UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

August 30, 2016, at 3:00 p.m.

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1. **16-22100-E-13** **DAVID/DEANNA TIBBETT**
Matthew DeCaminada

OBJECTION TO CONFIRMATION OF PLAN BY JPMORGAN CHASE BANK, N.A.
8-2-16 [55]

Tentative Ruling: The Objection to Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and 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.

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, and Chapter 13 Trustee, on August 2, 2016. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

JPMorgan Chase Bank, National Association ("Creditor") has a first lien secured by interest in David Tibbett's and Deanna Tibbett's ("Debtors") real property commonly known as 4724 Winter Oak Way, Antelope, California (the "Property"). Creditor opposes confirmation of Debtors' Plan on the basis

that:

1. Debtors' Plan fails to provide for $3,422.87 in pre-petition arrears owed to Creditor. The Debtor's Plan classifies Creditor's claim in both Class 2 and Class 4. However, because Debtor was delinquent on the obligation to Creditor at the time of the filing of the petition, Creditor's claim should be in Class 1.

2. Debtors' Plan understates the monthly payment owed to Creditor. The Plan provides for monthly payments in the amount of $1,641.59. The monthly mortgage payment, as of May 1, 2016, is $1,684.02.

DISCUSSION

The Creditor's objections are well-taken.

The basis for Creditor's objection is that Debtors' Plan fails to provide for the pre-petition arrears owed to Creditor. Creditor has filed a Proof of Claim that shows arrears of $3,422.87. Case No. 16-22100 Claim No. 12. This suggests that the plan is not feasible and should not be confirmed. *See* 11 U.S.C. § 1325(a)(6).

The Creditor also states that the Debtors' Plan understates the monthly payment owed to Creditor. The attachments to Proof of Claim No. 12 (Part 1 p. 4) state that the monthly payment is $1,684.02.

The objecting creditor holds a deed of trust secured by the Debtors' residence. The Creditor has filed a timely proof of claim in which it asserts $3,422.87 in pre-petition arrearages. The Plan does not propose to cure these arrearages. Because the Plan does not provide for the surrender of the collateral for this claim, the Plan must provide for payment in full of the arrearage, as well as maintenance of the ongoing note installments. *See* 11 U.S.C. §§ 1322(b)(2), (b)(5) & 1325(a)(5)(B). Because it fails to provide for the full payment of arrearages, the Plan cannot be confirmed.

The 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 JPMorgan Chase Bank, National Association having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

2. 16-23802-E-13 ADRIAN PEREZ
DPC-1 Pro Se

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
8-4-16 [28]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) on August 4, 2016. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

1. Adrian Perez ("Debtor") failed to appear at the First Meeting of Creditors held on July 28, 2016. The Meeting was continued to September 15, 2016, at 11:00 a.m. Trustee asserts that Debtor should know of this requirement because of his prior filings in cases 08-38822, 12-28151, and 12-32916.

2. Debtor failed to provide the Trustee with Employer Payment Advices received sixty (60) days prior to filing

3. Debtor has failed to provide the Trustee with a tax transcript or a copy of

Debtor's Federal Income Tax Return with attachments for the most recent pre-petiton tax tear for which a return was required, or a written statement that no such documentation exists.

4. Debtor cannot make the plan payments under the plan or comply with the plan:

a. Section 2.15 of the Plan is blank. The Debtor failed to list a dividend to creditors with a general unsecured claim;

b. Schedules D, E, and F were marked that the Debtor has no creditors holding secured, priority, or unsecured claims to report. It is not clear if the debtor has completed Schedules D, E, and F properly;

c. The Statement of Financial Affairs is incomplete and provides no information;

d. Debtor lists Wells Fargo Bank arrears in Class 1 of the Plan for $41,834.64 with a listed interest rate of 3.450%. The creditor may not be entitled to interest, unless the securing note provides for interest on late payments or applicable non-bankruptcy law requires interest. The Plan will not complete in sixty (60) months as proposed.

e. Debtor attached a separate sheet to the Plan but failed to identify it by a section number and indicate what section of the Plan was modified. The following language was inserted as page 6 of the Plan:

> The monthly payment amount for the real property at 3032 Funston Drive is $203.56 for principal, $439.98 for interest for a combined total of $643.54 per month. The total monthly payment amount for escrow is $592.79, bringing the monthly total payment to $1,236.33. I believe the proposed $800.00 monthly payment is realistic and will fit our budget.
>
> I am also requesting a payment plan moratorium for 90 days while my wife's worker's compensation claim is heard and resolved, at which time I will make payments as outlined.

It appears Debtor is attempting to modify a debt secured solely by Debtor's primary residence. Debtor's plan appears to propose no

payments for the first three (3) months of the Plan.

f. The plan payment of $800.00 is insufficient to fund the Class 1 on-going mortgage payment, Class 1 monthly dividends total $19,033.82, which includes 6.5% Trustee compensation.

5. The Plan fails the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). The Debtor's non-exempt equity totals $1,600.00. The Debtor failed to propose the creditors with general unsecured claims a dividend, and it does not appear that Debtor exempted any personal property on Schedule C.

DISCUSSION

The Trustee's objections are well-taken.

The basis for the Trustee's objection is that the Debtor failed to appear for the First Meeting of Creditors held pursuant to 11 U.S.C. § 341. Attendance is mandatory. *See* 11 U.S.C. § 343. To attempt to confirm a plan while filing to appear and be questioned by the Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). This is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

The Debtor has not provided the Trustee with employer payment advices for the sixty (60)-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 the Debtor did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. *See* 11 U.S.C. § 521(e)(2)(A); 11 U.S.C. § 1325(a)(9); Fed. R. Bankr. P. 4002(b)(3). The Debtor has failed to provide all necessary pay stubs and has failed to provide the tax transcript. These are independent grounds to deny confirmation. 11 U.S.C. § 1325(a)(1).

The Debtor may be unable to make payments under the Plan or comply with the Plan under 11 U.S.C § 1325(a)(6). The Debtor has failed to fully and accurately complete the necessary documents. Debtor's Plan leaves many Sections blank including Section 2.15, which designates the dividend to be payed to creditors with a general unsecured claim. Additionally, Schedules E, D, and F of Debtor's petition indicate that Debtor has no creditors holding secured, priority, or unsecured claims. Debtor's statement of financial affairs is incomplete and provides no information. This suggests that the plan is not feasible and should not be confirmed. 11 U.S.C. § 1325(a)(6). Without an accurate picture of the Debtor's financial reality, the court cannot determine whether the plan is confirmable.

Further, the Debtor is in material default under the Plan because the Plan will complete in more than the permitted 60 months and the plan payment is insufficient to fund the Class 1 on-going mortgage payments. The Plan proposes fifty-seven (57) payments of $800.00 for a total of $45,600.00; however that will be insufficient to pay off the arrears if the Creditor is entitled to interest.

Debtor's Additional Provisions, in addition to being improperly identified by a section number and failing to indicate which section of the Plan is being modified, attempts to modify a debt secured solely

by Debtor's primary residence. 11 U.S.C. § 1322(b)(2) provides:

> Subject to subsections (a) and (c) of this section, the plan may modify the rights of holders of secured claims, *other than a claim secured only by a security interest in real property that is the debtor's principal residence*, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims.

(Emphasis added). The Plan cannot modify the claim secured by the real property that is the Debtor's primary residence. This is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

The Debtor's Plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). The Trustee states that the Debtor's non exempt totals $1,600.00. Debtor did not claim any personal property as exempt on Debtor's Schedule C. The Debtor has not explain how creditors with a general unsecured claim are not entitled to a dividend when there appears to be non-exempt assets. This is cause to deny confirmation. 11 U.S.C. § 1325(a)(4).

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

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

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

3. **12-20308-E-13** **HEATH MURRAY AND LUCRETIA HEATH** **MOTION TO MODIFY PLAN**
HLG-6 **Kristy Hernandez** **7-19-16 [102]**

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 19, 2016. By the court's calculation, 42 days' notice was provided. 35 days' notice is required.

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

The court's decision is to deny without prejudice the Motion to Confirm the Modified Plan.

Heath B. Murray and Lucretia M. Heath filed the Instant Motion to Confirm the Modified Plan on July 19, 2016. Dckt. 102.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13, Trustee, filed an opposition to the instant Motion on August 16, 2016. Dckt. 108. The Trustee opposes confirmation on the grounds that Heath Murray and Lucretia Heath ("Debtors") have not filed a supplemental Schedule I in support of the Motion to Modify. Debtors' Motion and Declaration indicate Debtors' projected average monthly income from Schedule I is $5,931.74. Debtors' last Schedule I was filed on October 5, 2012. That Schedule I indicates that Heath Murray is unemployed and receives $0.00 and Lucretia Heath is employed by The Home Depot and receives a monthly net income of $5,931.74.

Debtors' Motion, Declaration, and Supplemental Schedule J reflect that Debtors' income has remained unchanged for nearly four years. The Trustee requests that the court order the Debtors to file a current Schedule I and that the Debtors supply the Trustee with a copy of their 2014 and 2015 tax returns and sixty (60) days of their most current pay stubs.

Notwithstanding there being any current financial information, the Trustee says, notwithstanding the Objection, the court should confirm the plan and order the Debtors to file Supplemental Schedules I and J disclosing the current income and expense information (given that more than four years have passed since the now-stale financial information was provided), as well as current payroll advices.

The court is a bit bewildered as to how, if the Trustee has (and the Trustee has raised) a bona fide, good faith objection based on there not being sufficient financial information. The court cannot make the required findings of fact and conclusions of law on whether the Plan is filed in good faith and is feasible without such information. For the court to grant the Motion as requested, it would have to close its eyes and abdicate the judicial power to the Trustee for his subsequent review.

DISCUSSION

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

The Trustee's objections are well-taken.

The Debtors may not be able to make Plan payments or comply with the Plan. The Debtors' Plan relies on information in Debtors' Schedules that is potentially outdated and inaccurate. Without an accurate picture of the Debtors' financial reality, the court cannot determine whether the plan is confirmable.

The fact that Supplemental Schedules I and J or other evidence providing current financial information is nothing new and should not surprise any attorney who regularly appears in this District – such as Debtors' counsel. It may have been that Debtors' counsel believed that such information was not reasonably necessary because the only amendment is to increase the monthly plan payment from $2,875.00 to $2,982.00 due to an increase in the monthly mortgage payment being made through the plan.

On July 19, 2016, Debtors filed an "Amended" Schedule J, which has the effect of amending the Debtors' expenses dating back to the filing of this case in January 2014. Dckt. 101. Based on this amendment, Debtors' Monthly Net Income would be $2,985.32, greater than what was "erroneously" stated when the case was filed (requiring this "amendment"), and the Debtors should have been paying this higher amount since the case was filed.

It may be that Debtors do not really mean to file an "Amended" Schedule J, but a "Supplemental Schedule J" (The court notes that Debtors are using the old form for Schedule J, which may have compounded this confusion, and that, as discussed below, Debtors filed a Supplemental Schedule I).

Debtors, in response to the Trustee's Objection (which merely requested that the court confirm the plan notwithstanding the Trustee stating that there was inadequate financial information), have filed a "Supplemental" Schedule I, which states that the Debtors' current gross income is $8,671.15 (for a family of four, including two teenage children). This compares with Debtors stating gross income of $7,521.65

when this case was filed in 2012. Dckt. 18.

In 2012, Debtors stated under penalty of perjury that the withholding included $36.79 to repay (to the Debtors) an existing 401(k) loan and to make (to the Debtors) an additional $150.00 401(k) contribution. *Id.* and Dckts. 52, 57, and 87. The court confirmed Debtors' Plan based on this financial information. Dckt. 92.

But in the Supplemental Schedule I, Debtors state that the monthly 401(k) contribution, monies Debtors pay to Debtors rather than creditors, has jumped to $433.55 (a 200% increase), and the 401(k) loan payments have increased to $91.82 a month (a 140% increase). It appears that Debtors had an extra $280.00 a month above expenses to fund the pay, rather than pay themselves, as well as borrowing additional monies post-petition without authorization.

As with the Trustee, the court deprived of the current financial information, cannot confirm a Chapter 13 plan. Then, in an attempt to address the concern flagged by the Chapter 13 Trustee, the Debtors slipped in a Supplemental Schedule I two work days before the hearing – which Supplemental Schedule I contains significant conflicting financial information from the prior Schedule I stated under penalty of perjury.

The court cannot determine that the Plan is feasible. Further, the conflicting financial information and it now being stated under penalty of perjury that Debtors have been paying significantly more monies into the 401(k) than previously stated under penalty of perjury and relied upon by the court for Debtors' own use and are making higher 401(k) payments (indicating unauthorized post-petition borrowing), the court cannot determine that this case has been prosecuted in good faith, that this plan has been proposed in good faith, and that Debtors are complying with the Bankruptcy Code in seeking confirmation.

