs to be done, with the court concluding that a $15,000.00 downward adjustment is warranted.

The court determines that the Property has a value of $608,000.00 ($623,000–$15,000). Making the mathematical calculation based on a $608,000.00 value, the value of the Creditor's interest in the Debtor's interest in the collateral is computed as follows:

Gross Value of Property.....$608,000.00

Claim Secured by Senior Lien.....($548,427.99) Proof of Claim No. 3

Value of Creditor's Secured Claim.....$ 59,572.01

Debtor May Avail Herself of the Provisions of 11 U.S.C. § 506(a)

Creditor has argued that the Motion cannot be granted because of a 1993 decision in this court stating that a valuation motion cannot be granted when a joint tenant ownership is involved. That logic was addressed and resolved by the Bankruptcy Appellate Panel in 2001. *See Highland Fed. Bank v. Maynard (In re Maynard)*, 264 B.R. 209, 214–15 (B.A.P. 9th Cir. 2001). In that case, the appellant relied upon *In re Rodriguez* for the same proposition as Creditor here, but there, the court held that *In re Rodriguez* was distinguishable because the debtor entered the *Rodriguez* case with only a fractional interest that became part of the estate, as opposed to the case on appeal in which community property (which under 11 U.S.C. § 541(a)(2) brought all of the property into the estate) was not barred from valuation because of a non-debtor.

In this case, the deed of trust for the Property shows that it was held by Armando Leyva and Debtor as joint tenants. Additionally, Debtor disclosed in her petition that Mr. Leyva is deceased. While the Creditor chose to make the loan only to Armando Leyva, Creditor insisted on getting the grant of a security interest from Debtor. In effect, Creditor made a non-recourse loan with respect to Debtor and Debtor's interests in the Property.

Additionally, in alleging that Debtor is not the "sole owner" of the Property, Creditor appears to be misstating the facts. On Schedule A/B, Debtor states under penalty of perjury that she is the sole owner of the Property. Dckt. 1 at 11. On Schedule H, Debtor states under penalty of perjury that Armando Leyva was a co-debtor on an obligation, but that he is deceased. *Id.* at 27.

The Deed of Trust provided by Creditor, Exhibit B attached to the Supplemental Opposition (Dckt. 59 at 13), lists Debtor and Mr. Leyva as "joint tenants." Creditor offers no explanation as to how Mr. Leyva, if deceased as stated under penalty of perjury by Debtor, could continue to be a "joint tenant." The court also notes that Creditor has not provided a declaration or other method of authenticating Exhibit B as required by Federal Rules of Evidence 901 and 902.

It appears that Creditor (through the original lender from whom this obligation has been assigned) knew from day one that Debtor could be the owner of the property and that its obligation was subject to the bankruptcy laws of this country.

Creditor has not offered any counter-evidence to the statements under penalty of perjury that the joint tenant of the property identified in Creditor's deed of trust is deceased and that Debtor is the only remaining person having an interest in the Property.

RULING

Creditor's secured claim is determined to be in the amount of $59,572.01, the value of the collateral after the senior deed of trust, and therefore payments in the secured amount of the claim shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value Secured Claim filed by Josephine Melone ("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 Bosco Credit II, LLC Trust Series 2010-1 secured by a second in priority deed of trust recorded against the real property commonly known as 1049 Star Lilly Court, Vacaville, California (rental property), is determined to be a secured claim in the amount of $59,572.01, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $608,000.00 and is encumbered by a senior lien securing a claim in the amount of $548,427.99, which does not exceed the value of the Property that is subject to Creditor's lien.

31. **11-29166-E-13 WW-6** | **MICHAEL/JENNIFER PETERS** **Mark Wolff** | **CONTINUED OBJECTION TO NOTICE OF MORTGAGE PAYMENT CHANGE 4-25-17 [152]**

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—Continued Hearing.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor on April 25, 2017. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Objection to Notice of Mortgage Payment Change was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. The court set a briefing schedule and final hearing.

The Objection to Notice of Mortgage Payment Change is sustained.

Michael Peters and Jennifer Peters ("Debtor") object to a Notice of Mortgage Payment Change filed by MTGLQ Investors LP ("Creditor") on March 1, 2017. Debtor alleges that creditor violated Federal Rule of Bankruptcy Procedure 3002.1(c) by failing to file and serve Debtor, Debtor's attorney, and David Cusick (the Chapter 13 Trustee), with a notice itemizing all fees, expenses, and charges.

Debtor requests that the court, pursuant to Federal Rule of Bankruptcy Procedure 3002.1(i):

A. Preclude Creditor from presenting omitted information as evidence;

B. Determine that payment of the fees, costs, and expenses allegedly incurred in the past 180 days are not required by the underlying agreement and applicable bankruptcy law to cure a default or to maintain payments in accordance with 11 U.S.C. § 1322(b)(5);

C. Require Creditor to pay Debtor's incurred attorney's fees; and

D. Award sanctions to Debtor and against Creditor and Rushmore Loan Management Services.

Summary of Debtor's Objection

Debtor argues that Creditor has collected, or charged Debtor for, fees, costs, or expenses after December 1, 2011, without giving notice. A review of the docket shows that Creditor has not filed any Notice of Fees, Expenses, and Charges since December 1, 2011. Nevertheless, Debtor has asserted—and attached as Exhibit A—that Creditor has charged for various fees, including:

1/20/16	Property Preservation DI	$96.00
1/22/16	Property Preservation DI	$55.00
1/22/16	Property Preservation DI	$15.00
1/22/16	Property Preservation DI	$1.50
2/9/16	Property Preservation DI	$10.50
2/24/16	Property Preservation DI	$15.00
2/24/[16]	Property Preservation DI	$1.50
3/8/16	Misc Corporate Disbursem	$1.18
3/16/16	Misc Corporate Disbursem	$1.18
3/25/16	Property Preservation DI	$1.50
3/25/16	Property Preservation DI	$15.00
4/28/16	Property Preservation DI	$15.00
4/28/16	Property Preservation DI	$1.50
5/5/16	Misc Corporate Disbursem	$1.18
5/20/16	Property Preservation DI	$15.00
5/20/16	Property Preservation DI	$1.50
5/24/16	Misc Corporate Disbursem	$1.18
5/31/16	Misc Repayment	$109.00
6/2/16	Misc Corporate Disbursem	$1.18
6/23/16	Property Preservation DI	$1.50
6/23/16	Property Preservation DI	$15.00
6/27/16	Misc Corporate Disbursem	$1.18
7/7/16	Misc Corporate Disbursem	$1.18

7/8/16	Misc Repayment	$1.18
7/15/16	Attorney Advance Disburs	$215.00
7/25/16	Misc Corporate Disbursem	$1.18
7/25/16	Property Preservation DI	$55.00
7/27/16	Property Preservation DI	$96.00
7/27/16	Property Preservation DI	$15.00
7/27/16	Property Preservation DI	$1.50
8/1/16	Property Preservation DI	$10.50
8/2/16	Escrow Advance	$10,859.60
8/10/16	Misc Corporate Disbursem	$1.18
8/10/16	Misc Corporate Disbursem	$0.29
8/29/16	Property Preservation DI	$15.00
8/29/16	Property Preservation DI	$1.50
9/6/16	Misc Corporate Disbursem	$1.18
9/26/16	Property Preservation DI	$15.00
9/26/16	Property Preservation DI	$1.50
9/29/16	Corporate Advance Disbursem	$1.18
10/26/16	Corporate Advance Disbursem	$1.18
10/26/16	Property Preservation DI	$15.00
10/26/16	Property Preservation DI	$1.50
10/31/16	Misc Corporate Disbursem	$1.18
11/1/16	Misc Corporate Disbursem	$0.79
11/23/16	Property Preservation DI	$15.00
11/23/16	Property Preservation DI	$1.50
11/29/16	Misc Corporate Disbursem	$1.18
12/1/16	Escrow Advance	$2,443.05
12/7/16	Misc Corporate Disbursem	$0.63
12/30/16	Property Preservation DI	$1.50

12/30/16	Property Preservation DI	$15.00
5/6/15	Corp. Advance Adjustment	$5,327.95
5/27/15	Property Preservation	$1.50
5/27/15	Property Preservation	$15.00
6/26/15	Property Preservation	$15.00
6/26/15	Property Preservation	$1.50
7/16/15	Property Preservation	$96.00
7/28/15	Attorney Advances	$25.00
7/28/15	Property Preservation	$55.00
7/28/15	Misc. F/C and B/R expenses	$1.44
7/28/15	Misc. F/C and B/R expenses	$1.44
7/30/15	Property Preservation	$15.00
7/30/15	Property Preservation	$1.50
7/30/15	Property Preservation	$9.50
8/3/15	Property Preservation	$9.50
8/27/15	Property Preservation	$15.00
8/27/15	Property Preservation	$1.50
9/11/15	Attorney Advances	$150.00
9/25/15	Property Preservation	$15.00
9/25/15	Property Preservation	$1.50
10/27/15	Property Preservation	$1.50
10/27/15	Property Preservation	$15.00
11/30/15	Property Preservation	$15.00
11/30/15	Property Preservation	$1.50
12/10/15	Misc Corporate Disbursement	$1.18
12/10/15	Misc Corporate Disbursement	$1.18
12/23/15	Property Preservation	$15.00
12/23/15	Property Preservation	$1.50

	Total	**$19,977.25**

Debtor argues that Creditor's charges were discovered only recently. Debtor believed that an escrow account had been established to pay Creditor and that Creditor was collecting its necessary amount through the Chapter 13 Plan.

