

- A. The Debtor filed the Motion, rather than electing to immediately convert the case, to allow the Chapter 13 Trustee to disburse \$43.79 to creditor Asset Recovery Department in August 2016.
- B. The Motion makes reference to another order of the court (unidentified) that is found at Docket No. 64 by which the Chapter 13 Trustee is holding \$8,000.00. Debtor believes that he, whether the case were to remain in Chapter 13 or converted to a Chapter 7 case, would be entitled to those monies.
- C. Debtor requests that the court order that the Chapter 13 Trustee remain in place, notwithstanding conversion of the case (apparently in competition with the fiduciary Chapter 7 Trustee for the bankruptcy estate).

Motion, Dckt. 108.

No points and authorities is provided to give the court any legal basis for ordering that the Chapter 13 Trustee continues in office, notwithstanding conversion of this case to one under Chapter 7 and the Chapter 7 trustee being appointed.

DISCUSSION

In substance, it appears that Debtor seeks to have this court pre-adjudicate the rights and interests of the bankruptcy estate against a Chapter 7 trustee. Alternatively, it appears that Debtor seeks to have the court take away from the Chapter 7 trustee property of the estate and leave it with the Chapter 13 Trustee, who otherwise has no authority to act with respect to property of the estate following conversion of the case. A third possible strategy point is that Debtor and Debtor's counsel want to pre-select their opponent for Debtor to exercise unarticulated claims to the \$8,000.00, ensuring that the opponent has no authority to disburse the monies to any creditors.

The court has gone back and reviewed the order (which was not explained in the Motion) concerning the \$8,000.00. The court ordered that as conditions of the sale,

5. In addition, \$8,000.00 of the sales proceeds shall be paid from escrow directly to the Chapter 13 Trustee from escrow. The Avoided Judgment Lien of Cach, LLC (Order, Dckt. 47) attaches to the net proceeds of the sale, the amount of sales proceeds after payment of the authorized senior liens, taxes, and costs of sale, and attaches to such proceeds in the same amount, extent, and validity in which the avoided lien existed in the Property. Debtor's exemptions shall also attach to the \$8,000.00 in proceeds. The Chapter 13 Trustee shall hold the \$8,000.00 in sales proceeds pending further order of the court."

Order, Dckt. 64.

The Civil Minutes from the hearing on the motion to sell provide enlightenment why there is \$8,000.00 being held by the Chapter 13 Trustee.

“The Debtor is requesting that they keep \$25,302.29 of the sale proceeds to pay for relocation costs, down payment for possible replacement housing, car repairs and auto replacement, clothing replacement, and furnishing replacements. However, the **Debtor does not provide any authority to support the Debtor receiving such a large sum from the sale** rather than it being disbursed to the Trustee for distribution to creditors under the plan.

The **Debtor has not provided sufficient evidence as to justify the Debtors receiving a windfall of \$25,302.29** from the sale of the Property **at the expense of** the Debtor[‘]s **creditors** through the proposed plan.

...
The court has **granted the motion to avoid the lien of Cach, LLC**, such avoidance of the lien is subject to the condition that the Debtor[‘]s bankruptcy case not be dismissed. 11 U.S.C. § 349(b); Order, Dckt. 47. If this bankruptcy case is dismissed, then the judgment lien is reinstated on the property. No provision is made for this lien or the possibility that the buyer may be acquiring the property to this lien which pre-dates the proposed purchase.

...
Debtor has not sought, and the court cannot order (out of [whole] cloth) the sale of the property free and clear of the Cach, LLC lien. No relief has been requested pursuant to 11 U.S.C. § 363(f), nor has Cach, LLC been provided with notice that its contingent lien rights (11 U.S.C. § 349(b)) are the subject of judicial proceedings.

However, the court can, and does order, that **the lien, if any, of Cach, LLC which is the subject of the Order Avoiding Lien, Dckt. 47, attach to \$8,000.00 of the net proceeds from the sale**, after payment of the secured claims and costs of sale, in the same extent, validity, and priority as existed in the property being sold. The net proceeds from the sale shall be disbursed directly from escrow to the Chapter 13 Trustee, who shall hold said monies pending further order of the court. **If the bankruptcy case is dismissed, the Chapter 13 Trustee (or successor trustee) shall notify [Cach], LLC of the dismissal** and that the Trustee is holding monies subject to the judicial lien. **It appears that the \$8,000.00 in net proceeds should be sufficient to pay the judgment secured by the judgment lien if this case is dismissed.** If Debtor completes the Plan, the Trustee or Debtor may seek a further order for distribution of the monies to (1) Debtor to the extent of any exemption and (2) to creditors through the Chapter 13 Plan.”