The Motion to Confirm the Modified Chapter 13 Plan is denied, it failing to comply with 11 U.S.C. §§ 1322, 1325, and 1329. FN.1.

FN.1. It is unfortunate that, having the opportunity to obtain substantial relief under the Bankruptcy Code, after more than four years in the case, it appears that Debtors have chosen to squander the opportunity, not comply with the law, and attempt to create their own special, unique, bankruptcy law that allows them to take as much money as they want and not have to pay creditors. Debtors purported, under penalty of perjury to be under such financial strain that they could only pay a 4% dividend on creditors holding general unsecured claims. Proposed Modified Plan, Dckt. 106; confirmed Chapter 13 Plan, Dckt. 83.

Through the bankruptcy case, Debtors sought to cure a $37,000.00 arrearage on the debt secured by the senior lien on Debtors' residence and lien strip a second deed of trust securing a $20,000.00 debt. Other than a small car loan payment of $80.00 a month reamortized through the plan and paying state and federal taxes of $1,000.00, there are no significant creditor payments. Based on the information now provided by Debtors under penalty of perjury, it appears that Debtors may have been diverting $400.00 a month of monies, which equates to $4,800.00 a year, and possibly more than $20,000.00 to date.

The Debtors' ability to lien strip, cure the arrearage, and discharge debt may have been squandered, this case is incapable of being completed, and Debtors may having lost the ability to obtain a

discharge of the current debts in any future bankruptcy case.

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

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

4.	**16-24111-E-13** **AP-1**	**ABBIGAIL CLYMER** **D. Randall Ensminger**	**OBJECTION TO CONFIRMATION OF PLAN BY WELLS FARGO BANK, N.A.** **8-4-16 [21]**

APPEARANCE OF BRYAN FAIRMAN AND JOSEPH DELMOTTE, ATTORNEYS FOR WELLS FARGO BANK, N.A. LISTED ON THE OBJECTION, REQUIRED FOR AUGUST 30, 2016 HEARING

TELEPHONIC APPEARANCES PERMITTED – FOR THIS HEARING ONLY

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on August 4, 2016. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to overrule the Objection.

Wells Fargo Bank, N.A. ("Creditor"), opposes confirmation of the Plan on the basis that Abbigail Clymer's ("Debtor") Plan fails to properly provide for the cure of Creditor's pre-petition arrears or ongoing monthly post-petition payments.

The Creditor's objections are well-taken.

The Creditor holds a deed of trust secured by Debtor's residence. The Creditor has failed to file a proof of claim. The Objection states that the Plan does not provide for the curing of arrears, and the Creditor asserts that the approximate amount in arrears is $680.72.

Unfortunately, the Creditor does not provide any evidence of the arrears in the form of a declaration or proof of claim or account statement. Instead, the Creditor merely states the $680.72 in arrears in the Objection without admissible evidence.

The Creditor objects on the basis that Debtor's Plan fails to properly provide for the cure of Creditor's pre-petition arrears or the maintenance of post-petition payments. Unfortunately, Creditor offers no evidence of any such "arrearage." Rather, it again only provides argument of counsel. Merely because Wells Fargo Bank, N.A. has its attorneys assert that it is a creditor does not create a special exception to the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and Federal Rules of Evidence. FN.1.

FN.1. The rejection of this objection may be but a Pyrrhic victory for the Debtor. If this asserted creditor is correct and an unprovided-for arrearage exists, the court can envision shortly seeing a motion for relief from the stay. At that point, the Debtor and counsel would have to prepare a modified plan, motion to confirm modified plan, evidence to support the modified plan, notice a hearing, and conduct a hearing on the proposed modified plan. Any such proceedings because of the unprovided-for cure of the arrearage would be clearly anticipated work to be covered by the no-look fee and likely not be reasonable additional costs and expenses if counsel has chosen to opt out of the no-look fee.

The Objection is overruled. FN.2.

FN.2. Overruling this objection is of little import, as the court is denying confirmation under the Trustee's objection to confirmation. However, it raises to light a much more significant issue. Counsel for Wells Fargo Bank, N.A. regularly appears in this court and knows, having been told on a number of prior occasions, that evidence must be provided and that this counsel does not have special abilities to merely state allegations that the court then repeats as facts. Given that the court's prior discussions have gone apparently unheaded, it may be because counsel makes telephonic appearances. The court will consider whether the use of such a privilege is causing counsel to not understand these basic pleading and evidentiary requirements, and that in-person, non-telephonic appearances like most of the other attorneys, is necessary for all attorneys in counsel's firm.

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 Wells Fargo Bank, N.A. having been presented to the court, and upon review of the pleadings, evidence,

arguments of counsel, and good cause appearing,

IT IS ORDERED that Objection to confirmation of the Plan is overruled.

5.	**16-24111-E-13** **DPC-1**	**ABBIGAIL CLYMER** **D. Randall Ensminger**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **8-4-16 [17]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on August 4, 2016. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

1. The Debtor is $406.97 delinquent in plan payments. The Debtor has made no payments to the Trustee to date.

2. Debtor's Plan is incomplete. Pages 3, 4, and 7 of the Plan were not filed. The

> treatment to and for Ensminger Law Offices, Golden 1 Credit Union, and Wells Fargo Bank listed on Schedule D is unknown. Counsel for the Debtor stated at the meeting of creditors that he has taken a note and deed of trust on the Debtor's property in the amount of $4,000.000 and that the agreement is that the note will be paid only if the Debtor sells or refinances the property. The Trustee does not have a copy of the Note and Deed of Trust , and a search of the Placer County Recorders website reveals the Note and Deed of Trust may not be recorded.

The Trustee's objections are well-taken.

A basis for the Trustee's objection is that the Debtor is $406.97 delinquent in plan payments, which represents one month's payment. The Debtor's delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Debtor's Plan is incomplete. The Plan appears to be missing pages 3, 4, and 7. Further, the Treatment of Ensminger Law Offices, Golden 1 Credit Union, and Wells Fargo Bank, all of which were listed as Creditors on Schedule D, is unknown. While Debtor's Counsel stated at the Meeting of Creditors that he has taken a Note and Deed of Trust on the Debtor's property in the amount of $4,000.00 that will be paid only if the Debtor sells or refinances the property, the Trustee has not received a copy of the Note or Deed of Trust. The Trustee's search of the Placer County Recorder's website reveals that the Note and Deed of Trust may not have been recorded. This suggests that the plan is not feasible and should not be confirmed. 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 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to confirmation the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

6. **16-24111-E-13** **ABBIGAIL CLYMER** **OBJECTION TO CONFIRMATION OF**
RMP-1 **D. Randall Ensminger** **PLAN BY BOSCO CREDIT, LLC**
7-20-16 [13]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on July 20, 2016. By the court's calculation, 41 days' notice was provided. 14 days' notice is required.

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

The court's decision is to overrule the Objection.

BOSCO CREDIT LLC, c/o Franklin Credit Management Corp. ("Creditor"), opposes confirmation of the Plan on the basis that:

1. The Plan incorrectly reflects the pre-petition arrearages owed to Creditor. Debtor's Plan accounts for pre-petition arrears of $20,709.84. However, Creditor has filed a proof of claim that reflects $27,941.00 in pre-petition arrears are due and owing under the Note and Deed in Trust.

2. The Plan fails to provide for the contract interest rate on the pre-petition arrears due and owing to Creditor. Under the Note, Creditor is entitled to an

interest rate of 8.75% (variable) on the pre-petition arrears. The Plan provides for an interest rate of 0%.

3. The Debtor's Plan may not be feasible.

   a. Debtor appears to rely on obtaining a loan modification from Creditor in order to have a feasible Plan. Debtor has not obtained a Loan Modification from Creditor.

   b. Debtor's Plan proposes adequate protection payments in the amount of $150.00 per month while the alleged loan modification is pending. The installment payment according to Creditor's Proof of Claim is $218.86 per month. Debtor intends to keep the property as her personal residence at the detriment and expense of Creditor.

Objection on Amount of Arrearage

The first basis for Creditor's objection is that Debtor's Plan incorrectly provides for the pre-petition arrears owed to the Creditor, who holds a deed of trust secured by Debtor's residence. Section 2.04 of the Plan states:

> The proof of claim, not this plan or the schedules, shall determine the amount and classification of a claim unless the court's disposition of a claim objection, valuation motion, or lien avoidance motion affects the amount or classification of the claim.

Creditor has filed a Proof of Claim that asserts $27,941.99 in pre-petition arrearages. Proof of Claim No. 1. Irrespective of the amount stated in the Plan, it is the proof of claim amount that controls. This issue becomes whether the plan provides sufficient funding for the arrearage stated in the proof of claim (with the monthly payment as computed by the Chapter 13 Trustee). The first objection is overruled.

Objection Based on Loan Modification

Additionally, Creditor argues Debtor's Plan relies on obtaining a Loan Modification from the Creditor. However, Debtor has not obtained a Loan Modification to Date. Further, the Debtor proposes adequate protection payments in the amount of $150.00 per month while the Loan Modification is pending. The Creditor's Proof of Claim indicates that the installment payment is $218.86 per month, though. This suggests that the plan is not feasible and should not be confirmed. *See* 11 U.S.C. § 1325(a)(6).

Creditor's basic argument is that no plan, which provides for adequate protection for Creditor's secured claim, can be confirmed unless it provides for payment in full of Creditor's secured claim. Creditor misreads the law.

Here, Debtor seeks to obtain a loan modification when Debtor commits to prosecute in good faith and which Creditor must consider in good faith (even if only based on the implied covenant of good faith and fair dealing in every contract). The obligation to Creditor is not modified by confirmation of the Chapter 13 Plan, which merely continues in full force and effect the various provisions of the Bankruptcy

Code enacted by Congress - including 11 U.S.C. § 362 for the automatic stay and 11 U.S.C. § 361 requiring adequate protection.

The Additional Provisions set forth in the Plan relating to the possible loan modification are ones worked out by sophisticated creditors and their counsel, working in good faith with consumer attorneys. Under these provisions, including the specific provisions requiring the good faith prosecution of the loan modification by the debtor and recognizing Creditor's right to deny the request, all of Creditor's rights, including 11 U.S.C. § 362(d), are preserved.

This grounds of the Objection are overruled.

Contract Interest Rate

The Debtor's Plan fails to provide for the contract interest rate such that the value of the plan payments would be less than the allowed amount of the Creditor's claim in violation of 11 U.S.C. § 1325(a)(5). Specifically, the Plan proposes a 0% interest rate as to the Creditor's claim, instead of the contracted 8.75% variable rate.

However, the Plan does not alter the interest rate, as the Plan merely provides for adequate protection payments. Debtor confuses the issue by placing dollar amounts in the Class 1 Claim section of the Plan, and then in the Additional Provisions states that notwithstanding what is stated in Class 1, the "real" treatment is provided in additional provisions.

Further, Creditor does not provide the court with a legal basis for the interest rate it demands on the non-principal amounts of the arrearage

The Objection is overruled. This overruling of the objection is of little legal moment for Creditor in light of the court denying confirmation pursuant to the objection of the Chapter 13 Trustee. However, it is significant that counsel for Creditor, who regularly appears in this court, ignores the actual terms of the Additional Provisions and incorrectly states the terms of the plan.

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 Bosco Credit, LLC having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to confirmation of the Plan is overruled.

7.	**16-23825-E-13 DPC-1**	**JEFFREY NELSON AND LURDES ROSALES Muoi Chea**	**OBJECTION TO DISCHARGE BY DAVID P. CUSICK 7-22-16 [20]**

Final Ruling: No appearance at the August 30, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtors, Debtors' Attorney, and Office of the United States Trustee on July 22, 2016. By the court's calculation, 39 days' notice was provided. 28 days' notice is required.

The Objection to Discharge has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4003(b). The failure of the Debtor and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the Debtors and the other parties in interest are entered, the matter will be resolved without oral argument and the court shall issue its ruling from the parties' pleadings.

The Objection to Discharge is sustained.

David Cusick, the Chapter 13 Trustee ("Objector"), filed the instant Objection to Debtors' Discharge on July 22, 2016. Dckt. 20.

The Objector argues that Jeffrey Nelson and Lurdes Rosales ("Debtors") are not entitled to a discharge in the instant bankruptcy case because the Debtor previously received a discharge in a Chapter 7 case.

The Debtors filed a Chapter 7 bankruptcy case on March 14, 2015. Case No. 15-22023, Dckt. 1. The Debtor received a discharge on September 25, 2015. Case No. 15-22023, Dckt. 59.

The instant case was filed under Chapter 13 on June 13, 2016.

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

Here, the Debtors received a discharge under 11 U.S.C. § 727 on September 25, 2015, which is less than four years preceding the date of the filing of the instant case. Case No. 15-22023, Dckt. 59. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), the Debtor is not eligible for a discharge in the instant case.