Debtor provides a task billing for the attorney fees incurred with this Objection and asserts that the total amount of fees is $8,695.00.

MAY 9, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on July 11, 2017. Dckt. 160. The court instructed Creditor to file supplemental pleadings on or before June 2, 2017, and Debtor to reply, if at all, on or before June 19, 2017.

CREDITOR'S RESPONSE

Creditor filed a Response on June 2, 2017. Dckt. 167. Creditor argues that Debtor has failed to pay property taxes during the bankruptcy case. Creditor explains that when Rushmore Loan Management Services, LLP ("Rushmore") acquired the loan in May 2015, it learned from the records that Debtor had not been paying property taxes and were deficient by $12,000.00. Additionally, Rushmore allegedly payed the following tax advances on Debtor's behalf:

A. $8,948.04 on August 1, 2016;

B. $1,911.56 on August 2, 2016;

C. $2,443.05 on December 1, 2016; and

D. $2,433.05 on March 20, 2016.

Creditor argues that it was not required to file a Notice of Postpetition Fees, Charges, and Expenses pursuant to Federal Rule of Bankruptcy Procedure 3002.1 because tax payments were made on Debtor's behalf by Rushmore as escrow account disbursements, charged toward Debtor's escrow account.

Creditor notes that Debtor has routinely been paying $2,366.00, which—while being $128.78 in excess of the required monthly payment of $2,237.22—is not sufficient to support a $407.18 monthly escrow payment.

Creditor states that Rushmore filed a Response to the Notice of Final Cure Payment, indicating that Debtor was current with post-petition payments. Rushmore, allegedly intended to reflect only that post-petition payments were current, not that the escrow deficiency had been cured. Creditor states that Rushmore will be amending its Response.

Finally, Creditor states that it will be waiving all other fees, charges, and expenses because they were not noticed property according to Federal Rule of Bankruptcy Procedure 3002.1.

DEBTOR'S REPLY

Debtor filed a Reply on June 19, 2017. Dckt. 173. Debtor argues that Creditor's Response fails to:

A. Address the May 22, 2017 escrow account disclosure statement sent to Debtor;

B. Acknowledge or show how Creditor applied $8,901.00 paid for escrow by the Trustee;

C. Show how Creditor applied the post-bankruptcy escrow payments;

D. Detail the fees, expenses, or charges that make up the asserted $27,457.90 escrow shortage;

E. Address or explain why Creditor should be excused from its failure to file or provide Debtor with:

1. Payment change notices pursuant to Federal Rule of Bankruptcy Procedure 3002.1(b) during this case,

2. Notice of fees, expense, and charges pursuant to Federal Rule of Bankruptcy Procedure 3002(c) during this case,

3. Annual Escrow Account and disclosure statements required by RESPA during this case, and

4. Annual accountings of the escrow account as required by the Deed of Trust; and

F. Explain how Creditor should be exempt from Federal Rule of Bankruptcy Procedure 3002.1(c) based upon an "escrow account disbursement" exception when Creditor took no action consistent with maintaining an escrow account and did not "analyze and impound the escrow account until March 2017."

Dckt. 173 at 2.

Debtor does not oppose setting a monthly payment of $2,664.40, but Debtor opposes a shortage of thousands of dollars as unexplained. Debtor notes that the excess funds that were being paid monthly were put into an account that Creditor labeled "other" without any explanation of how those funds were applied to escrow or to Debtor's loan.

Debtor argues that Creditor does not account for $3,407.12 that Debtor paid in each of March, April, and May 2017. Additionally, Debtor contains to maintain that Creditor has not accounted for and itemized a $27,457.90 escrow shortage. Debtor argues that Creditor has owned the loan since 2011 but has only provided documentation for escrow advances since August 1, 2016, and has not provided evidence of charges approximating $12,000.00 prior to May 2015.

In response to Creditor stating that Rushmore analyzed and impounded the escrow account in March 2017, Debtor argues that no accountings were provided to Debtor as required by RESPA and the Deed of Trust.

Regarding Creditor's argument that it was not required to file a Notice of Postpetition Fees, Charges, and Expenses, Debtor makes three arguments. First, Debtor argues that no escrow account was created until March 2017, well after Creditor allegedly advanced funds for expense payments. Second, Debtor argues that property preservation fees and other expenses can be run through the escrow account to bypass reporting requirements. Third, Debtor argues that an implied exception to Federal Rule of Bankruptcy Procedure 3002.1(c) for escrow account disbursements comes with an implied requirement that Creditor will comply with RESPA and Federal Rule of Bankruptcy Procedure 3002.1(b) and will disclose all escrow charges in an annual escrow account and disclosure statement.

JULY 11, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on August 15, 2017, at the parties' request, believing that they were close to negotiating an agreed-upon resolution. Dckt. 179.

AUGUST 15, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on August 29, 2017. Dckt. 183.

DISCUSSION

No further pleadings have been filed since the August 15, 2017 hearing. No settlement has been proposed for the court's review.

Federal Rule of Bankruptcy Procedure 3002.1(c) states that a claimholder must file and serve a notice of fees, expenses, and charges "within 180 days after the date on which the fees, expenses, or charges are incurred."

On April 24, 2017, Creditor filed its Response to Notice of Final Cure Payment, expressly affirming under penalty of perjury, that:

> "Creditor agrees that the debtor(s) have paid in full the amount required to cure the prepetition default on the creditor's claim."

and

"Creditor states that the debtor(s) are current with all postpetition payments consistent with § 1322(b)(5) of the Bankruptcy Code, including all fees, charges, expenses, escrow, and costs.

The next postpetition payment from the debtor(s) is due on: 04/24/2017"

Creditor Response to Notice of Final Cure Payment (Form 4100R), April 24, 2017 Docket Entry, Filed as part of Proof of Claim No. 5-1.

This Response confirms that Creditor admits that the Chapter 13 Trustee's Notice of Final Cure Payment (Dckt. 145) is correct and that there is no outstanding pre-petition or post-petition arrearage as of the February 2017 completion of Plan payments. Despite Creditor's assertion that Rushmore understood it to refer to post-petition fees only, Rushmore has not amended the Response.

It is worth restating, verbatim, exactly what Creditor confirmed under penalty of perjury in responding to the Notice of Final Cure Payment:

"Part 2: Prepetition Default Payments

Check one:

☒ Creditor agrees that the debtor(s) have paid in full the amount required to cure the prepetition default on the creditor's claim

☐ Creditor disagrees that the debtor(s) have paid in full the amount required to cure the prepetition default on the creditor's claim. Creditor asserts that the total prepetition amount remaining unpaid as of the date of this response is: $_____

Part 3: Prepetition Default Payments

Check one:

☒ Creditor states that the debtor(s) are current with all postpetition payments consistent with § 1322(b)(5) of the Bankruptcy Code, including all fees, charges, expenses, escrow, and costs.

The next postpetition payment from the debtor(s) is due on: 04/24/2017

☐ Creditor states that the debtor(s) are not current on all postpetition payments consistent with § 1322(b)(5) of the Bankruptcy Code, including all fees, charges, expenses, escrow, and costs.

Creditor asserts that the total amount remaining unpaid as of the date of this response is:

a. Total postpetition ongoing payments due: (a) $ _____

b. Total fees, charges, expenses, escrow, and costs outstanding: + (b) $ _____

c. Total. Add lines a and b. (c) $ _____

Creditor asserts that the debtor(s) are contractually obligated for the postpetition payment(s) that first became

due on: _ __/___/___"

Response to Notice of Final Cure Payment, Filed April 24, 2017, p. 1. It appears that this Response crossed in the mail with the Objection to Notice of Mortgage Payment Change.

Creditor provides the declaration of Barkley Sutton in response to the Motion. Declaration, Dckt. 168. Mr. Sutton testifies under penalty of perjury that he is an Assistant Vice President for Rushmore Loan Management Services, LLC, the servicer and attorney in fact for Creditor. He then goes further to testify that he, or possibly Rushmore, is not a party to this "action." Declaration, p. 2:2–4; Dckt. 168.

Mr. Sutton testifies that Rushmore, and not the Creditor, has made advances for property taxes on the Property that secures Creditor's claim. As stated above, Rushmore is not a party to this "action" and does not purport to be the creditor having a claim in this case, but is merely the loan servicer for Creditor.