Civil Minutes, Motion to Sell; Dckt. 63 (emphasis added).

If the Debtor has the right to claim an exemption in the Property and the right to have the Chapter 7 Trustee disburse the monies to Debtor, then he can make such a demand on the Chapter 7 trustee. If the Chapter 7 Trustee disagrees, Debtor can seek to properly enforce his rights and obtain a “further order” from this court for disbursement of the monies to the Debtor (if proper).

What Debtor cannot do is re-write the Bankruptcy Code to make special provisions for himself, select his own trustee for a Chapter 7 case, and select a trustee who has no authority to pay monies to creditors that should properly be paid to creditors.

The Motion is granted, and the case is converted to one under Chapter 7. The balance of the requested relief is denied.

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

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

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

IT IS ORDERED that the Motion to Convert is granted, and this case is converted to one under Chapter 7.

All other relief requested in the Motion is denied.

2. [13-32506-E-13](#) **RICHARD EADDY** **CONTINUED MOTION TO DISMISS**
DPC-3 **Richard Jare** **CASE**
7-22-16 [[104](#)]

Final Ruling: No appearance at the September 13, 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, Debtor's Attorney, and Office of the United States Trustee on July 22, 2016. By the court's calculation, 19 days' notice was provided. 14 days' notice is required.

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

The Motion to Dismiss is denied without prejudice.

David Cusick, the Chapter 13 Trustee, filed the instant Motion to Dismiss on July 22, 2016. Dckt. 104.

The Trustee seeks dismissal of the case on the basis that the Debtor is \$1,500.00 delinquent in plan payments, which represents multiple months of the \$300.00 plan payment. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

AUGUST 10, 2016 HEARING

At the hearing, the court noted that Debtor has a motion to convert set for hearing on September 13, 2016, at 3:00 p.m., with Debtor's counsel to re-notice the correct hearing date.

DISCUSSION

The court ordering this case to converted to one under Chapter 7, the Motion is denied without prejudice.

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

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

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

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

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 August 2, 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 the Motion to Confirm the Modified Plan.

Dax Chavez and Tina Chavez (“Debtors”) filed the instant Motion on August 2, 2016. In the Motion, Debtors quote their supporting declaration about facing problems making plan payments after their daughter was involved in an automobile collision. Dckt. 89. Debtors purchased a vehicle from a friend and spent more money than they anticipated fixing the vehicle.

Debtors state that they have paid \$83,354.00 to the Chapter 13 Trustee over the last thirty-eight (38) months, and now, they have missed approximately 2.94 plan payments in the amount of \$6,972.00. Dckt. 89. Debtors request that the \$6,792.00 in missed plan payments be forgiven and that plan payments of \$2,780.00 begin in July 2016 and continue for twenty-two (22) months, remaining at a total of sixty (60) months for the plan term.

Debtors assert that the Modified Plan has been proposed in good faith and that it will not modify the rights of any holder of a secured or an unsecured claim.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on August 29, 2016. Dckt. 97. Trustee objects on the following grounds:

- A. The proposed Modified plan provides for post-petition arrears in the amount of \$5,100.15 to be paid as Class 1 ongoing arrears, but the Trustee's records reflect post-petition arrears in the amount of \$1,700.05.
- B. The Trustee has no current statement of business income and no statement of expenses on file. The Trustee's most recent records for those matters were filed on April 3, 2013.
- C. Debtors may have made an unauthorized purchase of a vehicle. Debtors have not filed details about the vehicle involved in a collision, the Trustee has no record of a motion to incur debt, and there is no evidence of the amount paid for the replacement vehicle or the expense costs to fix the replacement vehicle.

DEBTOR'S REPLY

Debtors filed a reply to the Trustee's Opposition on September 6, 2016. Dckt. 100. Debtors request that the instant Motion be continued to allow Debtors time to address the Trustee's opposition.