Therefore, the objection is sustained. Upon successful completion of the instant case (Case No. 16-

23825), the case shall be closed without the entry of a discharge, and Debtors 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 13Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to Discharge is sustained.
>
> **IT IS FURTHER ORDERED** that, upon successful completion of the instant case, Case No. 16-23825, the case shall be closed without the entry of a discharge.

8. 16-23825-E-13 DPC-2 | JEFFREY NELSON AND LURDES ROSALES Muoi Chea | OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 8-4-16 [29]

Final Ruling: No appearance at the August 30, 2016 Hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on August 4, 2016. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to continue the hearing on the Objection to Confirmation of Plan to 3:00 p.m. on September 20, 2016.

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that Co-Debtor Jeffrey Nelson failed to appear at the First Meeting of Creditors held on July 28, 2016. The Trustee received an email from Debtor's counsel that Co-Debtor Jeffrey Nelson would be unable to attend the Meeting due to a planned, paid field trip for and with his kindergarten and first grade classes. The Meeting

was continued to September 15, 2016, at 11:00 a.m.

The Trustee requests that the hearing be continued to 3:00 p.m. on September 20, 2016, to allow for the continued First Meeting of Creditors to be conducted.

On August 23, 2016, Debtor filed a concurrence in the request to continue the hearing. Dckt. 33.

In light of the facts identified by the Trustee and Debtor, the hearing is continued.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Objection to Confirmation Plan is continued to September 20, 2016.

9. **13-20028-E-13** **GREGORY/ELISA WYATT** **MOTION TO MODIFY PLAN**
EJS-24 **Eric Schwab** **7-21-16 [266]**

Final Ruling: No appearance at the August 30, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 21, 2016. By the court's calculation, 40 days' notice was provided. 35 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Modified Plan is granted.

TRUSTEE'S RESPONSE

The Trustee filed a response on August 16, 2016. Dckt. 272. The Trustee states that the Debtors' Motion and Modified Plan have been reviewed, that Debtors' are current under the proposed Plan, and that the Modified Plan is feasible. Trustee states that he has no basis to oppose confirmation of the Modified Plan but notes that Debtors have a payment of $5,501.00 due on August 25, 2016.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. Gregory Wyatt and Elisa Wyatt ("Debtors") have filed evidence in support of confirmation. No opposition to the Motion was filed by the Chapter 13 Trustee or creditors. The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329, and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of

counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted, Debtors' Chapter 13 Plan filed on July 21, 2016, is confirmed. Counsel for the Debtors 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.

10. 13-27835-E-13 HLG-2 JEFFREY/MONICA JACKSON Kristy Hernandez MOTION TO MODIFY PLAN 7-19-16 [139]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 19, 2016. By the court's calculation, 42 days' notice was provided. 35 days' notice is required.

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

The court's decision is to deny without prejudice the Motion to Confirm the Modified Plan.

Jeffrey Jackson and Monica Jackson ("Debtors") filed the Instant Motion to Modify Plan on July 19, 2016. Dckt. 139.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the Instant Motion on August 16, 2016. Dckt. 146. The Trustee opposes confirmation on the grounds that:

1. Debtors have not filed a current Schedule I in support of the Motion to Modify Plan. Debtors' Motion and Declaration indicate that Debtors' projected average monthly income from Schedule I is $4,169.90. Debtors' last Schedule I was filed on June 7, 2013, and indicates that Debtor Jeffrey Jackson is disabled and receiving Social Security income in the amount of $2,219.90 and that Monica Jackson is unemployed and receiving unemployment benefits in the amount of $1,950.00. The Trustee requests that the court order the Debtors to file a current Schedule I.

2. The Debtors' decreased expense may not be reasonable. Debtors propose to increase their plan payment from $2,180.00 to $2,344.00 due to an increase in their mortgage payment. Debtors' declaration indicates that Debtors will afford this increase by reducing their monthly food expenses from $600.00 to $435.00. Debtor has not filed a current Schedule I to indicate whether Debtors are still claiming two dependents. The national standard for allowable food expenses for a family of four is $815.00.

DISCUSSION

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

The Trustee's objections are well taken. Though this case is not more than three years old, Debtors chose not to provide the court with current financial information. Debtors, two work days before this hearing dropped a Supplemental Schedule I on the court. Dckt. 149. The Supplemental Schedule J was filed on July 19, 2016. Dckt. 138.

Looking at Supplemental Schedule I, the financial information is inconsistent. On Supplemental Schedule I, Debtors state net monthly income of $4,310.38. Dckt. 149. This includes business income of $2,447.68. However, on the attachment showing Debtors' gross and net business income, Debtors state that the net monthly income just from the business is $14,686.12. *Id.* at 3.

The Motion is denied, the court not being able to determine from the evidence presented (and some evidence untimely presented by Debtors) that the plan is feasible, the amount of income received by Debtors, and that the Plan is being proposed in good faith.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Motion to Confirm the Modified Plan is denied without prejudice.

11. 13-20939-E-13 PGM-2 | **TIMOTHY/TAMARA MENEBROKER** | **CONTINUED MOTION TO MODIFY PLAN**
Peter Macaluso | **5-12-16 [50]**

Continued from 7/26/16

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 12, 2016. By the court's calculation, 75 days' notice was provided. 35 days' notice is required.

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

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

Tamara Menebroker ("Debtor") filed the instant Motion to Modify Plan on May 12, 2016. Dckt. 50.

TRUSTEE'S OPPOSITION

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

1. Debtor Tamara Menebroker may not have authority to file a proposed modified plan where Debtor has signed as successor in interest for Timothy Menebroker.

2. The Debtor's plan indicates additional provisions are appended, but there are none.

ORDER RESETTING HEARING

On June 15, 2016, the court issued an order resetting the hearing for 3:00 p.m. on July 26, 2016. Dckt. 64.

DEBTOR'S REPLY

The Debtor filed a reply on June 21, 2016. Dckt. 69. The Debtor states that "[t]he Notice of Death and Motion for Omnibus Relief upon Death of Debtor was continued to July 26, 2016, and this motion is recommended to be continued to that date to insure proper authority to modify this plan." Dckt. 69.

JULY 26, 2016 HEARING

At the hearing, the court held that:

> First, the Debtor inaccurately states the status of her Motion for Omnibus Relief upon Death of Debtor. The court denied the Motion without prejudice on June 14, 2016. Dckt. 66.
>
> As such, there is no person substituted as a personal representative for deceased Debtor Timothy Menebroker. Until the parties are authorized to act as the personal representative, the Debtor Tamara Menebroker can not sign on behalf of the deceased Debtor.
>
> Additionally, the Debtor's failure to attach additional provisions when indicating that there should be raises concerns over whether the court and other parties in interest have the full terms of the proposed plan. The court will not just "rubber stamp" plans without analyzing the entirety of the plans terms to ensure their compliance with the Bankruptcy Code.

DISCUSSION

No further pleadings have been filed since the July 26, 2016 hearing. The Trustee's objections are well-taken still . No party has been authorized to act as personal representative for Debtor Timothy Menebroker.

It is very concerning to the court that Debtor's counsel and a person purporting to serve as a personal representative came to the court on May 12, 2016, (Dckt. 44) and has failed to prosecute the request for such relief. The surviving Debtor has expended significant monies without authority under the Plan, and appears to now have adopted a strategy of ignoring the conduct, hiding from the court, and

wanting to slip away from these federal court proceedings.

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 Tamara Menebroker having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Confirm the Plan is denied, and the proposed Modified Chapter 13 Plan is not confirmed.

12. 16-23346-E-13 JOSHUA BORS MOTION TO CONFIRM PLAN
JMC-1 Joseph Canning 7-13-16 [20]

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

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

Below is the court's tentative ruling.

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

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

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

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

Joshua Bors ("Debtor") filed the Instant Motion to Confirm Amended Plan on July 13, 2016. Dckt. 20.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the Instant Motion on July 22, 2016. Dckt. 29. The Trustee opposes confirmation on the basis that:

A. The Plan fails to specify a definite amount to be disbursed to the mortgage creditor Chapel of Light Special Care Fund. Section 2.08 of Debtor's First Amended Plan list Class 1 mortgage arrears of $70,289.61 to Chapel of Light Special Care Fund. The arrearage dividend column states "*see additional provisions." Section 6 of the Plan states, "The arrearage dividend to Creditor Chapel of Light Special Care Fund shall increase in month 19 of the plan with the corresponding increase in plan payment."

The Plan fails to specify a definite amount to be disbursed to the Creditor each month.

B. Debtor cannot afford to make the payments or comply with the plan.

1. Section 6 of Debtor's Plan calls for plan payments of $1,768.00 for eighteen (18) months, then $3,165.49 for forty-two (42) months. Debtor's Schedule J lists net income of $1,768.00. Debtor's Schedule J does not indicate any increase or decrease of expenses anticipated over the next year. Debtor's Motion and Declaration in Support do not offer any explanation fo how Debtor will make the increased plan payment in month 19 of the Plan.

2. Debtor's plan relies on the Motion to Value Collateral of Wells Fargo Dealer Services on a 2010 Chevy Impala, which is set for hearing on August 23, 2016. If the Motion to Value is not granted, Debtor's Plan does not have sufficient monies to pay the claim in full.

DISCUSSION

The Trustee's objection is well-taken.

The basis for the Trustee's objection is that the plan does not provide for equal monthly installments and fails to specify a definite amount to be disbursed to creditor Chapel of Light Special Care Fund. While Section 2.08 of the Plan states "see additional provisions," Section 6 of the plan only shows additional provisions for Section 1.01 followed by a statement that: "The arrearage dividend to Creditor Chapel of Light Special Care Fund shall increase in month 19 of the plan with the corresponding increase in plan payment."

The court notes that whether Debtor intends to put the additional $1,397.49 that the Plan begins to pay in the nineteenth month toward the arrears owed to Creditor Chapel of Light Special Care Fund is not clear from the Plan. This is also contrary to 11 U.S.C. § 1325(a)(5)(B)(iii)(I), which provides:

> Except as provided in subsection (b), the court shall confirm a plan if with respect to each allowed secured claim provided for by the plan–the plan provides that if property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts.

The Plan proposes to increase the dividend paid to Chapel of Light Special Care Fund in month 19 of the Plan. This is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(5).

Further, the Trustee objects on the basis that the Debtor cannot make the Payments or comply with the Plan. While Debtor's Plan indicates an increase in payments in month 19 from $1,768.00 to $3,165.49 for the remaining forty-two (42) months, Debtor's Schedule J lists a net income of $1,768.00 and does not indicate any increase of income or decrease of expenses anticipated over the next year. It is unclear based on the Schedules and Debtor's Declaration how Debtor will make the increased plan payment in month 19 of the Plan. This indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Lastly, the Trustee objects on the basis that the Plan relies on the Motion to Value Collateral of Wells Fargo Dealer Services. The Motion was set for hearing on August 23, 2016, and was granted. Dckt. 32. The Motion to Value Collateral of Wells Fargo Dealer Services having been granted, this portion of the Trustee's objection is overruled.

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

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

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

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

13. **15-27854-E-13** **DELANOYE ROBERTSON** **OBJECTION TO CLAIM OF U.S. BANK, N.A., CLAIM NUMBER 2**
RJ-3 **Richard Jare** **6-21-16 [94]**

DEBTOR DISMISSED: 08/15/16

Final Ruling: No appearance at the August 30, 2016 hearing is required.

The case having previously been dismissed, the Objection to Claim 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 Objection to Claim having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is dismissed as moot, the case having been dismissed.

14. 15-29555-E-13 DIANNE AKZAM MOTION TO VACATE
DA-1 Pro Se 7-15-16 [75]

No Tentative Ruling: The Motion to Vacate has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on July 15, 2016. By the court's calculation, 46 days' notice was provided. 28 days' notice is required.

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

The court's decision on the Motion to Vacate is xxxxxxxxxxxxxx.

Dianne Akzam ("Debtor") filed the instant Motion to Vacate Order for Relief from Automatic Stay on July 15, 2016. Dckt. 75. The Motion is deceptively "simple," while implicating a long history and some fundamental issues arising under federal law.

In the Motion, Debtor requests that the court vacate its prior order granting relief from the automatic stay as to U.S. Bank, National Association ("Asserted Creditor"), to:

> "allow U.S. Bank National Association, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the real property commonly known as 802 Ohio Street, Vallejo, California."

Order, Dckt. 73. The court also granted relief from the automatic stay pursuant to 11 U.S.C. § 362(d))(4), preventing the automatic stay from going into effect during the following two years unless said relief is affirmatively granted by the bankruptcy judge in that case.