Mr. Sutton offers no testimony as to why Debtor has an obligation to pay Rushmore any amounts.

Mr. Sutton provides the further testimony under penalty of perjury that "10. Rushmore did not analyze the Loan to recover the above tax payments until th Notice of Mortgage Payment Change was filed on 03/01/2017." Declaration, p. 4:1–2; Dckt. 168. He provides no testimony about why, if Rushmore had a belief that it had a right to be repaid for more than $12,000 in property taxes paid during the period March 2015 through December 2016 (Declaration, p. 3:16–21; *Id.*), it would have known of such prior to waiting until March 2017 to "analyze the Loan."

The March 1, 2017 Notice of Mortgage Payment Change (filed as part of Proof of Claim No. 5) filed by Creditor states that the current monthly principal and interest payment is $2,237.22. On top of this, Creditor states that the escrow payment is an additional $1,169.90. The attachment states that there is a ($27,457.90) escrow shortage, almost double the $15,735.70 in alleged property tax payments by Rushmore (not asserted to be advances by Creditor).

Attached to the Notice of Mortgage Payment Change is an Escrow Analysis Disclosure Statement dated February 23, 2017. That Statement identifies the Principal and Interest Payment to be $2,237.22. In addition, the "required escrow payment" is stated to be $407.18. In "double addition," the Statement says that there is an additional $762.72 that must be paid for "shortage/Surplus Spread."

On Proof of Claim No. 5, Creditor states under penalty of perjury that there was a $31,475.58 pre-petition arrearage. Exhibit A to Proof of Claim No. 5 states that the total monthly payment is $2,237.22, with that amount subject to either a change in the escrow requirement or interest rate. The arrearage is stated to consist of $31,321.08 for fourteen missed monthly payments and $134.50 for appraisal and inspection fees.

The confirmed Modified Plan provided for curing this arrearage in full through the Plan. Plan, ¶ 2.08(c); Dckt. 89. In his final report, the Chapter 13 Trustee confirms that the pre-petition arrearage on Creditor's secured claim was paid in the amount of $31,475.58. Dckt. 163 at 3.

As provided in the testimony of Debtor (Declaration, Dckt. 154), the 2016 Mortgage Interest 1098 Statement issued by Creditor (that was received in 2017) shows that Creditor and Rushmore were assessing various "Property Preservation DI" charges, with multiple charges in each month. No such "fees" and "charges" were disclosed in this bankruptcy case. The 1098 Statement also states that there was an escrow advance of $2,443.05 in December 1, 2016 for "county tax." Exhibit A, Dckt. 156.

Exhibit B is the Annual Escrow Account Disclosure Statement dated December 27, 2016, advising Debtor that the monthly mortgage payment was going to increase to $4,032.56. *Id.* Further, Creditor and Rushmore asserted that there was a $25,422.03 escrow shortage (taking the "starting balance" shown on the statement).

The Statement continues, indicating that prior to 2016 there was a negative escrow balance of $12,119.38, and in 2015, Creditor and Rushmore made payments of $11,392.09 for "County/Paris" and $1,911.56 for "County Tax." This ballooned the stated shortfall to $25,422.03. *Id.* The Statement does not indicate what a "County/Paris" disbursement is for with respect to Debtor's loan.

As addressed above, Creditor has confirmed/admitted under penalty of perjury that there are no pre- or post-petition arrearages to be addressed, with Debtor starting with the loan as current as of February 28, 2017. Response under penalty of perjury, filed with Proof of Claim No. 5, April 24, 2017 Docket Entry.

Creditor's admission is bolstered by there having been no notice of any fees, expenses, or charges as required by Federal Rule of Bankruptcy Procedure 3002.1(c). If any had actually existed, they would have been raised timely, and Debtor would then have had the opportunity to address them during the five years of the bankruptcy plan. If such actually existed and Creditor failed to provide the notice (and waited until the case was completed to spring them on the consumer debtor), then such non-compliance clearly works a prejudice on Debtor caused by Creditor's non-compliance.

As provided in Federal Rule of Bankruptcy Procedure 3002.1(e) and (h), the final notice of cure having been given, the confirmation that all pre- and post-petition obligations of Debtor under the loan are current through February 2017, the proof of claim specifying the pre-petition arrearage, and there being no notice during the bankruptcy case of any such post-petition, the court confirms that there are no pre-petition or post-petition (through February 2017) fees, expenses, charges, or arrearages due on the loan upon which Proof of Claim No. 5 is based.

Possible Tax Obligation

Rushmore, who admits it is not a party to this "action" appears to have sprung on these least-sophisticated debtors that there has been a "gift" of property tax payments made by Rushmore in 2016, paying property taxes for some unstated period of time. A skeptical person could well believe that Rushmore made such a gift in an attempt to try to create a trap for Debtor and take the Property by asserting a default for takes intentionally allowed by Rushmore to fester.

Conversely ever for the most least sophisticated creditor, Debtor has not addressed how Debtor could have some good faith belief that it could continue to live in the Property and not pay property taxes. On the Statement of Expenses filed in support of the Motion to Confirm the Modified Plan, Debtor

confirmed that the property tax payment was not included in the monthly mortgage payment. Dckt. 87 at 3. Debtor further stated that each month Debtor was spending (saving to timely pay) $283 for the current real estate taxes and $75.00 for "back taxes." The $283.00 per month amount equates to $3,396.00 annually for taxes. Over five years, that totals $16,980.00, an amount suspiciously close to the $15,735.70 property tax payment gift made by Rushmore.

Even if given such a gift, then Debtor has not account for $16,980.00 in additional projected disposable income for this phantom expense not paid by Debtor.

DETERMINATION OF TAX OBLIGATION, IF ANY

Creditor and Rushmore have squarely presented the court with the issue of whether, now, as of the conclusion of this case there is any obligation of Debtor to pay a post-petition property tax arrearage. Creditor will have to show first that there is an obligation to pay Creditor under the Note and Deed of Trust for what appears to have been a "reorganization gift" made by Rushmore.

Debtor also needs to address for the court, the Trustee, and creditors, where the $16,980.00 of post-petition property taxes are if not paid by Debtor.

Award of Attorneys' Fees

Federal Rule of Bankruptcy Procedure 3002.1(f)(2) further authorizes the award of attorney's fees and costs related to the failure to provide the required notice of fees, expenses, and charges. In this case, Creditor having filed a Notice of Mortgage Payment Change and sent a Statement purporting to state Debtor owed payment for charges, fees, expenses, advances for which no Notice had been given, Debtor was forced to both investigate this contention and then file the Objection to Notice of Mortgage Payment Change.

Creditor has ameliorated the problem a bit with its admission in the Reply that there are no pre- or post-petition (through February 2017) arrearages owed by Debtor. However, Creditor did not rescind its Notice of Mortgage Payment Change and file a new one accurately stating the payment amount and that there were no pre- or post-petition (through February 2017) arrearages owed under the loan. This inaction required Debtor and Debtor's counsel to continue in having to prosecute the Objection. Then, Creditor's Response after the May 9, 2017 hearing necessitated more work for Debtor's counsel.

Debtor's counsel has provided copies of time records for work asserted to have been done in connection with the December 27, 2016 Annual Escrow Account Disclosure Statement and the more than doubling the amount of the asserted regular mortgage payment to $4,932.56. No declaration of counsel is provided authenticating the records.

The billing records state a total of $8,345.00 in fees requested. That is 21 hours of time at $350.00 per hour and 3 hours at $250.00 per hour by Mark Wolff, counsel for Debtor. No task billing analysis is provided. The court organizes the legal work into several task areas:

A. Communications with Client and Initial Review of Statement Doubling Payment and Stating Arrearage..... 3.7 hours

B. Communications with Counsel for Creditor..... 1.4 hours

C. Research in Preparation of Objection..... 5.5 hours

D. Drafting Objection Pleadings.....10.5 hours

E. Meeting with Client Re Objection, Declaration..... 3.6 hours

For the above 24.7 hours, the total fees average $337.85 per hour, not an unreasonable hourly rate.

The need for Debtor to have counsel address the Notice of Mortgage Payment Change that doubled Debtor's mortgage payment was driven by the Notice itself and Creditor asserting theretofore undisclosed charges, fees, advances, and costs purported to have been piled up by Creditor and its loan servicer.

After the May 9, 2017 hearing, Debtor's counsel filed a Declaration listing additional hours (with an invoice) of work done in this matter. Dckt. 174. Debtor's counsel states that he spent an additional 6.6 hours on this matter: 5.0 hours reviewing Creditor's Response and drafting the Reply, 1.2 hours communicating with Debtor and preparing a declaration, and 0.4 hours compiling billing and drafting Debtor's counsel's Declaration regarding time spent. *Id.* Debtor's counsel states that his hourly rate is $350.00. The total additional incurred fees are $2,310.00.