DISCUSSION

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. A review of the Motion provides the following grounds stated with particularity (Fed. R. Bankr. P. 9013) upon which the requested relief is based:

- A. Debtors filed the current case.
- B. Debtors have a confirmed plan in this case.
- C. Debtors' daughter was in a car accident and totaled the Debtors' car.
- D. Debtors chose to purchase (apparently without court authorization) a replacement car.
- E. Debtors chose to divert plan payments to purchase this car (a used 2004 Chrysler PT Cruiser, as disclosed in Debtors' declaration).
- F. The car was purchased from a "friend," and almost immediately suffered major engine damage (No information is provided as to why Debtors did not demand their money back from the "friend").
- G. Debtors then elected to divert more money from the plan and put a new engine in the 2004 PT Cruiser.

- H. Debtors have defaulted in making \$6,972.00 plan payments and seek to be excused of making those payments (effectively making creditors pay for the 2004 PT Cruiser purchase and new engine).
- I. The term of the proposed Modified Plan is sixty (60) months.
- J. The Modified Plan is proposed in good faith (to excuse making \$6,972.00 in payments to creditors for Debtors' unauthorized, and ill-advised purchase of a 2004 PT Cruiser from a "friend") and not by any mean prohibited by law.
- K. The Modified Plan will not modify any rights of (undisclosed) holders of secured claims.
- L. The Modified Plan will not modify any rights of holder so unsecured claims.

Motion, Dckt. 87.

The Motion fails to allege the basic elements for confirmation of a modified plan under the Bankruptcy Code found in 11 U.S.C. §§ 1329, 1325, and 1322. 11 U.S.C. § 1329(b) provides,

"11 U.S.C. § 1329(b)

(b) (1) Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section."

The minimum requirements for confirmation in the above Bankruptcy Code sections are:

11 U.S.C. § 1322

(a) The plan—

(1) shall provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan;

(2) shall provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim;

(3) if the plan classifies claims, shall provide the same treatment for each claim within a particular class; and

(4) notwithstanding any other provision of this section, may provide for less than full payment of all amounts owed for a claim entitled to priority under section 507(a)(1)(B) only if the plan provides that all of the debtor's projected disposable income for a 5-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

(b) Subject to subsections (a) and (c) of this section, the plan may—

(1) designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated; however, such plan may treat claims for a consumer debt of the debtor if an individual is liable on such consumer debt with the debtor differently than other unsecured claims;

(2) 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;

(3) provide for the curing or waiving of any default;

(4) provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or any other unsecured claim;

(5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;

(6) provide for the payment of all or any part of any claim allowed under section 1305 of this title;

(7) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(8) provide for the payment of all or part of a claim against the debtor from property of the estate or property of the debtor;

(9) provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity;

(10) provide for the payment of interest accruing after the date of the filing of the petition on unsecured claims that are nondischargeable under section 1328(a), except that such interest may be paid only to the extent that the debtor has disposable income available to pay such interest after making provision for full payment of all allowed claims; and

(11) include any other appropriate provision not inconsistent with this title.

(c) Notwithstanding subsection (b)(2) and applicable nonbankruptcy law—

(1) a default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured under paragraph (3) or (5) of subsection (b) until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law; and

(2) in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title.

§ 1325. Confirmation of plan

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

(1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title;

(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law;

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

(5) with respect to each allowed secured claim provided for by the plan—

(A) the holder of such claim has accepted the plan;

(B) (i) the plan provides that—

(I) the holder of such claim retain the lien securing such claim until the earlier of—

(aa) the payment of the underlying debt determined under nonbankruptcy law; or

(bb) discharge under section 1328; and

(II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and

(iii) if—

(I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and

(II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan; or

(C) the debtor surrenders the property securing such claim to such holder;

(6) the debtor will be able to make all payments under the plan and to comply with the plan;

(7) the action of the debtor in filing the petition was in good faith;

(8) the debtor has paid all amounts that are required to be paid under a domestic support obligation and that first become payable after the date of the filing of the petition if the debtor is required by a judicial or administrative order, or by statute, to pay such domestic support obligation; and

(9) the debtor has filed all applicable Federal, State, and local tax returns as required by section 1308.

For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day period

preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.”

Debtors recounting the car accident and the purchase and repair of the 2004 PT Cruiser, and then the four simple statements identified in paragraphs I–L above fail to state grounds upon which confirmation of the proposed Modified Plan may be granted.