The court's findings of fact and conclusions of law in granting such relief from the automatic stay are set forth in the Civil Minutes for the June 28, 2016 hearing on that motion. Dckt. 70. In addressing the Chapter 13 Trustee's motion to dismiss this bankruptcy case, the court discussed the multiple prior bankruptcy cases by Debtor and her brother. Dckt. 30. The court revisited this history in ruling on the motion for relief from the automatic stay. This discussion is again repeated here.

History of Debtor's and Debtor's Brother's Bankruptcy Filings

Bankruptcy Filings by Jeffrey Akzam, Debtor's Brother

Though not grounds in and of itself to deny confirmation, the following is the series of cases filed by the Debtor and Debtor's brother, Jeffrey Azkam and subsequently dismissed:

A. 11-25844 in *Pro Se* - Debtor Jeffrey Azkam

1. Chapter 13 Filed March 9, 2011

2. On Schedule A lists 802 Ohio Street, Vallejo, California, as property in which he is a "co-owner," with the property not subject to any secured claims. 11-25884, Dckt. 20.

3. Motion to Dismiss for failure to file motion to confirm plan, failure to file tax returns, failure to provide most recent tax return, and failure to provide copies of business records. Dckt. 28.

4. Case converted to Chapter 7 at request of debtor Jeffrey Akzam. Order, Dckt. 42.

5. The court vacated an order granting relief from the automatic stay for U.S. Bank, National Association to foreclose on the 802 Ohio Street Property. Jeffrey Akzam asserted that he had not been properly served with the motion.

6. Discharge entered September 2, 2011.

B. 13-20155 in *Pro se* - Debtor Jeffrey Akzam

1. Chapter 13 Filed January 7, 2013.

2. Case dismissed because of debtor Jeffery Akzam's failure to file tax returns and Mr. Akzam's failure to file a motion to confirm a Chapter 13 Plan. Civil Minutes, Dckt. 73. The court also determined that the Plan, as

proposed by debtor Jeffery Akzam, was not feasible and that the plan was underfunded. *Id.*

3. In connection with Jeffery Akzam's Chapter 13 case 13-20155, Jeffery Akzam filed an Adversary Proceeding disputing the lien of Option One Mortgage. Adv. 13-2103.

   a. After granting a motion to dismiss the Complaint, a First Amended Complaint was filed, in which Debtor Dianne Akzam was added as a joint plaintiff with Jeffery Akzam. Debtor Dianne Akzam and her brother Jeffery Akzam disputed the secured claim and alleged violations of the automatic stay.

   b. The court determined that abstention pursuant to 28 U.S.C. § 1334(c), the court finding that there were no issues arising under the Bankruptcy Code or in the bankruptcy case. Civil Minutes, Dckt. 85.

4. Jeffery Akzam again listed an interest in the 802 Ohio Street, Vallejo, California, property, now stating his interest was that of "co-owner/beneficiary." 13-20155; Schedule A, Dckt. 22.

C. 14-30332 in *Pro Se* - Debtor Jeffery Akzam

1. Chapter 13 Case filed October 17, 2014

2. Case dismissed on July 8, 2015.

3. The case was dismissed due to debtor Jeffrey Akzam's failure to file an amended plan after the court denied confirmation of the proposed plan. Civil Minutes, Dckt. 83.

4. Jeffery Akzam again listed an interest in the 802 Ohio Street, Vallejo, California, property, describing it as a "co-owner/beneficiary" interest. 14-30332; Schedule A, Dckt. 15.

Bankruptcy Filings by Dianne L. Akzam, Debtor

The six prior bankruptcy cases filed by Debtor are summarized as follows:

14-28272 *In Pro Se*	Chapter 13 Case	Filed August 14, 2014 Dismissed September 29, 2014

	I. Case dismissed for failure to filed Schedules, Statement of Financial Affairs, and Chapter 13 Plan. II. Court denied Debtor's Motion to Extend the Automatic Stay 11 U.S.C. § 362(c)(3)(B). Dckt. 28. The court discussed in detail the Debtor's history of failure to prosecute prior multiple bankruptcy cases. Civil Minutes, Dckt. 28. III. Also the court issued an order to show cause why the case should not be dismissed due to failure to pay filing fees.	
14-23825 *In Pro Se*	Chapter 13 Case	Filed April 14, 2014 Dismissed July 23, 2014
	I. Case dismissed because Debtor did not meet the eligibility requirements for a Debtor in a Chapter 13 case as (1) she did not have any regular income and (2) had not filed a Certificate of Pre-Filing Credit Counseling. Dckt. 49.	
12-37369 *In Pro Se*	Chapter 13 Case	Filed September 27, 2012 Dismissed November 19, 2012
	I. The case was dismissed due to Debtor failing to file Schedules, Statement of Financial Affairs, and Plan. Dckt. 21. II. Motion to Vacate Dismissal Order denied. Order, Dckt. 33 III. Also the court issued an order to show cause why the case should not be dismissed due to failure to pay filing fees.	
11-43187 *In Pro Se*	Chapter 13 Case	Filed September 27, 2011 Dismissed December 14, 2011
	I. The case was dismissed for failure of Debtor to file Schedules, Statement of Financial Affairs, and Plan. Order, Dckt. 25. II. Case also dismissed due to Debtor failing to pay filing fees. Order, Dckt. 26.	
11-20282 *In Pro Se*	Chapter 13 Case	Filed January 4, 2011 Dismissed March 18, 2011

	I. Case dismissed due to Debtor's failure to attend First Meeting of Creditors and failure to file motion to confirm Chapter 13 Plan. Motion and Order, Dckts. 22, 27. II. Also the court issued an order to show cause why the case should not be dismissed due to failure to pay filing fees.	
10-45216 *In Pro Se*	Chapter 13 Case	Filed September 22, 2010 Dismissed December 16, 2010
	I. The bankruptcy case was dismissed due to Debtor failing to file a motion to confirm the Chapter 13 Plan and Debtor being delinquent in Plan payments. Motion and Order, Dckts. 22, 38. II. Also the court issued an order to show cause why the case should not be dismissed due to failure to pay filing fees.	

History of Current Bankruptcy Case

The instant case was filed on December 11, 2015. Dckt. 1.

On May 17, 2016, Asserted Creditor filed a Motion for Relief from Automatic Stay. Dckt. 44. The Debtor did not file a plan when this bankruptcy case was filed, but filed a Chapter 13 Plan in this (her seventh Chapter 13 case) on January 8, 2016. Dckt. 24. Because of the delay in filing the Plan, Debtor was obligated to file a motion to confirm, supporting evidence, and setting the matter for hearing. L.B.R. 3015-1(c), (d). The proposed Chapter 13 Plan filed by Debtor requires a $95.00 a month plan payment by Debtor for sixty (60) months. Dckt. 24. No Class 1 or 2 secured claims are to be paid. There is no surrender of collateral for any Class 3 creditors with secured claims. Debtor will make no payments outside the Plan for any Class 4 secured claims. No Class 5 priority unsecured claims are to be paid. No Class 7 general unsecured claims are to be paid. For Class 6 special treatment unsecured claims (such as co-signed debt for which special treatment is permissible under the Bankruptcy Code), Debtor lists two creditors with claims totaling $5,400.00. The reason stated for special treatment is "promised to pay."

When the Debtor failed to file a motion to confirm a month later on February 1, 2016, the Chapter 13 Trustee filed a motion to dismiss the case. Dckt. 26. It was not until April 8, 2016, (three months after the Plan was filed) that Debtor filed a motion to confirm the Plan. Dckt. 38. In denying the Motion to Confirm, the court's conclusions included the Debtor changing her expenses without explanation, with some being inconsistent or implausible. Civil Minutes, Dckt. 64.

On June 28, 2016, a hearing on the Motion for Relief from Automatic Stay was held, and the Motion was granted. Dckt. 70. On July 15, 2016, Debtor filed this instant Motion to Vacate claiming that Asserted Creditor lacked prudential standing and that Debtor was denied Due Process. The Debtor seeks to have the order dismissing the case vacated, per Federal Rule of Bankruptcy Procedure 9024.

On July 29, 2016, Debtor filed a First Amended Chapter 13 Plan (Dckt. 85) that still provides for a $95.00 per month plan payment for sixty (60) months. There continues to be no provision for paying any secured claims, there are no priority claims, and for the Class 7 general unsecured claims, Debtor proposes a 13% dividend for $37,240.00 in general unsecured claims. The claim amount has increased due to the California Franchise Tax Board filing Proof of Claim No. 1 for a general unsecured claim in the amount of $31,840.23.

The hearing on the Debtor's motion to confirm the Plan is set for September 13, 2016.

GROUNDS FOR RELIEF FROM PRIOR ORDER

In her current Motion, Debtor asserts that an error was made in granting the relief because the court "relied upon erroneous information provided by [Asserted Creditor], [the court] did not have jurisdiction and violated Debtor's due process rights by not allowing any oral argument which the tentative ruling stated she could do." Motion, Dckt. 75. Debtor adamantly asserts that she had oral argument to present that would have prevented the court from making the mistake of relying on the "erroneous information" provided by Asserted Creditor.

At the core of her argument is that Asserted Creditor lacks both constitutional standing and prudential standing to seek relief from the automatic stay. She cites back to a prior decision of another bankruptcy judge in this District on the issue of standing. That judge's rulings are consistent with this court on the constitutional standing requirement being a fundamental pre-requisite for the exercise of federal judicial power and the court-constructed prudential standing inquiry to insure that it is the real parties in interest appearing before the court and not a non-party proxy or officious intermeddler. The court addresses these legal principles later in this Ruling.

Debtor drives home the point that in the court's tentative ruling it stated, "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." This is the court's standard language, indicating there being a permissive allowance of oral argument, as opposed to the court removing the matter from calendar.

Oral argument is not required, and one of the hallmarks of federal court bankruptcy practice in this District is that the parties (as did the Debtor) are required to clearly state the grounds for relief or opposition, legal points and authorities, and evidence to support their respective positions. It is not like in some court where even on the law and motion calendars surprise arguments and evidence is presented to "blow the case wide open." Oral argument is the icing on the cake, not the substantial cake itself.

The judge who heard the calendar that day and determined that oral argument was not necessary is not the current judge (the judge who posted the tentative ruling). Given the history of bankruptcy filings by this Debtor and her brother, and the detailed pleadings filed in opposition by Debtor, it is not unusual that the judge perceived oral argument as not being necessary or beneficial. To the extent that Debtor believes that oral argument may we lead to a different conclusion, she will have such opportunity through the present Motion.

The meat of Debtor's contention (as it has been through the various bankruptcy cases filed) is

that Asserted Creditor has not presented competent evidence that it is in possession of the promissory note endorsed in blank that it asserts is secured by the 802 Ohio Street, Vallejo, California, property. (The same property listed by her brother in which he asserts a "co-owner/beneficial" interest.)

The Debtor correctly points out that an employee of Wells Fargo Bank, N.A., the loan servicer for Asserted Creditor, purports to provide personal knowledge testimony (Fed. R. Evid. 601, 602) that Asserted Creditor is in possession of the note endorsed in blank. While an employee of Wells Fargo Bank, N.A., Debtor argues that there is nothing to show that the Wells Fargo Bank, N.A. employee has any personal knowledge of who is in possession or that she has the requisite knowledge to quote from the "books and records" of Asserted Creditor.

Debtor concludes that there was no admissible evidence that Asserted Creditor was in possession of the note, and therefore there is no admissible evidence that Asserted Creditor or its loan servicer, Wells Fargo Bank, N.A., had constitutional or prudential standing to seek relief from the automatic stay.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response on August 16, 2016. Dckt. 91. The Trustee notes that Debtor brings the instant Motion under Federal Rule of Bankruptcy Procedure 9024, which incorporates Federal Rule of Civil Procedure 60. The Trustee cannot determine under what specific section of Federal Rule of Civil Procedure 60 Debtor seeks relief.

ASSERTED CREDITOR'S OPPOSITION

Asserted Creditor filed an Opposition to Motion on August 16, 2016. Dckt. 93. Asserted Creditor contends that Debtor's actions are in bad faith as part of a scheme to delay, hinder, and defraud U.S. Bank National Association, as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates Series 2006-AR4. Asserted Creditor further contends that Debtor's bad faith actions include: (1) the unauthorized transfer of real property commonly known as 802 Ohio Street, Vallejo, California; (2) ten (10) successive bankruptcy filings by Debtor and her brother; and (3) default under the Note and Deed of Trust.

What Asserted Creditor's Opposition does not address is how it demonstrated, by admissible evidence that it had standing, constitutional or prudential, to assert the alleged rights for which relief from stay was requested. While the relief from stay process is a summary proceeding and the court does not adjudicate the underlying rights, the parties must still meet the basic constitutional requirements for the issues presented to the court.