From a review of the pleadings, the potential attorneys' fees award has grown to$9,380.00. That could be viewed as allowing for 26.8 hours of the 31.3 hours of work at $350.00 per hour, or it could be viewed as lowering the hourly rate to $300.00 for 31.27 hours for the above work. Either way, the court is convinced that $9,380.00 in attorneys' fees were reasonably incurred in having to address the Notice of Mortgage Payment Change purporting to double the Debtor's monthly mortgage payment. The court notes that counsel for Debtor did attempt to communicate with counsel for Creditor for two weeks before beginning to work on the Objection.

Presumably, as these proceedings continue and Creditor belatedly shows a basis for asserting that there is an obligation to pay it for the property tax payment gift that Rushmore states it made for Debtor, the attorneys' fees cost demanded by Debtor will rise.

Requested Award of Sanctions

The Objection also requests the additional award of Sanctions, citing the court to Federal Rule of Bankruptcy Procedure 3002.1(i)(2) "other appropriate relief" language as the legal basis. Debtor also directs the court to *In re Gravel* for the contention that Rule 3002.1 provides that the court can issue an order for sanctions pursuant thereto. 556 Br. 561 (Bankr. D. Vt. 2016).

First, the court is not as convinced as Debtor that Rule 3002.1 "explicitly" empowers the court to issue corrective sanctions. While there may be other grounds for doing so, they are not now before this court. Second, the court is ordering the payment of $9,380.00 in compensatory attorneys' fees as damages. That is not an insignificant amount.

The court denies, without prejudice, any request for sanctions.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Notice of Mortgage Payment Change filed by Michael and Jennifer Peters, Debtor, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is sustained, and the Notice of Mortgage Payment Change filed on March 1, 2017, for Proof of Claim No. 5 by MTGLQ Investors, LP is disallowed in its entirety.
>
> **IT IS FURTHER ORDERED** that all pre-petition and post-petition monetary defaults and arrearages were cured, and all obligations therefore owing by Debtor to Creditor MTGLQ Investors, LP ("Creditor"), or any other person, for the debt that is the basis for Proof of Claim No. 5 filed by Creditor were current as of February 28, 2017.
>
> **IT IS FURTHER ORDERED** that Debtor is awarded $7,070.00 in attorney's fees against MTGLQ Investors, LP.
>
> **IT IS FURTHER ORDERED** that the request for "sanctions" is denied without prejudice.
>
> This Order constitutes a judgment (FED. R. CIV. P. 54(a) and FED. R. BANKR. P. 7054, 9014) and may be enforced pursuant to the Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure (including FED. R. CIV. P. 69 and FED. R. BANKR. P. 7069, 9014).

32. **17-23174-E-13** **NICOLE PRESTON** **OBJECTION TO CONFIRMATION OF**
DPC-1 **Mark Briden** **PLAN BY DAVID P. CUSICK**
7-26-17 [17]

Final Ruling: No appearance at the August 29, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on July 26, 2017. By the court's calculation, 34 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 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection.

The Objection to Confirmation of Plan is sustained.

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

A. Debtor is delinquent to Mr. and Mrs. Duralia and misclassified that Claim in Class 4 instead of Class 1;

B. Debtor listed Santander Consumer USA on Schedule D and H instead of Schedule F; and

C. Debtor may not have listed all personal property on the Statement of Financial Affairs.

The Trustee's argues that Glen Duralia and Lori Duralia are creditors who should be listed in Class 1 and not Class 4 claims. Debtor admitted at the First Meeting of Creditors that she is delinquent approximately $12,000.00 to them.

The Trustee asserts that Santander Consumer USA should be listed on Schedule D and H, instead of Schedule F. Debtor co-signed the loan for her son, and Debtor's son pays Santander Consumer USA directly.

The Trustee believes that Debtor may not have listed all of her personal property. Schedule I lists income of $300.00 from craft sales. The Statement of Financial Affairs showed craft sales of $4,976.00 this year and $10,992.00 last year. Debtor also failed to list any craft supplies or inventory on Schedule B.

TRUSTEE'S STATUS REPORT

The Trustee filed a Status Report on August 16, 2017. Dckt. 27. The Trustee notes that treatment to and for Glen Duralia and Lori Duralia is no longer provided for in the amended plan. The lack of treatment to this creditor will draw another opposition to confirmation from the Trustee.

AMENDED PLAN FILED

On August 9, 2017, Debtor filed a Motion to Confirm an Amended Plan. Dckt. 23. Attached to the Motion is a copy of a "First Amended Plan." However, the "First Amended Plan" itself has not been filed in this case.

The court sustains the Objection to Confirmation.

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

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

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

IT IS ORDERED that the Objection to Confirmation of the Plan is sustained and the proposed Chapter 13 Plan filed on May 22, 2017, is not confirmed.

IT IS FURTHER ORDERED that Debtor shall file the Proposed First Amended Plan as a separate document in this case on or before September 5, 2017.

33. **17-23874-E-13** **LAURA HILTON** **OBJECTION TO CONFIRMATION OF**
DPC-1 **Matthew DeCaminada** **PLAN BY DAVID P. CUSICK**
7-26-17 [21]

WITHDRAWN BY M.P.

Final Ruling: No appearance at the August 29, 2017 hearing is required.

The Chapter 13 Trustee having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Objection to Confirmation was dismissed without prejudice, the matter is removed from the calendar, and the Chapter 13 Plan filed on June 9, 2017, 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.

34. 17-24074-E-13 DPC-1 | **LARRY/LINDA HERRERA** **Scott Hughes** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 7-26-17 [25]**

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 26, 2017. By the court's calculation, 34 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 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection. At the hearing ----------.

The Objection to Confirmation of Plan is overruled.

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

A. The Plan relies upon a pending Motion to Value, set for August 1, 2017, and

B. The Plan is not Larry Herrera and Linda Herrera's ("Debtor") best effort.

DECLARATION BY DEBTOR'S COUNSEL

Debtor's Counsel filed a Declaration on August 15, 2017. Dckt. 37. Debtor's Counsel agrees that Debtor is over the means test in the original budget; he has filed new Schedules I and J. Debtor's Counsel has proposed raising plan payments to $395.00 per month beginning in month 2, and he believes that the Trustee would be satisfied by that change. He also states that the court has granted the motion to value.

DISCUSSION

A review of Debtor's Plan shows that it relies on the court valuing the secured claim of Golden 1 Credit Union. That Motion was granted on August 1, 2017. Dckt. 31.

The Trustee alleges that the Plan may not be Debtor's best effort under 11 U.S.C. § 1325(b) because there is approximately $1,398.20 in monthly net income from a retiree account statement that was not disclosed on Schedule I, leading to increased plan payments of $200.00 per month. Debtor has filed Amended Schedules and Form 122C-1 to account for the extra income and has proposed increasing plan payments from $188.00 to $395.00.

The Plan, as modified to increase plan payments to $395.00 beginning in month 2 and to state that unsecured claims shall not receive less than 13%, complies 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 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 Debtor's Chapter 13 Plan filed on June 20, 2017, and as amended to increase plan payments to $395.00 beginning in month 2 and to state that unsecured claims shall receive a dividend of not less than 13%, 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.

35. **17-24379-E-13 GEL-1** | **MARCIS/MARTI BEUTLER** **Gabriel Libermann** | **MOTION TO VALUE COLLATERAL OF ALLY BANK** **8-11-17 [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 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 August 11, 2017. By the court's calculation, 18 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 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 Ally Financial Inc. ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $9,275.00.

The Motion filed by Marcis Beutler and Marti Beutler ("Debtor") to value the secured claim of Ally Financial Inc. ("Creditor") is accompanied by Debtor's declaration. FN.1. Debtor is the owner of a 2012 Dodge Journey ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $5,204.00 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).

FN.1. Debtor identified Creditor as "Ally Bank," but the court notes that the claim filed before this Motion was filed is for Ally Financial Inc. Claim. No. 1.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on August 15, 2017. Dckt. 25. The Trustee states that Debtor estimates value of the Vehicle to be $5,204.00 and does not provide specific information of style of the Vehicle. He notes that Ally Financial filed a proof of claim on July 25, 2017, for a secured amount of $11,800.00.

CREDITOR'S OPPOSITION

Creditor filed an Opposition on August 17, 2017. Dckt. 28. Creditor opposes the Motion on the grounds that paying only $5,204.00 towards its claim on the Vehicle fails to provide it with the full value of its claim in violation of 11 U.S.C. § 1325(a)(5)(B)(ii). Creditor provided the National Automobile Dealers Association guide as Exhibit D, which retails the Vehicle at $9,275.00. Creditor argues that Debtor uses the Vehicle for personal use, and the market price for this vehicle for personal usage is different from retail value.

DISCUSSION

The Donna Belliveau Declaration seeks to introduce evidence establishing the value of the asset. Dckt. 29. The NADA Valuation Report is attached as an Exhibit, but it is not properly authenticated.