A review of the proposed Modified Plan, Dckt. 90, and the incomplete grounds stated (subject to the certifications by Debtors and counsel pursuant to Fed. R. Bankr. P. 9011) in the Motion indicate that the statements in the motion are incorrect. Debtors state that no rights of a creditor having a secured claim are being modified under the proposed Modified Plan. However, the proposed Modified Plan forces the Class 1 creditor having a secured claim to have its rights modified as to both the \$24,073.63 arrearage and now a \$5,100.15 post-petition arrearage modified. This creditor will not be allowed to exercise its lien rights, but be forced to take modified payments from the defaulting Debtors.

Debtors and counsel go further to state that under the proposed Modified Plan no rights of any creditor having an unsecured claim will be modified under this Plan. However, the dividend to pay creditors having unsecured claims is 0%, a significant modification of their pre-petition rights. Debtors and counsel may argue that “what we meant to say is that the confirmed plan, which is substantially in default, already provided for a 0% dividend, so we will just say that this proposed plan does not modify those rights and treat the defaulted plan as if it had been completed and the rights of these creditors already permanently modified.” The existing plan, substantially in default, has not been completed, the rights of creditors have not yet been modified, and such an argument would be a false statement.

Lost Car and Missing Monies

On Schedule B, Debtors state under penalty of perjury to owing two vehicles, a 2000 Starcraft Camper and a 2001 Ford F250. Dckt. 1. Debtor does not state what insurance proceeds, if any, were received from the accident. It may be that given the age of the vehicles, Debtors elected to go uninsured (self-insured) for the value of the vehicle. However, the court notes that the Motion and Declaration of Debtors fail to disclose any information concerning insurance.

Denial of Motion

The Trustee’s opposition is well-taken. At this time, Debtors have not submitted recent statements of income and expenses to support the Modified Plan, and Debtors have not provided details about the purchase of a replacement vehicle.

Debtors request that the court continue the hearing so that they can, now that they have been called on it by the Trustee, provide some of the minimum evidence necessary to confirm a modified plan – but which they failed to file with the Motion. A continuance to “make-up” for the deficient original filing is not warranted.

The current financial information for Debtors is clearly required and not something of a surprise. Also, explaining the actual finances of the unauthorized purchase of a vehicle (which turned out to be grossly defective) and then spending money to rebuild the car, is not a surprise to Debtors or their counsel. Federal court litigation is not a game in which the moving party withholds evidence and provides it only when the movant forces the Trustee to object. The court will not create a marketplace for parties to try and “slip it by the court and parties in interest,” with the only downside being having to provide the required evidence when caught.

Debtors and their counsel can carefully prepare a new motion and the required evidence, file and set for hearing a new motion, and have those proceedings start with a (relatively) clean slate. If there is a good explanation provided for changes in the Debtors’ finances to allow now for a higher plan payment (25% increase) under the Plan, Debtors and counsel may be able to meet the good faith and feasibility elements for confirmation.

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

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

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

The Motion to Confirm the Chapter 13 Plan filed by the 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 denied without prejudice, and the proposed Chapter 13 Plan is not confirmed.

4.

[15-29511-E-13](#)
MEV-3

HOA NGUYEN
Marc Voisenat

MOTION TO SELL
8-29-16 [[83](#)]

Tentative Ruling: The Motion to Sell Property was not 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 whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(iii).

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on August 29, 2016. By the court’s calculation, 15 days’ notice was provided. 21 days’ notice is required. Fed. R. Bankr. P. 2002(a)(2) (requiring 21 days’ notice for a motion to sell).

The Motion to Sell Property was not 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 Sell Property is denied without prejudice.

INSUFFICIENT NOTICE PROVIDED

Federal Rule of Bankruptcy Procedure 6004 requires that notices of proposed sales, use, or leases of property, other than cash collateral, not in the ordinary course of business be given pursuant to Federal Rule of Bankruptcy Procedure 2002(a)(2), (c)(1), (I), and (k). Federal Rule of Bankruptcy Procedure 2002(a)(2) mandates that twenty-one days’ notice be provided to parties in interest for motions proposing the sale of property.

Here, Debtor Hoa Nguyen (“Movant”) filed and served the Motion to Sell on August 29, 2016, 15 days before this hearing date. Movant set the Motion for hearing under Local Bankruptcy Rule 9014-1(f)(2). This Motion is denied without prejudice because Movant did not provide sufficient notice for

potential respondents to file written opposition to the Motion under Federal Rule of Bankruptcy Procedure 2002(a)(2).