APPLICABLE LAW

Federal Rule of Civil Procedure 60(b)

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

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199 (5th Cir. La. 1993). The court uses equitable principals when applying Rule 60(b). *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §2857 (3rd ed. 1998). The so-called catch-all provision, Fed. R. Civ. P. 60(b)(6), is "a grand reservoir of equitable power to do justice in a particular case." *Compton v. Alton S.S. Co.*, 608 F.2d 96, 106 (4th Cir. 1979) (citations omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847, 863 (1988), relief under Rule 60(b)(6) may be granted in extraordinary circumstances, *id.* at 863 n.11.

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

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

Standing

To exercise jurisdiction over a party, a federal court must meet both constitutional and prudential standing requirements. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004). "The concept of standing involves more than constitutional standing. It involves two inquiries." *In re Jackson*, 451 B.R. 24, 27–28 (Bankr. E.D. Cal. 2011) (citing *Franchise Tax Bd. v. Alcan Aluminum*, 493 U.S. 331, 335 (1990) ("We have treated standing as consisting of two related components: the constitutional requirements of Article III and nonconstitutional prudential considerations."); *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). Standing is a threshold question in every federal case that determines the power of the court to hear the suit. *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011).

Constitutional Standing

Constitutional standing requires an injury fairly traceable to the defendant's allegedly unlawful conduct that is likely to be redressed by the requested relief. *In re Jacobson*, 402 B.R. 359, 366 (Bankr. W.D. Wash. 2009). Constitutional standing is based on the case or controversy requirement in Article III, § 2 of the United States Constitution and cannot be waived. It is "a threshold jurisdictional requirement." *Perishing Park Villas Homeowners Ass'n v. United Pac. Ins. Co.*, 219 F.3d 895, 899–900 (9th Cir. 2000). An assignee of a claim must hold legal title to the claim being asserted. *Sprint Comm'ns Co. v. APCC Services, Inc.*, 554 U.S. 269 (2008). Assignees, including assignees for collection, have traditionally satisfied Article III standing requirement. *Id.* at 286–87. A party seeking stay relief need only establish that it has a colorable claim to enforce a right against property of the estate to demonstrate standing to seek relief from the automatic stay. *United States v. Gould (In re Gould)*, 401 B.R. 415, 425 n. 14 (B.A.P. 9th Cir. 2009).

Prudential Standing

Prudential standing is a judicially self-imposed limit on the exercise of federal jurisdiction. *Elk Grove*, 542 U.S. 1, 11. A key component of prudential standing applicable to this case is the doctrine that requires a plaintiff to assert legal rights and prohibits the plaintiff from asserting the legal rights of others. *Sprint*, 554 U.S. 269, 289.

"Generally, a party without legal rights to enforce an obligation under applicable substantive law lacks prudential standing." *In re Jackson*, 451 B.R. at 28 (citing *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1044 (9th Cir. 2008). "Under the Bankruptcy Code, a party seeking relief from stay must establish entitlement to that relief[,] . . . [f]oreclosure agents and servicers do not automatically have standing." *Id.* at 27 (citing *In re Jacobson*, 402 B.R. 359, 367 (Bankr. W.D. Wash. 2009). "Where a negotiable instrument represents the obligation to be enforced . . . the issue whether the movant has a legal right to enforce the obligation, and, thus, whether the movant has prudential standing, is determined by the Commercial Code." *Id*. "If a party has suffered sufficient injury to satisfy the jurisdictional standing requirement of Article III, but the party cannot satisfy the applicable prudential standing requirement(s), the party cannot state a claim upon which relief can be granted." *Id.* at 28 (citing *Guerrero v. Gates*, 357 F.3d 911, 920–21 (9th Cir. 2004).

In California, a party is able to foreclose based solely on its status as an assignee of a lender's rights under a deed of trust, without regard to who holds the borrower's promissory note. Cal. Civ. Code § 2924. The holder of the beneficial interest under the deed of trust, the original trustee or the substituted trustee under the deed of trust, or the designated agent of the holder of a beneficial interest may initiate the foreclosure process or file a notice of default. Cal. Civ. Code §2924(a)(6).

Whether a party has standing to enforce an obligation and thus, has prudential standing, where a negotiable instrument represents the obligation to be enforced, is determined by the Commercial Code. *In re Jackson*, 451 B.R. 24 (Bankr. E.D. Cal. 2011). An ownership right in an instrument may not always lead to an entitlement to enforce the instrument. U.C.C. § 3-203 Comment 1 (AM. LAW COMM. & UNIF COMM'L COMM. 2016). U.C.C. § 3-301 describes who is entitled to enforce an instrument as follows:

> "Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a

> person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 3-309 or 3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument."

The concept of a "holder" is defined in U.C.C. § 1-201(b)(21)(A) as "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." This requires an examination of both the note and any indorsements. *In re Veal* 450 B.R. 897 (B.A.P. 9th Cir. 2011).

Relief from Stay Proceeding

In adjudicating a motion for relief from the automatic stay, it is a "summary proceeding." This summary nature of a relief from stay proceeding was stated by the Bankruptcy Appellate Panel in *Hamilton v. Hernandez*, No. CC-04-1434-MaTK, 2005 Bankr. LEXIS 3427 (B.A.P. 9th Cir. Aug. 1, 2005), relief from stay proceedings are summary proceedings which address issues arising only under 11 U.S.C. § 362(d). Hamilton, 2005 Bankr. LEXIS 3427 at *8–*9 (citing *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740 (9th Cir. 1985)). The court does not determine underlying issues of ownership, contractual rights of parties, or issue declaratory relief.

The court does not, and cannot, adjudicate the rights and interests of the debtor and the moving party as part of a motion for relief from the automatic stay. Rather, as in the present situation, often times relief from the stay is sought by a creditor or property owner to assert rights it purports to have, and then for the debtor to then defend and assert counter rights the debtor has against the creditor.

In this context, the issue for the court in determining standing is whether the party seeking relief has shown that it is asserting rights that the debtor contends to be blocked by the automatic stay, and if so, then do proper grounds exist for granting such relief. The court does not "suffer lightly" officious intermeddlers who are seeking to assert or enforce rights of some undisclosed or hidden third-party.

One method the court has to blunt such officious intermeddlers or proxies who are attempting to hide the identity of the real party in interest is that the order for relief is limited to the moving party and its agents and representatives, and successors. Order, Dckt. 73. The order does not grant such relief to the movant's principal or other parties.

Evidence

A moving party is required by some courts to provide admissible evidence tracing the identity of the various holders and services of the deed of trust in question and of the note evidencing the underlying obligation. The business records exception to the rule against hearsay requires that the records: (1) be made at or near the time, by or from information transmitted by, a person with knowledge; (2) pursuant to a regular practice of the business activity; (3) kept in the course of regularly conducted business activity; and (4) the source, method, or circumstances of preparation must not indicate lack of trustworthiness. Fed. R. Evid. 803(6). The elements of the exception must be established by the testimony of a qualified witness, and the documents must be authenticated. Rule 803(6) explicitly requires the proponent of a document to produce a custodian of record or other qualified witness to testify that the offered document was kept in the

course of regularly conducted business and that it was the regular practice of the business to make such a document. *Tongil Co. v. Vessel "Hyundai Innovator,"* 968 F.2d 999, 1000 (9th Cir. 1992).

At the center of this dispute is the testimony under penalty of perjury provided by Tifanee Brown in her declaration in support of the motion for relief from the automatic stay. Dckt. 46. This testimony includes in pertinent part the following:

A. "I am a Vice President Loan Documentation of Wells Fargo Bank, N.A. ("Wells Fargo") . . . ." Declaration ("Dec.") ¶ 1.

B. Wells Fargo Bank, N.A. is the servicing agent for U.S. Bank, N.A., as trustee. *Id.*

C. "As part of my job responsibilities for Wells Fargo, I have personal knowledge of and am familiar with the types of records maintained by Wells Fargo in connection with the account that is the subject of the Motion . . . ." Dec. ¶ 2.

D. "I have access to and have reviewed the books, records and files of Wells Fargo that pertain to the Account and extensions of credit given to the borrower concerning the property securing such Account." *Id.*

E. "The information in this declaration is taken from Wells Fargo's business records regarding the Account." Dec. ¶ 3.

F. "4. Wells Fargo's records also reflect that Movant is in possession of the original Note. The Note is indorsed and payable in blank. See Exhibit 1." Dec. ¶ 4.

Dckt. 46.

The universe of this dispute centers on one sentence: "Wells Fargo's records also reflect that Movant is in possession of the original Note. The Note is indorsed and payable in blank." There is no declaration from an employee or officer of Asserted Creditor stating that based on that employee's knowledge of the books and records of Asserted Creditor "the promissory note indorsed in blank is in the possession of U.S. Bank, N.A., and is located . . . ." Rather, the testimony is that Ms. Brown has read in the Wells Fargo Bank, N.A. files that somehow, somebody who prepares the books and records of Wells Fargo Bank, N.A. knows what is in the books and records of Asserted Creditor. No information is provided why there is not an employee or officer of Asserted Creditor who is testifying as to this information about Asserted Creditor being in possession of a promissory note endorsed in blank.

While this is some testimony as to the underlying obligation, the question is whether it is sufficient for the limited issues of a relief from stay hearing.

DISCUSSION

As an initial policy matter, the finality of judgments is an important legal and social interest. The standard for determining whether a 60(b)(1) motion is filed within a reasonable time is a case-by-case analysis. The analysis considers "the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties." *Gravatt v. Paul Revere*

Life Ins. Co., 101 Fed. Appx. 194, 196–97 (9th Cir. 2004); *Sallie Mae Servicing, LP v. Williams (In re Williams)*, 287 B.R. 787, 792 (B.A.P. 9th Cir. 2002).

As to Debtor's argument that Due Process rights were violated, the court notes that a hearing on the Motion for Relief from Automatic Stay was held on June 28, 2016, and the parties were afforded an opportunity to address the court. Debtor references 11 U.S.C. § 362(d)(1) & (2) for the proposition "on request of a party in interest and after notice and hearing." Debtor has not established a factual basis from that language that she was denied a hearing. In fact, as mentioned, a hearing was held on June 28, 2016. Additionally, Debtor references this court's tentative ruling language that reads: "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." The court stresses that "Oral argument *may* be presented," but the parties are not required to present any arguments. Debtor does not cite to any supporting evidence that such a hearing without oral argument violates Due Process, and consequently, Debtor has failed to establish a legal basis for her argument.

Debtor has failed to establish any factual or legal basis upon which the court could find a violation of Due Process by the court not allowing oral argument at the prior hearing. Further, whatever shortcomings Debtor perceived in connection with the prior hearing on that point, Debtor has been afforded the opportunity to address this issue of standing in connection with the present Motion.

Standing and Application of Rule 60(b)

As with many of these "yes I can, no you can't" disputes is that one or both of the parties have tried to short-cut the process. It is curious that Asserted Creditor, knowing of this continuing contention by Debtor and her brother through multiple bankruptcy cases that they do not recognize Asserted Creditor as a person who has rights in the 802 Ohio Street Property, did not file an iron clad motion with solid testimony by an employee of the Asserted Creditor. Rather than providing clear testimony of its employee, Asserted Creditor relies on an employee of a third-party loan servicer to provide testimony about the business practices and conduct of Asserted Creditor. FN.1.

FN.1. A cynical person might think that Asserted Creditor is unaware of these proceedings and the loan servicer, unsure of who is the actual creditor, is filing documents to create the colorable appearance of there being a party in interest who is seeking relief from the stay.

However, Debtor herself might well provide Asserted Creditor with standing to seek relief from the automatic stay. Debtor contends that the automatic stay applies to Asserted Creditor. Debtor seeks to enforce the automatic stay against the Asserted Creditor. Then, when the Asserted Creditor comes forward to seek relief from the automatic stay, Debtor argues that Asserted Creditor cannot appear in this court until it "proves" that it is actually a creditor with rights to enforce against the 802 Ohio Street Property. But that cannot be proven in a motion for relief from the stay.

Debtor, while disputing that Asserted Creditor has any rights, does not report to the court her diligent conduct to adjudicate her (and her brother's) asserted rights and interests in the 802 Ohio Street Property. Instead, as demonstrated by the Chapter 13 Plans proposed in this case and her conduct in her

prior six Chapter 13 bankruptcy cases and her brother's three bankruptcy cases, she views the automatic stay as the right to an injunction without her attempting to adjudicate her rights and interests.

This court has addressed extensively with Debtor (who has constructively communicated with the court during hearings) that she must proceed with a Chapter 13 Plan and enforce her rights if she wants to use the automatic stay in lieu of an injunction in district court or state superior court. This court has addressed using the automatic stay in lieu of an injunction in a number of cases, including, *In re De la Salle*, Bankr. E.D. Cal. 10-29678, Civil Minutes for Motion to Dismiss or Convert (DCN: MBB-1), Dckt. 230 (Bankr. E.D. Cal. 2011), affirm., *De la Salle v. U.S. Bank, N.A. (In re De la Salle)*, 461 B.R. 593 (B.A.P. 9th Cir. 2011).