Though the court will *sua sponte* take notice that the NADA Valuation Report can be within the "market reports and similar commercial publications" exception to the hearsay rule (Federal Rule of Evidence 803(17)), it does not resolve the authentication requirement. FED. R. EVID. 901. In this case, and because no opposition has been asserted by Debtor, the court will presume the Declaration of Donna Belliveau to be that she obtained the NADA Valuation Report and is providing that to the court under penalty of perjury. Creditor and counsel should not presume that the court will provide *sua sponte* corrections to any defects in evidence presented to the court.

The lien on the Vehicle's title secures a purchase-money loan incurred on September 28, 2013, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $12,703.05. 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 $9,275.00, the NADA retail value. *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 Marcis Beutler and Marti Beutler ("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 Ally Financial Inc. ("Creditor") secured by an asset described as a 2012 Dodge Journey ("Vehicle") is determined to be a secured claim in the amount of $9,275.00, 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 $9,275.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

36. 17-20681-E-13 MRL-2 | **KEVIN/ELEANOR MOONEY** | **Mikalah Liviakis** | **MOTION TO CONFIRM PLAN** | **7-6-17 [64]**

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, creditors, parties requesting special notice, and Office of the United States Trustee on July 7, 2017. By the court's calculation, 53 days' notice was provided. 42 days' notice is required. FED. R. BANKR. P. 2002(b); 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 xxxxxxxxxxxxxxxxxx.

Kevin Mooney and Eleanor Mooney ("Debtor") seek confirmation of the Amended Plan because with Debtor's current monthly income and expenses, Debtor cannot pay current creditors without modification and a waiting period to sell Debtor's real estate. Dckt. 67.

The Amended Plan proposes to pay monthly payments of $450.00 per month for fifty-nine months and $520,000.00 for one month upon the sale of Debtor's real estate. The $450.00 will be used to make the following payments:

A. $3,853.00 to Debtor's Counsel..... (see below)
B. Payment of Class 1 Arrearage.....$ 0.00 per month for 59 Months
C. Chapter 13 Trustee Fee (est. at 7%).....$ 31.50 per month for 59 Months
D. Franchise Tax Board, $2,000 claim.....$ 33.89 per month for 59 Months
E. Unsecured Claims, $6,367.....$107.91 per month for 59 Months

Of the $450.00 a month, there is an "extra" $276.70 PER month to first fund payment of the attorney's fees or cure the arrearage pending a sixtieth month sale of Debtor's Property. If the full amount is used to pay the attorney's fees, they would be paid in full by the fourteenth month of the Plan (which is April 2018).

In Debtor's third plan now before the court it states:

> "1. Debtor is afforded 6 months to complete a sale of their real property located at 3349 Adam Court, El Dorado Hills, CA and if an escrow is opened during that time, Debtor would have an additional 90 days to close escrow. Otherwise Creditor may request relief from the automatic stay.
>
> 2. Debtor shall share a comparable properties market determination with Creditor to assure Creditor that the property is not being listed at too high a price. Nothing in these terms limits the Debtors from changing the listing price or negotiating with the buyers.
>
> 3. Creditor shall be paid in full from sale through escrow (i.e. not a "fixed" amount) but based upon an updated payoff since the Creditor is advancing for taxes and insurance.
>
> 4. Debtors plan for Broker's contract to be renewed in July 2017 because the parties are cooperating, or if they intend to obtain a new broker that be disclosed promptly and a new broker hired so the transition is seamless. June through August are the "prime time" for sales of properties, and the Debtors should take advantage of the "selling" season."

Second Amended Plan, Additional Provisions; Dckt. 66 at 8.

Though Debtor and counsel may have intended to write a plan stating that Debtor shall have sold property and paid the secured claim by "xxxx," 2017, that is not what is written. Rather, there is no date by which the sale must be completed. Rather, it is just that six months, from some date, that the sale be "completed." Then, even though the sale is to be "completed" within six months of some date, "escrow" is to be extended an additional ninety days.

There is no provision for termination of the automatic stay for Creditor if the sale does not "timely" occur. This Plan appears to now provide that sometime, during sixty months, if there is a sale, then Creditor will be paid—but during that time, Creditor is paid nothing, and the property taxes will not be paid.

While the Second Amended Plan provides that Creditor may request relief from the stay after the six-month period to "close" and then the ninety-day extension to "close escrow," as discussed above, it appears that the six-month period provision, as written, may be illusory.

Finances upon Which Plan Is Premised

On Schedule I, Debtor lists being self-employed with net income of $2,150.00 per month. Dckt. 1 at 34. He reports having an additional $100.00 per month in income from music lessons. *Id.* On the Business Income and Expenses attachment Debtor reports his business having $4,000.00 per month in gross income and ($1,850.00) in expenses. *Id.* at 36. Though the business has no "payroll" expenses Debtor reports having ($1,000.00) per month in "payroll taxes." Debtor has no "rent expense," but he lists having $300 per month in expenses for "utilities." Debtor also states that he has a ($150) per month business "vehicle expense" and ($150) per month "travel and entertainment expense." *Id.*

On Schedule J, Debtor lists having no dependents. *Id.* at 37. Debtor's household unit consists of two adults (the two debtors). The monthly expenses stated on Schedule J for these two adults total ($1,800.00). *Id.* at 38. Of this, Debtor will make no current monthly mortgage payment, property tax payment, or property insurance. *Id.* at 37. Debtor does allocate $60 per month to home maintenance.

For other expenses, Debtor's monthly expenses include the following (Questionable) amounts:

A. Electricity **and** Gas.....($100)
B. Food **and** Housekeeping Supplies.....($400)

Assuming housekeeping supplies of ($50) per month, that leaves ($175) for food for each adult. Assuming a thirty-day month, that provides for ($1.94) for each meal for each of these two debtors. This does not appear to be a reasonable allowance for food.

C. Transportation.....($300)

On Schedule B, Debtor lists owning one vehicle, a 2003 GMC Yukon with 111,000 miles. One questions whether $300.00 per month for gas, repairs, and maintenance—and registration—on a fifteen-year-old vehicle is reasonable.

Denial of Confirmation of Prior Plans

Debtor's Original Plan proposed a lump sum payment in month sixty and indicated that Debtor had listed the real estate for sale for $750,000.00. When the Trustee and mortgage creditor objected, Debtor filed a new plan.

Debtor's Proposed First Amended Plan proposed a lump sum payment by month twelve. Again, the Trustee and mortgage creditor opposed. The Proposed First Amended Plan was not confirmed because it was found that Debtor was occupying the real estate without paying rent, taxes, or insurance.

The court denied confirmation of Debtor's Proposed First Amended Plan, which grounds for denial include the following:

> Creditor is justified in opposing a plan that appears to have no deadline for a debtor to sell property while not making any payments to that creditor. Debtor's plan is merely a thinly veiled example of "I'll live in the house for free and speculate if the value can rise enough for me to sell it and make a few bucks." If after a year of free housing Debtor's speculation turns out to be improvident, then it is Creditor who takes an even bigger loss.
>
> Debtor contends that the property securing Creditor's claim has a value of $750,000.00, with only $420,861.00 owed. Though more than a purported equity of $300,000.00, Debtor proposes that Debtor live in the house for free for a year. It is not credible that such huge equity could exist, that Debtor has no other claims, that Debtor would not have already sold the house (without the cost and expense of bankruptcy), and that a person trying to sell it is a debtor who is unable to make any payments.
>
> . . .
>
> On its Proof of Claim No. 4, Creditor states that there is a $62,899.20 arrearage on this obligation, for which Debtor wants to defer any payment for another twelve months. On the attachment to the Proof of Claim, Creditor states that the last payment received was in July 2015. Proof of Claim No. 4, p. 5–7.
>
> This court has allowed a Chapter 13 debtor to provide for the prompt, orderly, and commercially reasonable sale of property as part of a Chapter 13 plan. When selling a residence, a debtor generally makes the current payment, including taxes and insurance, as adequate protection payments. While the court may allow a year for marketing and sale, the year figure is used to ensure that the debtor can hit the marketing season and is not forced to "dump" the property during the off-season (such as the holidays, when property is covered in snow, and the like). If Debtor was promptly and in good faith prosecuting a plan to sell the property, when Debtor filed the case in February 2017, Debtor would have hired a broker and prepared the property to catch the spring and summer 2017 selling period. With the current market, Debtor would likely have had the property sold, Creditor paid, and the time and expense of the bankruptcy case and plan confirmation avoided.
>
> . . .
>
> Looking at Schedule J, Debtor makes no provision for paying the property taxes or insurance while Debtor would continue to live in the property for free for another year. Dckt. 1 at 37. Not only living in the residence for free, but occupying it without paying taxes or insurance does not demonstrate good faith by Debtor."

Civil Minutes, Dckt. 60.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on August 11, 2017. Dckt. 69.

The Trustee asserts that the Plan was not proposed in good faith. The Trustee states that pleading with particularity is required and that Debtor did not explain the reason for the Second Amended Plan, or the result of the prior two plans.

The Trustee states Debtor's third plan proposes as one to allow six months to sell Debtor's real estate, or ninety additional days if an open escrow exists. The Plan also provides that Creditor may request relief from the automatic stay. Upon the sale of the real estate, Creditor shall be paid in full from the sale through escrow. The Trustee notes that while Debtor provided a signature line on the Plan for Creditor to approve, no signature appears.

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor's Plan fails to provide for the secured claim of California Service Bureau, Inc. For $13,287.54. The Abstract of Judgment was recorded on December 7, 2011. The Trustee states that the real estate sale is not certain, and the proposal of a lump sum payment by the sixtieth month to the Trustee is not clear. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

CREDITOR'S OBJECTION

Creditor filed an Objection on August 15, 2017. Dckt. 72. Creditor argues that Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6).

Creditor argues that Debtor is filing vague and infeasible plans in the hope of continued delay; Debtor has not provided proof of ability to make mortgage payments, property taxes, or property insurance. Creditor states that the Plan is contingent on the sale of Debtor's real estate, and that by itself is an uncertain matter. Creditor filed a Proof of Claim on February 1, 2017, for the amount of $455,675.82 on Debtor's real estate.

Also, Creditor objects to Debtor proposing a $520,000.00 lump sum payment because Creditor argues that Debtor has no knowledge of the amount of the secured claim's payoff statement due to the fact that there is no sale pending as of August 14, 2017. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

RULING

This case was filed on February 1, 2017. Seven months have now expired in this case; there is no sale. The real property selling season has passed, and there is no sale. Debtor is now moving into the Fall holiday season and winter; there is no sale. No motion to approve sale has been filed. The listing agreement for the broker authorized to be employed by the court expired on July 31, 2017. Dckt. 53. No further employment has been authorized by the court.

In addressing this Proposed Second Amended Plan, the court first notes that it appears Debtor has been struggling for a long period (the arrearage on Creditor's claim dating back to 2015). Proof of Claim No. 4 Attachment.

Though Debtor believes that an equity exists in this Property, that equity has been dwindling since 2015, with Debtor delaying the creditor foreclosing and Debtor selling the property and having the equity to proceed with a financial fresh start.

In looking at the attachment to Proof of Claim No. 4, as of the February 1, 2017 commencement of this case, the interest accrual, fees and costs, and escrow advances totaled $34,814.39. *Id.* at 4. From the Attachment, it appears that the last payment from Debtor was made in July 2015. That was eighteen months before the commencement of this case. The above expense averages $1,934.13 per month. This amount continues to grow with each further default, with property taxes and insurance compounding the loss.

As drafted, the Amended Plan does not comply with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is not confirmed. Debtor fails not only to make any reasonable, confirmable proposal for a confirmable plan, but what is proposed is nothing more than Debtor living for free in the property for sixty months, with the creditor to subsidize Debtor's property taxes and insurance. The Third Amended Plan, as written, does not clearly provide that Debtor will have the Property sold by the sixth month of the Plan, but merely says that there will be a lump sum payment after the fifty-ninth month.

Though the drafting of the Second Amended Plan may not clearly provide for a sale of the home in a manner that is confirmable, such could be accomplished if Debtor actually intends to promptly sell the house, pay Creditor and other claims in this case, and have the equity above the claims, administrative expenses, and costs of sale to use going forward.

Though it is clear that the only funding for the Plan must come from a sale of the Property, Debtor waited until the end of May to obtain an order to employ a real estate broker. May 20, 2017 filed *Ex Parte* Motion to Employ, Dckt. 52. That employment has now expired.

Interestingly, no declaration is provided by the real estate broker documenting all of the good faith efforts by broker to market and sell the Property. No testimony is provided for the Property being listed, the price listed, and how the broker has determined the listing price to be reasonable.

It may well be that Debtor's intention is not nearly as nefarious as trying to live in the house for free, with Creditor paying all expenses, for five years (solely at Creditor's expense) while speculating on a possible rise in real estate prices. Debtor may well be unable, emotionally, to sell the property, own up to the financial situation, pay Debtor's creditors, take whatever equity exists, and move on to make a new financial life. If so unable, Debtor may need to have appointed a personal representative (Federal Rule of Civil Procedure 25) for the limited purposes of getting the property sold and realizing the equity, rather than it being lost through inaction. Possibly, it may be in the best interest of the Estate for the case to be converted to one under Chapter 7, an independent trustee taking control of Debtor's assets, and selling the property to preserve the equity that will inure to Debtor's benefit.

August 29, 2017 Hearing

At the August 29, 2017 hearing, the court oversaw a discussion between Debtor's counsel, the Chapter 13 Trustee, and Creditor's Counsel about how this case, and the apparent equity in the property, is properly administered. The discussion included **xxxxxxxxxxxxxxxxxxxxxxxxxxxx**.

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 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 **xxxxxxxxxxxx**.

37. 17-23881-E-13 TATYANA KRIVOSHEY
Pro Se

OBJECTION TO CONFIRMATION OF PLAN BY CAM XVIII TRUST
7-27-17 [29]

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 (*pro se*), Chapter 13 Trustee, and Office of the United States Trustee on July 27, 2017. 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 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.

CAM XVIII TRUST, Creditor with a secured claim, opposes confirmation of the Plan on the basis that the Plan does not provide for its claim and is infeasible. FN.1.

FN.1. Creditor is reminded that the Local 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. The Court will consider the Objection, but counsel is reminded that not complying with the Local Bankruptcy Rules is cause, in and of itself, to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(c)(l).

Creditor's objections are well-taken. Creditor alleges that the Plan is not feasible and violates 11 U.S.C. § 1322(b)(2) because it contains no provision for payment of Creditor's matured obligation, which is secured by Debtor's residence. *See* 11 U.S.C. § 1325(a)(6).

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

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

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

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

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

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

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

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

Notwithstanding the absence of a requirement in 11 U.S.C. § 1322(a) that a plan provide for a secured claim, the fact that this Plan does not provide for respondent Creditor's secured claim raises doubts about the Plan's feasibility. *See* 11 U.S.C. § 1325(a)(6). That is reason to sustain the Objection.

The objecting creditor holds a deed of trust secured by Debtor's residence. Creditor has filed a timely proof of claim in which it asserts $167,970.52 in pre-petition arrearages. The Plan does not propose to cure those arrearages. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments because it does not provide for the surrender of the collateral for this claim. *See* 11 U.S.C. §§ 1322(b)(2) & (5), 1325(a)(5)(B). The Plan cannot be confirmed because it fails to provide for the full payment of arrearages.

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor lists net income of $670.00, but somehow proposes plan payments of $700.00.

Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by a creditor with a secured claim 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.

38. 17-23881-E-13 DPC-1 | **TATYANA KRIVOSHEY** **Pro Se** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 7-26-17 [21]**

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 (*pro se*) on July 26, 2017. By the court's calculation, 34 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 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection. At the hearing ----------.

The Objection to Confirmation of Plan is sustained.

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

A. Tatyana Krivoshey ("Debtor") failed to appear at the first meeting of creditors.

B. Debtor failed to provide tax returns and pay advices.

C. Debtor cannot make payments or comply with the Plan because documents are incomplete.

The Trustee's objections are well-taken. Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. To attempt to confirm a plan while failing to appear and be questioned by the Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

Debtor has not provided the Trustee with employer payment advices for the sixty-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv). Also, the Trustee argues that Debtor did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. *See* 11 U.S.C. § 521(e)(2)(A); 11 U.S.C. § 1325(a)(9); FED. R. BANKR. P. 4002(b)(3). Debtor has failed to provide all necessary pay stubs and has failed to provide the tax transcript. Those are independent grounds to deny confirmation. 11 U.S.C. § 1325(a)(1).

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor may not have listed all of her creditors because none are listed on Schedules D and E, but Debtor listed real property on Schedule A. Treatment for "BSI" is unclear because it is listed on both Schedule F and in Class 6. Schedule J lists $1,700.00 on line 8a, which is unclear because no attachment has been filed. Finally, Debtor's net income is $670.00, but she proposes plan payments of $700.00. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

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

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

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

39. 15-27087-E-13 JB-1 | **SCOTT GARRINGER** **Mikalah Liviakis** | **MOTION TO DISMISS CASE AND/OR MOTION TO CONVERT CASE TO CHAPTER 7** **7-31-17 [37]**

WITHDRAWN BY M.P.

Final Ruling: No appearance at the August 29, 2017 hearing is required.

Creditor having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Motion to Dismiss or Convert was dismissed without prejudice, and the matter is removed from the calendar.**

40. **17-23093-E-13** **ROBERT CLIFF** **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY PENSCO TRUST COMPANY**
BRL-1 **Scott Hughes** **6-19-17 [32]**

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, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on June 19, 2017. By the court's calculation, 43 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 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.