If the court were to vacate the prior order, it appears that Debtor fails to address one of the key requirements for relief under Federal Rule of Civil Procedure 60(b): that the requesting party has a meritorious claim or defense. In this context, the meritorious claim or defense would be that Debtor is prosecuting a colorable, confirmable plan. Here, Debtor's Plan is to ignore the rights and interests of Asserted Creditor and spend the next five years making $95.00 a month payments to achieve a 13% dividend for creditors holding general unsecured claims. Essentially, Debtor "buys" a five year injunction for $95.00 a month, no bond or surety as otherwise required under applicable state or federal rules. *See* Fed. R. Civ. P. 65(c); Fed. R. Bankr. P. 7065.

As the court has discussed previously, the financial information provided by Debtor does not indicate that financially there is the colorable possibility of a confirmable plan in this bankruptcy case. For income, Debtor states that she is unemployed. Schedule I, Dckt. 22. For income, she will receive a $100.00 a month loan and a $450.00 a month "gift from her brother." *Id.* On Schedule I, Debtor states that she turns sixty-two (62) in December and will be applying for Social Security.

For expenses on Amended Schedule J, Debtor states that she has only $335.00 of expenses monthly. Dckt. 34. These consist of: (1) $0.00 for rent or mortgage; (2) $0.00 for property taxes; (3) $0.00 for property insurance; (4) $0.00 for home maintenance; (5) $29.00 for food and housekeeping supplies; (6) $5.00 for clothing; (7) $16.00 for transportation; and (8) $0.00 for medical and dental expenses. These expenses do not paint a colorable portrait of a debtor who can navigate and confirm a plan in a Chapter 13 case.

On her statement of Financial Affairs, Debtor listed as pending or recent litigation the case, *Akzam v. Sand Canyon* from the Solono County Superior Court, which is stated to be on appeal. No information is provided about any federal or state action to quiet title and address Debtor's dispute with Asserted Creditor in connection with the 802 Ohio Street Property.

At the hearing, Debtor provided additional argument and addressed issues, including whether her contention that the automatic stay applied to Asserted Creditor was sufficient for Asserted Creditor to seek relief from the stay so that it could enforce, and Debtor could then defend against, the rights in the 802 Ohio Street Property. **Xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.**

Further, at the hearing, Asserted Creditor addressed various issues, including why it did not, or cannot, produce an employee of Asserted Creditor to provide testimony as to who is in possession of the promissory note endorsed in blank. **Xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.**

Therefore, in light of the foregoing, the Motion is [granted/denied] [and the order dismissing the case (Dckt. Xx) is vacated].

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

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

The Motion to Vacate Order for Relief from Automatic Stay 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/denied] [and the order dismissing the case (Dckt. Xx) is vacated].

15. 16-24056-E-13 KEYCHA GALLON
CAH-1 Gabriel Libermann

MOTION TO VALUE COLLATERAL OF CAPITAL ONE AUTO FINANCE
8-2-16 [13]

Final Ruling: No appearance at the August 30, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on August 2, 2016. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion to Value secured claim of Capital One Auto Finance ("Creditor") is granted, and the secured claim is determined to have a value of $12,925.00.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response on August 16, 2016. Dckt. 21. Trustee states that Debtor's Motion contains a typographical error in its prayer. Debtor's Motion asserts that the 2013 Dodge Charger asset has a value of $12,925.00, but the prayer requests the court to value Capital One Auto Finance's ("Creditor") secured claim as $27,049.00.

DEBTOR'S SUPPLEMENTAL MOTION

Debtor's Attorney filed a supplemental motion on August 16, 2016. Dckt. 24. Debtor's Attorney admits that he typed the Creditor's lien amount inadvertently and that he meant to type Debtor's opinion of value. Debtor's Attorney states that the prayer should have read:

> WHEREFORE, the Debtor requests the Court to determine the value of the secured claim held by Capital One Auto Loan in the ASSET to be allowed at $12,925.00.

DISCUSSION

The Motion filed by Keycha Gallon ("Debtor") to value the secured claim of Creditor is accompanied by Debtor's declaration. Debtor is the owner of a 2013 Dodge Charger ("Vehicle"). The Debtor seeks to value the Vehicle at a replacement value of $12,925.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The lien on the Vehicle's title secures a purchase-money loan incurred on April 30, 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 $27,049.00. Therefore, the Creditor's claim secured by a lien on the asset's title is under-collateralized. The Creditor's secured claim is determined to be in the amount of $12,925.00. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Keycha Gallon ("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 [name of creditor] ("Creditor") secured by an asset described as 2013 Dodge Charger ("Vehicle") is determined to be a secured claim in the amount of $12,925.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is $12,925.00 and is encumbered by liens securing claims that exceed the value of the asset.

16. 16-24056-E-13 KEYCHA GALLON
DPC-1 Gabriel Libermann

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
8-4-16 [17]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on August 4, 2016. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

1. The Debtor cannot afford to make the payments or comply with the plan.

   a. Debtor's Plan relies on the Motion to Value Collateral of Capital One Auto Finance, which is set for hearing on August 30, 2016. If the Motion is not granted, Debtor's plan does not have sufficient monies to pay the claim in full.

   b. The Debtor admitted at the First Meeting of Creditors the following changes to her income:

i. She will no longer be earning the IHSS income listed on Schedule I, in the amount of $716.59.

ii. She will no longer be driving for Uber. This income is listed on Schedule I as ($3.17). Form 122C-2 lists Debtor's average net income as a Lyft driver in the amount of $760.83.

iii. The Debtor admitted the support income in the amount of $829.00 per month will cease in approximately two years when the minor child turns 18 years of age.

The Trustee's objections are well-taken.

The Trustee objects on the basis that the Debtor cannot afford to make the payments or comply with the Plan if the Motion to Value Collateral of Capital One Auto Finance, which is set for hearing on August 30, 2016, is denied.

However, though aware that the financial information provided was not accurate, Debtor attempted to proceed with the current plan without amending or supplementing the income and expense information, necessitating the Chapter 13 Trustee filing this Objection.

On August 25, 2016, two working days before this hearing, and only after the Trustee objected to confirmation, Debtor filed an "additional" Schedule I and J. Dckt. 26. Debtor does not state whether these are "amended" or "supplemental" Schedules I and J.

The Trustee's Objection raises the specter that when filed, the financial information on the Original Schedules I and J was not accurate. This appears to be a complex case, with Debtor stating that she has dependents consisting of one minor child and three minor nieces and nephews.

The Objection is sustained and confirmation of the current Chapter 13 Plan is denied, without prejudice. The Debtor can present a well thought out plan, supported by credible evidence, and avail herself of the extraordinary relief available under the Bankruptcy Code. FN.1.

FN.1. One of the more curious items on the Schedules J is that Debtor, who is supporting her own minor child and three minor nieces and nephews, states under penalty of perjury that she has and is spending $500.00 a month for charitable contributions. One might think that taking responsibility for three minor nieces and nephews would be a major "charitable" endeavor.

The phrase "charity begins at home" may be appropriate under these circumstances. While not directly quoted from the Bible, many cite its origin to Sir Thomas Browne (1642), "But how shall we expect charity towards others, when we are uncharitable to ourselves? 'Charity begins at home,' is the voice of the world." In 1 Timothy 5:4, Kings James Bible, we find " But if any widow have children or nephews, let them learn first to shew piety at home, and to requite their parents: for that is good and acceptable before God." The basic tenant is that before looking to help others, help those at home.

For any plan advanced by Debtor, she can document the historical charitable giving in the years prior to bankruptcy and how a purported $500.00 a month charity expense is consistent with a reasonable budget. A more cynical judge might infer that the $500.00 amount is merely a stock expense item to create a "slush fund" for the Debtor.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to confirmation the Plan is sustained and confirmation of the Chapter 13 Plan is denied without prejudice.

17.	**15-28165-E-13 TOG-6**	**LEON VICENTE AND ANGELA XILOJ Thomas Gillis**	**CONTINUED MOTION TO VALUE COLLATERAL OF DITECH FINANCIAL, LLC 6-8-16 [62]**

Final Ruling: No appearance at the August 30, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on June 8, 2016. By the court's calculation, 83 days' notice was provided. 28 days' notice is required.

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

The Motion to Value secured claim of Ditech Financial LLC ("Creditor") is granted, and the secured claim is determined to have a value of $0.00.

The Motion to Value filed by Leon Vicente and Angela Xiloj ("Debtors") to value the secured claim of Ditech Financial LLC ("Creditor") is accompanied by Debtors' declaration. Debtors are the owners of the subject real property commonly known as 6828 Blue Duck Way, Sacramento, California ("Property"). Debtors seek to value the Property at a fair market value of $134,581.00 as of the petition filing date. As the owners, Debtors' opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The valuation of property 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. It appears that Proof of Claim No. 8 filed by Ditech Financial LLC f/k/a Green Tree Servicing LLC is the claim that may be the subject of the present Motion.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response on July 12, 2016, in which he states that the Trustee has no basis to oppose the instant Motion. Dckt. 88.

CREDITOR'S OPPOSITION

Creditor has filed an opposition. Creditor disputes the Debtors' valuation of the subject property of $134,581.00 and argues that the value of the subject property is greater than $177,200.00, the balance of the first lienholder's loan. Creditor is currently in the process of obtaining its own appraisal to determine the value of the subject property.

DEBTORS' RESPONSE

Debtors filed a response on July 19, 2016, in which they assert that Creditor filed its objection late and that the court should not consider the objection because of that reason. Dckt. 93.

STIPULATION BY THE PARTIES

On July 22, 2016, Debtors and Creditor agreed to a stipulation to treat Creditor's junior lien as wholly unsecured. Dckt. 95.

JULY 26, 2016 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on August 30, 2016, to allow Creditor time to perform an appraisal of the Property. Dckt. 96.

DISCUSSION

The senior in priority first deed of trust held by Chase Mortgage secures a claim with a balance of approximately $177,200.00. Creditor's second deed of trust secures a claim with a balance of

approximately $53,300.00. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer),* 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam),* 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted. FN.1.

FN.1. Though the court grants the Motion, it is considering whether ordering Ditech Financial, LLC, fka Greet Tree Servicing, LLC to appear and provide evidence that it is actually the creditor, as that term is defined in 11 U.S.C. § 101(10), and not merely the loan servicer for the actual creditor. Previously, Green Tree Servicing, LLC represented to the court that it provides services as a "loan servicer" for the actual creditor.

Debtor and Debtor's counsel can live with the risk of whether the court's order values the claim of the creditor, or that the actual creditor has not been made a party to this Contested Matter and there has not been a valuation of the claim.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Leon F. Vicente and Angela Xiloj ("Debtors") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Ditech Financial LLC secured by a second in priority deed of trust recorded against the real property commonly known as 6828 Blue Duck Way, Sacramento, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $134,581.00 and is encumbered by a senior liens securing claims in the amount of $177,200.00, which exceeds the value of the Property that is subject to Creditor's lien.

18. **15-28165-E-13 TOG-7** | **LEON VICENTE AND ANGELA XILOJ** | **CONTINUED MOTION TO CONFIRM PLAN**
Thomas Gillis | **6-8-16 [67]**

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, and Office of the United States Trustee on June 8, 2016. By the court's calculation, 83 days' notice was provided. 42 days' notice is required.

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

The Motion to Confirm the Amended Plan is granted.

Leon Vicente and Angela Xiloj ("Debtors") filed the instant Motion to Confirm the Amended Plan on June 8, 2016. Dckt. 67.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on June 10, 2016. Dckt. 75. The Trustee opposes confirmation on the ground that the proposed plan relies on a Motion to Value Collateral of Ditech Financial LLC.

DEBTOR'S RESPONSE

The Debtors filed a response on July 12, 2016. Dckt. 90. The Debtors concur that the proposed plan relies on the Motion to Value.

JULY 26, 2016 HEARING

At the hearing, the court continued the Motion to Confirm the Amended Plan due to its interconnectedness with a Motion to Value Collateral of Ditech Financial, LLC (Dckt. 62). Dckt. 98.

DISCUSSION

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

On June 8, 2016, the Debtors filed a Motion to Value Collateral of Ditech Financial, LLC. Dckt. 62. The Motion was continued to 3:00 p.m. on August 30, 2016.

Having granted the Motion to Value Collateral of Ditech Financial, LLC, the Trustee's opposition to confirmation of the Amended Plan is moot. The Amended Plan complies with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Confirm the Plan is granted, and Debtors' proposed Chapter 13 Plan filed on June 8, 2016, is confirmed. Counsel for the Debtors 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 shall submit the proposed order to the court.