PENSCO Trust Company Custodian FBO April Y. Bisgaard IRA BI1AF, PENSCO Trust Company Custodian FBO Harry Abrahams SEP IRA #AB1AM, PENSCO Trust Company Custodian FBO Continental West Sales Co., Inc. Defined Benefit Plan #WE1DM, Harry Abrahams, successor trustee of the Pauline Abrahams Trust, Under Declaration of Trust dated August 23, 1999, Creditor with a secured claim, opposes confirmation of the Plan on the basis that the Plan does not require any dividend to pay arrearages to Creditor. Creditor argues that such failure is an improper modification of a secured claim secured only by Debtor's residence.

DEBTOR'S RESPONSE

Robert Cliff, Jr., ("Debtor") filed a Response on July 14, 2017. Dckt. 44. Debtor argues that the Plan provides for regular monthly mortgage payments to Creditor with the arrears to be paid from sale proceeds, estimating that the property will be sold within one year. Debtor cites legal authority for the

proposition that "curing of a default might be allowed if done within a reasonable time and while making ongoing payments." *Id.* at 2 (citing *In re Gavia*, 24 B.R. 216, 218 (Bankr. E.D. Cal. 1982), *aff'd*, 24 B.R. 573 (B.A.P. 9th Cir. 1982)).

Debtor states that he intends to seek court approval for employment of Diane Langston, a broker, soon and that he intends to sell and move out of the property by October 2017. Debtor reasserts that the Plan pays a 100% dividend to unsecured claims still.

AUGUST 1, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on August 29, 2017. Dckt. 57. The court ordered Debtor to file opposition on or before August 15, 2017, that includes information about the real estate broker who has been hired, confirmation that the property is listed for sale, the listing price, and how the property is being marketed.

DEBTOR'S SUPPLEMENTAL OPPOSITION

Debtor's Counsel filed a Supplemental Opposition on August 14, 2017. Dckt. 63. Debtor states that Dianne Langston has been hired as a real estate broker. *See* Dckt. 55. Debtor claims that the property was listed for sale on July 3, 2017, with a listing price of $299,000.00—Debtor expects less because the property needs substantial repairs. Debtor received an e-mail from Ms. Langston on August 11, 2017, regarding two offers for the property, which are pending.

Debtor's Counsel argues that the Objection mischaracterizes the facts. He argues that the Plan does not fail to pay mortgage arrears but in fact provides regular monthly mortgage payments in addition to arrears and property taxes being paid within one year from the sale of property.

CREDITOR'S SUPPLEMENTAL MEMORANDUM

Creditor filed an additional pleading on August 22, 2017. Dckt. 66. In it, Creditor argues that according to Debtor's Supplemental Opposition, no arrearage payments are required to be made to Creditor while Debtor attempts to sell his property. Instead, a full arrearage payment will be made on May 5, 2018 (Debtor's deadline to sell property).

Creditor analyzed the numbers Debtor provided and constructed the following information:

A. Debtor's property is valued at $284,000.00;

B. It was listed for sale at $299,000.00;

C. There is a six percent broker's commission;

D. **Debtor received two offers, $220,000.00 and $235,000.00**;

E. Creditor's claim is for $187,095.39;

F. Creditor has incurred approximately $4,000.00 in post-petition interest, attorneys' fees, and costs; and

G. County of Solano is owed $11,330.58.

Based upon that information, Creditor argues that if Debtor accepts the $235,000.00 offer, there is a chance that Debtor will not receive anything from the property sale. Creditor calculates that $235,000.00 minus eight percent for costs of sale nets $216,200.00. After subtracting delinquent property taxes, the net is $204,870.00 to pay Creditor.

Creditor argues that it bears the entire risk of the property rising or falling in value while Debtor withholds arrearage payments, and Creditor believes that the Property may be worth less because it needs repairs.

Creditor argues that what Debtor has proposed is an impermissible modification under 11 U.S.C. § 1322(b)(2).

DISCUSSION

The objecting creditor holds a deed of trust secured by Debtor's residence. Creditor has filed a timely proof of claim in which it asserts $24,271.57 in pre-petition arrearages. The Plan proposes to cure those arrearages through the sale of Debtor's residence. Dckt. 5, § 6.05. Additionally, Creditor's claim is being paid through the Plan. *Id.* at § 6.02. If the property is not sold by May 5, 2018, then Debtor proposes surrendering it to Creditor. *Id.* at § 6.03. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments because it does not provide for the immediate surrender of the collateral for this claim. *See* 11 U.S.C. §§ 1322(b)(2) & (5), 1325(a)(5)(B). Creditor may not enjoy waiting for a speculative sale to occur, but the court is inclined to allow Debtor to attempt to sell the property and pay Creditor's claim from the sales proceed—so long as Debtor is actively pursuing such a sale.

On Schedule A/B, Debtor lists his residence (the only real property listed) as having a value of $284,000.00. Dckt. 1 at 11. On Schedule D, Debtor states that debts totaling approximately $215,000.00. Assuming a normal residential real estate commission and costs of sale (estimated to be 8% of the gross sales price), a sale of the property would net (without further accruing interest on the claims, including real property taxes) $46,738.00 for Debtor and the Estate, but it requires that there be such a sale. Debtor's counsel has provided information that there have been two offers to purchase the property based upon a listing price of $299,000.00, although Debtor expects to sell for less.

The court has approved the employment of a broker, and Debtor appears to be actively pursuing sale of his property, evidenced by already receiving two offers to purchase.

Reviewing Debtor's Schedule I, there is gross monthly income of $3,784.00 from wages and $1,200.00 retirement income. From this $4,984.00 per month in income, there is ($850.00) per month withheld for taxes. Schedule I, Dckt. 1 at 25–26. On Schedule J, Debtor lists $2,448.00 in expenses, which do not include any payment on Creditor's secured claim. That leaves $1,686.00 in projected disposable income. *Id.* at 27–28.

This is not Debtor's first recent case. Debtor, with the same counsel as in this case, had a prior Chapter 13 case that was filed on November 20, 2015, and dismissed on March 30, 2017 (eighteen months). Bankr. E.D. Cal. No. 15-29002. Debtor's delinquency in the prior case was four months, which was for December 2016 through March 2017 when the case was dismissed. (The actual defaults first occurred in August 2016, with Debtor then falling further and further behind.) Unfortunately, though knowing that Debtor could not make the payments under a plan and face the loss of the Property, there is no evidence of actively marketing the Property during the past twelve months.

The court reads Debtor's plan in the same manner as the Trustee and objecting Creditor. Debtor cannot make the payments, there may or may not be an equity in the Property, but Debtor wants to gamble that equity will exist and delay any sale of the Property as long as possible.

The Plan does not comply with 11 U.S.C. §§ 1325 and 1322, and confirmation is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by a creditor with a secured claim 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 Debtor's Chapter 13 Plan filed on May 5, 2017, is not confirmed.

41. **17-23093-E-13** **ROBERT CLIFF** **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK**
DPC-1 **Scott Hughes** **6-20-17 [33]**

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.

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on June 20, 2017. By the court's calculation, 42 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 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection.

The Objection to Confirmation of Plan is sustained.

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

A. The Trustee cannot determine when plan payments will change according to the Additional Provisions;

B. The Additional Provisions list conflicting dates for when a sale of property must occur;

C. The Plan all but anticipates a modification later; and

D. The Plan proposes insufficient payments of $1,686.00 to cover debts of $1,742.00.

DEBTOR'S RESPONSE

Robert Cliff ("Debtor") filed a Response on July 14, 2017. Dckt. 42. Debtor asserts that his property is to be sold by May 5, 2018. Debtor also acknowledges that the Plan will most likely have to be modified either upon sale or surrender of his residence. Debtor also agrees that plan payments should be $1,742.00 per month, and he reports that he has made the first payment in that amount already.

AUGUST 1, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on August 29, 2017. Dckt. 59.

DISCUSSION

The court continued the hearing on the Objection to Confirmation for the creditor whose arrearage payment is to be delayed. The court did that to afford Debtor the opportunity to file Supplemental Opposition that would convince the court, and presumably the Objecting Creditor, that the property is being marketed in a commercially reasonable manner. Debtor has filed that Supplemental Opposition showing to the court that the property is being marketed actively in a way that makes his plan confirmable.

Regarding the Trustee's objections, Debtor agrees that the plan payment should be $1,742.00, that he will probably have to modify the Plan when his property sells, and that the sale cutoff date stated in the Plan should be May 5, 2018.

As discussed in connection with Objecting Creditor's objection to confirmation, on Schedule A/B, Debtor lists his residence (the only real property listed) as having a value of $284,000.00. Dckt. 1 at 11. On Schedule D, Debtor states that debts total approximately $215,000.00. Assuming a normal residential real estate commission and costs of sale (estimated to be 8% of the gross sales price), a sale of the property would net (without further accruing interest on the claims, including real property taxes) $46,738.00 for Debtor and the Estate, but it requires that there be such a sale. Debtor's counsel has provided information that there have been two offers to purchase the property based upon a listing price of $299,000.00, although Debtor expects to sell for less.