19. 16-23865-E-13 DEBRA KENNEDY
DPC-1 Mikalah Liviakis

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
7-19-16 [15]

Final Ruling: No appearance at the August 30, 2016 Hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on July 19, 2016. By the court's calculation, 42 days' notice was provided. 14 days' notice is required.

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

The court's decision is to dismiss the Objection.

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

a. The Debtor's plan may not be the Debtor's best effort. Debtor's Statement of Current Monthly Income indicates that the Debtor is under median income. The Debtor's plan proposes payments of $347.00 for 36 months. Debtor's Schedule I lists gross wages of $5,490.00 per month, and lists net income from IHSS of $500.00 per month. The total of these two amounts is $5,990 monthly.

   i. The Statement of Current Monthly Income fails to list the IHSS income, and therefore the Debtor's income is understated.

b. The Debtor's plan does not pay creditors with a general unsecured claim what they would receive in the event of a Chapter 7. If the Trustee is successful in the Objection to Exemptions, the Debtor will have claimed as exemption $114,553.00 in property where the exemptions may be disallowed. The plan proposes only $5,366.27 in payments to creditors with a general unsecured claim.

AUGUST 16, 2016 HEARING

At the hearing, the court continued the instant Motion to 3:00 p.m. on August 30, 2016, to provide time for Trustee to review Debtor's declaration that was filed on August 16, 2016. Dckt. 30.

The court noted the following:

The Trustee's objections are well-taken.

While the Debtor has filed an amended Schedule C, claiming exemptions under California Code of Civil Procedure § 704, the Trustee's objection over best efforts is valid. As the Trustee states, the Debtor appears to have under-calculated the Debtor's income, making her actually required to propose a sixty (60) month plan. This, coupled with the fact that, with the change in exemptions, that there is an additional $1,500.00 in non-exempt equity, the Debtor needs to correctly list all income to determine the length of the plan and to determine if additional monies are due to creditors with a general unsecured claim. The plan does not appear to be the Debtor's best effort. 11 U.S.C. § 1325(b).

Due to the waiver/non-waiver change of strategy, amended Schedule C waiver, and waiver of non-waiver of conflicting exemptions in the separate bankruptcy case of Debtor Debra Kennedy's spouse, going back to the drawing board on constructing a plan, documenting income and expenses, the Trustee and parties in interest being given a reasonable time to review the exemptions actually being claimed and exemptions which now are not being waived in the David Kennedy bankruptcy case is warranted. Continuance of this hearing is not warranted.

TRUSTEE'S SUPPLEMENTAL EX PARTE MOTION TO WITHDRAW

On August 18, 2016, Trustee submitted a Supplemental Ex Parte Motion to Dismiss Trustee's Objection to Confirmation of Plan, pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041. Dckt. 31. Trustee asserts that Debtor's declaration of August 16, 2016, (Dckt. 27) resolves Trustee's Objection to Confirmation of Plan. Also, Trustee notes that Debtor filed an Amended Schedule C (Dckt. 22). Accordingly, Trustee requests that the court dismiss Trustee's Objection to Confirmation of Plan.

DISCUSSION

The Chapter 13 Trustee filed an Ex Parte Motion to Dismiss this Objection to Confirmation on August 18, 2016, Dckt. 31. Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041. No prejudice to the Debtor appears to arise by the dismissal of the Objection, which dismissal is consistent the position advanced by Debtor. The *Ex Parte* Motion is granted, the Trustee's Objection to Confirmation is dismissed without prejudice.

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

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

The Objection to Confirmation filed by Trustee having been presented to the court, the Trustee having requested that the Motion itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure

7041 and 9014, Dckt. 31, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Trustee's Objection to Confirmation is dismissed without prejudice. Counsel for the Debtor shall prepare and forward to the Chapter 13 Trustee a proposed order confirming the Plan, which upon approval by the Trustee shall be lodged with the court.

20. 16-23768-E-13 DPC-1 | **DAVID KENNEDY** **Mikalah Liviakis** | **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **7-19-16 [14]**

Final Ruling: No appearance at the August 30, 2016 Hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on July 19, 2016. By the court's calculation, 42 days' notice was provided. 14 days' notice is required.

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

The court's decision is to dismiss the Objection.

AUGUST 16, 2016 HEARING

At the hearing, the court continued the motion to 3:00 p.m. on August 30, 2016. Dckt. 26. The court noted the following:

David Cusick, the Chapter 13 Trustee, filed the instant Objection to Confirmation on July 19, 2016. Dckt. 14.

The Trustee opposes confirmation of the Plan on the basis that the plan fails the Chapter 7 liquidation analysis under 11 U.S.C. § 1325(a)(4). The Debtor had claimed exemptions totaling $86,663.50 under C.C.P. §§ 704.730, 704.010, 704.020, 703.070, and 704.060 on Debtor's Schedule C, filed June 10, 2016. Dckt. 1. The Debtor has since filed a waiver, which waives the right to claim exemptions other than those under C.C.P. § 703.140(b).

The Trustee argues that where the Debtor originally claimed as exempt $86,663.50 in property and the plan appears to allow for only 19% on $90,421.00 of unsecured claims, it pays only $17,181.89 to creditors with a general unsecured claim.

Here, Debtor David Kennedy and his spouse, Debtor Debra Kennedy in her separate bankruptcy case filed incompatible claims of exemptions. Then, in this case, David Kennedy waived his non-California Code of Civil Procedure § 703.140(b) objections – effectively claiming no exemptions in this case. When the Trustee raised the issue as to the waiver, the conflicting exemptions, and the apparently substantial non-exempt equity, Debtor David Kennedy sought to rescind and un-waive his waiver of his exemptions. Then Debtor Debra Kennedy sought to rescind and un-waive her waiver of non-C.C.P. § 703.140(b) exemptions, file an amended Schedule, and jump-shift exemption schemes. The court has determined that the period to object to the current, rescinded waiver, un-waived, resurrected exemptions claimed by Debtor runs from the entry of the order on the Trustee's objection in this case (August 16, 2016 hearing).

Due to the waiver/non-waiver change of strategy, amended Schedule C waiver, and waiver of non-waiver of conflicting exemptions in the separate bankruptcy case of Debtor Debra Kennedy's spouse, going back to the drawing board on constructing a plan, documenting income and expenses, the Trustee and parties in interest being given a reasonable time to review the exemptions actually being claimed and exemptions which now are not being waived in the David Kennedy bankruptcy case is warranted. Continuance of this hearing is not warranted.

TRUSTEE'S SUPPLEMENTAL EX PARTE MOTION TO WITHDRAW

On August 18, 2016, Trustee submitted a Supplemental Ex Parte Motion to Dismiss Trustee's Objection to Confirmation of Plan, pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041. Dckt. 27. Trustee asserts that the court's ruling on the Trustee's Objection to Exemptions (Dckt. 24) resolves the matter. Additionally, the Trustee asserts that his concern about liquidation has been addressed satisfactorily because Debtor claimed costs of sale on real property, and the Plan now passes the liquidation analysis. Accordingly, Trustee requests that the court dismiss Trustee's Objection to Confirmation of Plan.

DISCUSSION

The Chapter 13 Trustee filed an *Ex Parte* Motion to Dismiss this Objection to Confirmation on August 18, 2016, Dckt. 27. Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041. No prejudice to the Debtor appears to arise by the dismissal of the Objection, which dismissal is consistent the position advanced by Debtor. The *Ex Parte* Motion is granted, the Trustee's Objection to Confirmation is dismissed without prejudice.

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

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

hearing.

The Objection to Confirmation filed by Trustee having been presented to the court, the Trustee having requested that the Motion itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 7041 and 9014, Dckt. 27, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Trustee's Objection to Confirmation is dismissed without prejudice. Counsel for the Debtor shall prepare and forward to the Chapter 13 Trustee a proposed order confirming the Plan, which upon approval by the Trustee shall be lodged with the court.

21. 16-23984-E-13 DPC-1 | **ANGELICA CASTILLON HERNANDEZ** **Robet Gimblin** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **8-4-16 [14]**

Final Ruling: No appearance at the August 30, 2016 Hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on August 4, 2016. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to continue the hearing on the Objection to Confirmation of Plan to 3:00 p.m. on September 13, 2016.

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that Angelica Hernandez ("Debtor") cannot afford to make the payments or comply with the Plan. The Debtor's Plan relies on a Motion to Value Collateral of Capital One Auto Finance. If the Motion to Value is not granted, Debtor's Plan does not have sufficient monies to pay the claim in full.

Debtor filed a Motion to Value Collateral of Capital One Auto Finance on August 11, 2016. The hearing on that Motion is set for September 13, 2016, at 3:00 p.m. The Trustee's Objection to Confirmation is continued to September 13, 2016, at 3:00 p.m.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to confirmation the Plan is continued to 3:00 p.m. on September 13, 2016.

22. 12-36688-E-13 HLG-1 DONALD TO AND KAREN CAO Kristy Hernandez MOTION TO MODIFY PLAN 7-19-16 [110]

WITHDRAWN BY M.P. 8/11/16

Final Ruling: No appearance at the August 30, 2016 hearing is required.

The Debtor having filed a Withdrawal of the Motion to Modify Plan, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, the Motion to Modify Plan was dismissed without prejudice, and the matter is removed from the calendar.

23. 16-23888-E-13 DPC-1 | **ALFREDO RODRIGUEZ Peter Lago** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 8-4-16 [17]**

Tentative Ruling: The Objection to Confirmation has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on August 4, 2016. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

Debtor has filed an amended plan, which is a de facto dismissal of the prior plan.

The court's decision is to sustain the Objection.

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

1. Alfredo Rodriguez ("Debtor") admitted several changes to expenses at the First Meeting of Creditors held on July 28, 2016. Those changes are:

   a. The $1,949.49 mortgage expense listed on Schedule J does not include any real property tax or insurance expenses. Debtor admitted that his monthly real property tax expense is $300.00 and his monthly property insurance expense is $100.00.

   b. Debtor admitted that he has a whole life insurance policy with a monthly expense of $289.00. Debtor failed to list that insurance policy on Schedule B.

   c. Trustee calculates Debtor's monthly net income as $136.51, not

$825.51 as listed on Schedule J.

Trustee also notes that Debtor's Plan of June 28, 2016, does not indicate whether Debtor's Attorney seeks a flat fee or will be filing a separate motion under Local Bankruptcy Rule 2016-1(a). Section 2.06 of the Plan is not chosen, and no Rights and Responsibilities have been filed. Trustee does not oppose confirmation on this ground as long as the court determines if attorney's fees will be approved in the order confirming or will require a separate motion.

TRUSTEE'S STATUS REPORT

Trustee filed a status report on August 19, 2016. Dckt. 24. Trustee notes that Debtor filed a Second Amended Plan (Dckt. 22) and a Rights and Responsibilities (Dckt. 21) on August 10, 2016. Trustee asserts that Debtor has not addressed Trustee's concerns about Debtor being able to make Plan payments or comply with the Plan. Trustee notes that Debtor has addressed the Trustee's concerns about Rights and Responsibilities being filed.

DISCUSSION

The Trustee's objections are well-taken.

As to attorney's fees for Debtor's counsel, the court notes that Debtor, in his Second Amended Plan, has selected no-look fees under Local Bankruptcy Rule 2016-1(c). Debtor has paid $2,525.00 in attorney's fees already and seeks to pay an additional $3,325.00, which totals $5,850.00. Local Bankruptcy Rule 2016-1(c)(1) states:

> The maximum fee that may be charged is $4,000.00 in nonbusiness cases, and $6,000.00 in business cases.

Here, Debtor's Plan would pay $5,850.00 in attorney's fees, which is $1,850.00 more than allowed by Local Bankruptcy Rule 2016-1(c)(1). That over-award is a ground for sustaining Trustee's objection.

Debtor may not be able to make plan payments or comply with the plan under 11 U.S.C. § 1325(a)(6). Debtor's Second Amended Plan proposes monthly plan payments of $825.00, which the court notes is $0.51 less than the net monthly income listed on Debtor's Schedule J. Debtor's Second Amended Plan, however, does not address Trustee's concerns about Debtor being able to make plan payments. At the First Meeting of Creditors, Debtor admitted to several expenses that would reduce his monthly net income to $136.51. Debtor does not appear to have sufficient income to support proposed plan payments, and Debtor has failed to adequately explain his expenses. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable. Therefore, the objection is sustained.

Debtor has now filed a Second Amended Plan, which necessitates the filing of a motion to confirm and evidence in support thereof.

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

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

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

24. 16-25089-E-13 MARK/JENNIFER GALISATUS — MOTION TO EXTEND AUTOMATIC STAY
DMD-1 Daniel Davis
8-15-16 [14]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, creditors, and Office of the United States Trustee on August 15, 2016. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

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

The Motion to Extend the Automatic Stay is denied.

Mark Galisatus and Jennifer Galisatus ("Debtors") seek to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond thirty (30) days in this case. This is the Debtors' second bankruptcy petition pending in the past year. The Debtors' prior bankruptcy case (No. 15-26286) was dismissed on January 11, 2016, after Debtors failed to obtain confirmation of an amended plan. *See* Order, Bankr. E.D. Cal. No. 15-26286, Dckt. 32, January 11, 2016. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtors thirty (30) days after filing of the petition.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition on August 18, 2016. Dckt. 19. Trustee states that he is uncertain whether there has been sufficient change in Debtor's circumstances to warrant extending the automatic stay. Trustee states that Debtors are scheduled to appear at the First Meeting of Creditors on September 1, 2016, but presently, they have not submitted tax returns, pay advices, and any business documents to the Trustee.

Trustee notes also that Debtors propose to pay tax debt in Classes 2 and 5 of the proposed Plan and to pay unsecured creditors 0%. Debtors listed the Department of Treasury in Class 2 for $10,481.00 at 0% interest. Debtors listed the Department of Treasury in Class 5 also for $77,048.70 and $42,818.30 as a general unsecured creditor. Trustee notes that the Department of Treasury filed Claim 1 for $118,672.61, claiming $52,401.00 as secured at 4% interest. $53,274.02 is claimed in Class 5 with $12,997.59 as general unsecured debt. The Department's claim includes unpaid priority taxes for the time Debtor's prior case was pending.

Finally, Trustee notes that this is the fourth bankruptcy case filed by Debtors in the last eight years.

DISCUSSION

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty (30) days if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). The subsequently filed case is presumed to be filed in bad faith if the Debtor failed to perform under the terms of a confirmed plan. *Id.* at § 362(c)(3)(C)(i)(II)(cc). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* at § 362(c)(3)(C).

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); *see also* Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209–10 (2008). Courts consider many factors — including those used to determine good faith under §§ 1307(c) and 1325(a) — but the two basic issues to determine good faith under § 362(c)(3) are:

1. Why was the previous plan filed?

2. What has changed so that the present plan is likely to succeed?

Elliot-Cook, 357 B.R. at 814–15.

Here, Debtor states that the instant case was filed in good faith and provides an explanation for why the previous case was dismissed, as follows:

A. Co-Debtor Jennifer Galisatus failed to appear at the first meeting of creditors because her employer required her to attend a company event in line with her employment as an Event Manager.

B. Debtors submitted one pay advice to the Trustee on time, but the remaining ones were not submitted until after the Trustee moved to deny Debtors' Plan.

C. Debtors enlisted help from a tax preparer to reconstruct their 2013 and 2014 financial records. The 2013 tax return was completed on November 10, 2015, and the 2014 tax return was completed in 2016. Now, Debtors have tax return records for those years and for 2015 as well.

D. Similarly, Debtors were not able to provide financial business records timely in their last bankruptcy case because they were working on compiling tax returns, but now they have 2014 and 2015 tax returns, and they use better accounting practices.

E. Debtors' Plan called for an extended period beyond sixty (60) months to make all payments.

F. Debtors listed incorrect income numbers on Schedule I and inconsistent and contradictory numbers for the amount of payment as stated in their Plan. Debtors assert that those mistakes would have been corrected.

While technically Debtors have had only one bankruptcy pending and dismissed within the preceding year such as to satisfy 11 U.S.C. § 362(c)(3)(B), the court notes that Debtors have a tendency to file a Chapter 13 bankruptcy case annually in a way that avoids imposition of the automatic stay under 11 U.S.C. § 362(c)(4). The court notes that Debtors filed the following Chapter 13 bankruptcy cases, each of which was dismissed:

A. Case No. 13-23407
   1. Filed: March 14, 2013
   2. Dismissed: November 19, 2013. Case No. 13-23407, Dckt. 107.

B. Case No. 14-21055
   1. Filed: February 4, 2014
   2. Dismissed: February 26, 2015. Case No. 14-21055, Dckt. 56.

C. Case No. 15-26286
   1. Filed: August 6, 2015
   2. Dismissed: January 11, 2016. Case No. 15-26286, Dckt. 32.

The Debtors have not sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay. The court sees no reason why Debtors' problems in getting a plan confirmed could not have been solved in one of the prior bankruptcy filings, and the presumption of bad faith carries significant weight here against the Debtors' latest filing.

The motion is denied, and the automatic stay is not extended.

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 Extend the Automatic Stay filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied, and the automatic stay is not extended pursuant to 11 U.S.C. § 362(c)(3)(B).

25. 16-23894-E-13 RICHARD CARTER
DPC-1 Pro Se
CONTINUED MOTION TO VACATE DISMISSAL OF CASE
8-2-16 [32]

DEBTOR DISMISSED:
07/22/2016

Order Re-setting hearing to 8/30/16 - Dckt. 36
Originally set for the 8/23/16 3:00 calendar.

Tentative Ruling: No appearance at the August 30, 2016 Hearing is required.

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

Correct Notice Not Provided. The Debtor failed to file a Proof of Service.

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

The hearing on the Motion to Vacate is denied.

Richard Clark ("Debtor") filed the instant Motion to Vacate Dismissal on August 2, 2016. Dckt. 32.

The instant case was filed on June 16, 2016. Dckt. 1. No plan was confirmed.

On June 20, 2016, the court filed an Amended Notice of Incomplete Filing and Notice of Intent to Dismiss Case due to not timely filing documents. Dckt. 19. Debtor moved for a time extension to file documents. Dckt. 21. The Court granted that motion and set Debtor's filing deadline as July 14, 2016. Dckt. 23.

On July 22, 2016, the court ordered Debtor's case dismissed for failure to timely file documents.

Dckt. 29.

On August 2, 2016, Debtor filed this instant Motion to Vacate Dismissal of Case claiming confusion due to Debtor's case being filed as a Chapter 7 one day before being corrected the following day. Debtor states that the confusion caused him to neglect filing a Chapter 13 plan in the time required by the court.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on August 5, 2016. Dckt. 34. The Trustee states that the Motion was not served on all parties, the court's error did not prevent the Debtor from filing any documents, and the plan filed by the Debtor is not feasible.

DEBTOR'S RESPONSE

The Debtor filed a response on August 16, 2016. Dckt. 38. The Debtor states that he is unavailable to attend the hearing because he will be in Phoenix, Arizona, moving his daughter into college. The Debtor requests that the Motion be continued to a date after August 26, 2016.

AUGUST 23, 2016 HEARING

At the hearing, the court noted Debtor's request. In the best interest of the parties, the court continued the matter to 3:00 p.m. on August 30, 2016.

No supplemental documents have been filed.

REVIEW OF BANKRUPTCY CASE

The Debtor has filed a Chapter 13 Plan concurrently with his motion to vacate dismissal. A summary of the Chapter 13 Plan reveals the following:

A. Monthly Plan Payment.....$85.85

B. Term of Plan.....60 Months

C. Distribution on Claims:

1. Class 1 Secured
   a. Current Monthly Installment.....($3,476.52)
   b. Arrearage Payment.....($ 0.00)

2. Class 2 Secured..... None

3. Class 3 Secured, Surrender..... None

4. Class 4 Secured, Direct Payment,..... None

5. Class 5, Priority Unsecured..... None

6. Class 6, Special Treatment Unsecured..... None

7. Class 7 General Unsecured
   a. Dividend of $5,151 General Unsecured..... 4%

Plan, Dckt. 33. (It appears that the $5,151.00 is the 4% the $103,014 of general unsecured claims listed on Schedule E/F. $5/151.00 divided by 60 months would be $58.85 a month.)

As drafted by the Debtor, the Plan requires a monthly payment of approximately (including a 7% Trustee fee) $3,811.74. However, Debtor provides for only $85.85 a month–dramatically under-funding the plan. Thus, it does not appear that there is a feasible plan or a likelihood of success if the order vacating the case was granted.

In reviewing the Schedules, the court notes the following:

A. Schedule A, Real Property

1. Waterboro Square.....$586,082 FMV

B. Schedule D, Secured Claims

1. Deeds of Trust, Waterboro Square.....($225,047.97)

C. Schedule E/F

1. E Priority..... None

2. F General Unsecured.....($103,014)

D. Schedule I, Income

1. Debtor is unemployed.....$0.00

2. Non-Debtor Spouse Gross Wages.....$8278

3. Deductions.....($3,143)

4. Take-Home Income.....$5,143.32

E. Schedule J, Expenses

1. Total.....($7,037)

2. Net Monthly Income.....($1,894)

3. Expenses Include
   a. Mortgage.....($2,886.57)
   b. Transportation (2 cars; gas, repairs, registration).....($165)

4. States that Debtor is working on a loan modification, which is anticipated to reduce the mortgage payment by more than $2,000.00 a month. It appears that the Schedule J expenses show an already reduced payment, not the actual payment that may be the $3,476.52 listed in the Plan.

Dckt. 26.

The court reconsidering or vacating a judgment or order is governed by Federal Rule of Civil Procedure 60(b), as made applicable in this case by Federal Rule of Bankruptcy Procedure 9024, which incorporates minor modifications that do not apply here. Grounds for relief from a final judgment, order, or other proceeding are limited to:

(1) Mistake, inadvertence, surprise, or excusable neglect;

(2) Newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) Fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) The judgment is void;

(5) The judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying in prospectively is no longer equitable; or

(6) Any other reason that justifies relief.

Fed. R. Civ. P. 60(b). The court uses equitable principles when applying Rule 60(b)Fed. R. Civ. P. 60(b). *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2857 (3rd ed. 1998). A precondition to the granting of such relief is that the movant show that he or she has a meritorious claim or defense. *See* 12-60 Moore's Federal Practice Civil § 60.24; *Brandt v. American Bankers Insurance Company of Florida*, 653 F.3d 1108, 111 (9th Cir. 2011); *Falk v. Allen*, 739 F.2d 461, 462 (9th Cir. 1984) ("We agree with the Third Circuit that three factors should be evaluated in considering a motion to reopen a default judgment under Rule 60(b): (1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default. *See Gross v. Stereo Component Systems*, 700 F.2d 120, 122 (3d Cir. 1983) ("Gross"); *see also United Coin Meter v. Seaboard Coastline R.R.*, 705 F.2d 839, 845 (6th Cir. 1983) (adopting Third Circuit test).").

Additionally, the Ninth Circuit Court of Appeals has instructed in *Aurich American Insurance Company v. International Fibercom, Inc. (In re International Fibercom, Inc.*) 503 F.3d 933, 941. (9th Cir. 2007),

> We have stated in the past that Rule 60(b)(6) should be "liberally applied," *Hammer*, 940 F.2d at 525, "to accomplish justice." *Yanow v. Weyerhaeuser S.S. Co.*, 274 F.2d 274, 284 (9th Cir. 1959) (quoting *Klapprott v. United States*, 335 U.S. 601, 615, 69 S. Ct. 384, 93 L. Ed. 266 (1949)). At the same time, "[j]udgments are not often set aside under Rule 60(b)(6)." *Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1103 (9th Cir. 2006). Rather, Rule 60(b)(6) should be "'used sparingly as an equitable remedy to prevent manifest injustice' and 'is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment.'" *United States v. Washington*, 394 F.3d 1152, 1157 (9th Cir. 2005) (quoting *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993)). Accordingly, a party who moves for such relief "must demonstrate both injury and circumstances beyond his control that prevented him from proceeding with . . . the action in a proper fashion." *Cmty. Dental Servs. v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 2002).

DISCUSSION

A review of the files in this case does not reflect a debtor asserting a meritorious defense to the Motion to Dismiss. It appears that this Debtor is seeking to obtain a loan modification, but none exists. It is likely that the Debtor is in default on the mortgages, which requires that they be paid through the plan. While a debtor can propose and confirm a Chapter 13 Plan that provides adequate protection payments to the creditor while a loan modification is being processed in good faith, no such plan is proposed. (Such plan provisions are commonly called in this court the "Ensminger Loan Modification Additional Provision." Mr. Ensminger is a consumer attorney who worked with creditors' attorneys and other consumer attorneys to structure the additional provisions that allow for the prosecution of a loan modification and adequate protection payments consistent with the Bankruptcy Code through a confirmed Chapter 13 Plan.).

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Vacate Dismissal of Case 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 Vacate the Dismissal is denied.

26. 16-23496-E-13 MICHELLE DORENKAMP MOTION TO CONFIRM PLAN
SJS-1 Matthew DeCaminada 7-13-16 [17]

Final Ruling: No appearance at the August 30, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, and Office of the United States Trustee on July 13, 2016. By the court's calculation, 48 days' notice was provided. 42 days' notice is required.

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

The Motion to Confirm the Amended Plan is granted.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a statement of non-opposition on July 25, 2016.

DISCUSSION

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

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

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

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