The court has approved the employment of a broker, and Debtor appears to be actively pursuing sale of his property, evidenced by already receiving two offers to purchase.

Reviewing Debtor's Schedule I, there is gross monthly income of $3,784.00 from wages and $1,200.00 retirement income. From this $4,984.00 per month in income, there is ($850.00) per month withheld for taxes. Schedule I, Dckt. 1 at 25–26. On Schedule J, Debtor lists $2,448.00 in expenses, which do not include any payment on Creditor's secured claim. That leaves $1,686.00 in projected disposable income. *Id.* at 27–28.

This is not Debtor's first recent case. Debtor, with the same counsel as in this case, had a prior Chapter 13 case that was filed on November 20, 2015, and dismissed on March 30, 2017 (eighteen months). Bankr. E.D. Cal. No. 15-29002. Debtor's delinquency in the prior case was four months, which was for December 2016 through March 2017 when the case was dismissed. (The actual defaults first occurred in

August 2016, with the Debtor then falling further and further behind.) Unfortunately, though knowing that Debtor could not make the payments under a plan and face the loss of the property, there is no evidence of actively marketing property during the past twelve months.

The court reads Debtor's plan in the same manner as the Trustee and objecting Creditor. Debtor cannot make the payments, there may or may not be an equity in the property, but Debtor wants to gamble that equity will exist and delay any sale of the property as long as possible.

The Plan does not comply with 11 U.S.C. §§ 1325 and 1322, and confirmation is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is sustained, and Debtor's Chapter 13 Plan filed on May 5, 2017, is not confirmed.

42.	**17-23993-E-13** **AP-1**	**SEGUNDO ALMOGELA** **Pro Se**	**OBJECTION TO CONFIRMATION OF PLAN BY U.S. BANK, N.A.** **7-26-17 [29]**

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 (*pro se*), Chapter 13 Trustee, and Office of the United States Trustee on July 26, 2017. By the court's calculation, 34 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 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.

U.S. Bank National Association, as Trustee for Specialty Underwriting and Residential Finance Trust Mortgage Loan Asset-Backed Certificates, Series 2007-BC2, Creditor with a secured claim, opposes confirmation of the Plan on the basis that:

A. The Plan was proposed in bad faith;

B. The Plan does not cure pre-petition arrears;

C. The Plan is not feasible; and

D. The Plan does not account for Creditor's secured claim.

Creditor's objections are well-taken. Creditor argues that the Plan was proposed in bad faith because 211 Akdeburgh Circle, Sacramento, California ("Property), is real property that secures Creditor's

claim. That property has been involved in six non-productive, successive bankruptcy cases, including the present one. Additionally, the Property was transferred by a quitclaim deed to Debtor as part of a contemporaneous bankruptcy filing. Creditor has demonstrated that the pattern of filing unproductive bankruptcy cases involving the Property is bad faith by Debtor. 11 U.S.C. § 1325(a)(3).

The objecting creditor holds a deed of trust secured by Debtor's residence. Creditor has filed a timely proof of claim in which it asserts $174,801.28 in pre-petition arrearages. The Plan does not propose to cure those arrearages. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments because it does not provide for the surrender of the collateral for this claim. *See* 11 U.S.C. §§ 1322(b)(2) & (5), 1325(a)(5)(B). The Plan cannot be confirmed because it fails to provide for the full payment of arrearages.

Creditor alleges that the Plan is not feasible and violates 11 U.S.C. § 1322(b)(2) because it contains no provision for payment of the Creditor's matured obligation, which is secured by Debtor's residence. *See* 11 U.S.C. § 1325(a)(6).

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

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

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

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

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

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

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

When a plan does not provide for a secured claim, the remedy is not denial of confirmation. Instead, the claimholder may seek termination of the automatic stay so that it may repossess or foreclose upon its collateral. The absence of a plan provision is good evidence that the collateral for the claim is not

necessary for the debtor's reorganization and that the claim will not be paid. This is cause for relief from the automatic stay. *See* 11 U.S.C. § 362(d)(1).

Notwithstanding the absence of a requirement in 11 U.S.C. § 1322(a) that a plan provide for a secured claim, the fact that this Plan does not provide for the respondent Creditor's secured claim raises doubts about the Plan's feasibility. *See* 11 U.S.C. § 1325(a)(6). That is reason to sustain the Objection.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by a creditor with a secured claim 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.

43. 17-23993-E-13 DPC-1 | **SEGUNDO ALMOGELA** **Pro Se** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 7-26-17 [21]**

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 (*pro se*) on July 26, 2017. By the court's calculation, 34 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 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection. At the hearing ----------.

The Objection to Confirmation of Plan is sustained.

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

A. Segundo Almogela ("Debtor") failed to appear at the first meeting of creditors;

B. Debtor has not made any plan payments;

C. Debtor has not provided tax returns; and

D. Debtor cannot make payments or comply with a plan because documents are incomplete.

The Trustee's objections are well-taken. Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. To attempt to confirm a plan

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

The Trustee asserts that Debtor is $300.00 delinquent in plan payments, which represents one month of the $300.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

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

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor did not list a dividend to unsecured claims or to any other creditor; the Plan does not indicate if there are additional provisions; Schedule J does not list dependents, but Debtor listed three people in his household on Form 122C-1; Schedule J lists $380.00 for car payments, but no claim is listed on Schedule D; Debtor's net income is $460.00, but the Plan proposes only $300.00 per month. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

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

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

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

44. 16-27099-E-13 JENNIFER BORBA MOTION TO MODIFY PLAN
ALF-1 Corrina Roy 7-13-17 [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.

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 July 13, 2017. By the court's calculation, 47 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(g) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

The Motion to Confirm the Modified Plan is granted.

Jennifer Borba ("Debtor") seeks confirmation of the Modified Plan because of the following reasons:

A. Fewer claims were filed than expected.

B. Debtor broke her ankle and is temporarily disabled because of the ankle and because of digestion and malnourishment issues.

C. Debtor's husband stopped working to return to school.

D. Debtor's husband began receiving a disability pension in June 2017.

E. Debtor moved out of her home after discovering black mold and moved into a similarly-sized house. Her rent increased from $850.00 per month to $1,775.00 per month.

F. Debtor hired an attorney for $500.00 per month as part of a child custody dispute.

G. Debtor cancelled her storage unit rental because she now has a garage.

H. Debtor cancelled her gym membership because of her broken ankle.

I. Debtor reduced clothing, personal care, and transportation expenses because neither she nor her husband are working.

J. Debtor no longer has separate sewer and garbage expenses because they are included in the lease at her new residence.

Dckt. 19. The Modified Plan proposes several changes, including:

A. Plan payments of $8,578.00 in months 1–9, during which time the Trustee shall suspend any and all delinquent disbursements.

B. Plan payments of $350.00 in months 10 & 11.

C. Plan payment of $731.00 in month 12.

D. Plan payments of $1,231.00 in months 13–60.

E. The Trustee shall disburse a total of $1,776.05 to Class 2 Creditor Partners Federal Credit Union in months 1–9. Beginning in month 10, that disbursement shall be $293.86 per month for the remainder of the Plan.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. Debtor argues that the Plan is feasible and will increase the dividend to unsecured claims from 28% to 32%.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on August 14, 2017. Dckt. 25. The Trustee argues that an order confirming entered on December 19, 2016, requires Debtor to notify the Trustee immediately of any change to Debtor's address and to her employment. The Trustee has not been advised about Debtor's new residential address and the changes to employment, including the relevant dates.

DEBTOR'S SUPPLEMENTAL DECLARATION

Debtor filed a Supplemental Declaration on August 18, 2017. Dckt. 29. Debtor states that a change of address has now been filed. Dckt. 28. She also states that events happened on the following dates:

A. August 2015: Debtor hired an attorney on retainer to work on child custody dispute.

B. October 2016: Debtor began seeking fully custody of a child.

C. January 2017: Retainer for attorney in child custody dispute ran out and Debtor began paying $500.00 per month to attorney.

D. April 3, 2017: Debtor applied for temporary disability benefits because of her broken ankle.

E. May 24, 2017: Debtor signed a lease for her current residence.

F. May 29, 2017: Debtor moved into her current residence.

G. May 31, 2017: Final day of employment for Debtor's husband.

H. June 6, 2017: Debtor received her first disability check from the state of California.

I. July 1, 2017: Debtor's husband received his first disability benefit payment from the Veterans Administration.

RULING

At the hearing, the Trustee confirmed that the information in Debtor's Supplemental Declaration satisfied his grounds for opposing the Motion. The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Modified Chapter 13 Plan filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Debtor's Modified Chapter 13 Plan filed on July 13, 2017, is confirmed. Debtor's Counsel 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.