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF A PARTY REQUESTS THE COURT TO SHORTEN THE NOTICE PERIOD

The Bankruptcy Code permits the Chapter 13 Debtor Hoa Nguyen (“Movant”) to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movant proposes to sell his interest in real property commonly known as 255 So. Rengstorff Avenue, Unit #51, Mountain View, California (“Property”).

The proposed purchaser of the Property is Di Xu and the terms of the sale are:

- A. \$805,000.00 purchase price;
- B. Through seller’s agent Sereno Group;
- C. Through buyer’s agent Keller Williams Realty;
- D. \$25,000.00 deposit;
- E. \$300,000.00 down payment to be submitted in escrow;
- F. \$480,000.00 loan fixed at 5% interest annually;
- G. Sale to include all existing fixtures;
- H. Additional items included in sale (*i.e.*, refrigerator, stove/range, microwave, washer);
- I. Property sold “as-is;”
- J. Escrow to close thirty (30) days from acceptance;
- K. Seller to pay escrow fees and the cost of an ALTA or CLTA homeowner’s policy of title insurance issued by or through Old Republic Title Company; and
- L. Seller to pay \$450.00 for a home protection plan. Exhibit A, Dckt. 85.

Movant anticipates receiving \$324,612.71 in net proceeds after fees and costs. Those fees and costs include:

- A. Loan payoff to Wells Fargo Bank in the amount of \$338,946.18;
- B. 2.5% commission to Sereno Group in the amount of \$20,125.00;

- C. 2.5% commission to Keller Williams Realty in the amount of \$20,125.00;
- D. Judgment to Credit Bureau Associates in the amount of \$38,380.65;
- E. Judgment to Parview West Homeowner's Association in the amount of \$52,487.49;
- F. Natural Hazard Disclosure Report to JCP-LGS in the amount of \$123.95;
- G. Pest/Termite inspection to Antique Termite in the amount of \$200.00;
- H. Home inspection to Real Estate Inspection Group in the amount of \$515.00;
- I. Home warranty to HomeGuard Home Warranty, Inc. in the amount of \$315.00;
- J. Reimbursement for key replacement to Colleen Rose in the amount of \$111.31;
- K. Reimbursement for HOA documents to Royce Cablayan in the amount of \$425.00;
- L. Credit for closing delay to extend loan rate in the amount of \$2,530.00;
- M. Prorata real estate taxes of July 1, 2016, to September 9, 2016, in the amount of \$1,154.51;
- N. Escrow fees to Old Republic Title Company in the amount of \$1,260.00;
- O. Notary fees in the amount of \$150.00;
- P. Title charges for homeowners policy of title insurance to Old Republic Title Company in the amount of \$2,097.00;
- Q. Recording fees to Santa Clara County in the amount of \$195.00;
- R. County transfer tax to Santa Clara County in the amount of \$885.00; and
- S. City transfer tax to City of Mountain View in the amount of \$1,328.25.

WELLS FARGO BANK'S CONDITIONAL NON-OPPOSITION

The Motion is a simple one, seeking authorization to sell property of the bankruptcy estate. 11 U.S.C. § 363(b). Movant is not attempting to sell the property free and clear of any liens or interests.

Wells Fargo Bank, N.A., holder of a secured claim, filed a conditional non-opposition on September 7, 2016. Dckt. 87. Wells Fargo Bank, N.A., states that it has no opposition to the proposed sale on the condition that specific language is included in the court's order. The language "required" by Wells Fargo Bank, N.A. is unusual and concerns the court, as it appears that Wells Fargo Bank, N.A. is admitting that every bankruptcy court ordered sale of property is made free and clear of any and all liens of Wells Fargo Bank, N.A. unless the court includes special language that is unique to Wells Fargo Bank, N.A.'s liens.

First, Wells Fargo Bank, N.A. demands that the order provide that any sale pay off in full whatever payoff demand is made by Wells Fargo Bank, N.A. Rather than acting like every other creditor and merely submitting a demand in escrow as a condition for releasing its lien, this Bank requires that the court issue a "blank check order" requiring the Debtor to pay whatever amount (whether actually owed or not) to Wells Fargo Bank, N.A.

Additionally, Wells Fargo Bank, N.A. demands that the court further give the Bank the authority to dictate the terms of any short sale. Given that the sales price exceeds the liens by hundreds of thousands of dollars, the court is unsure why Wells Fargo Bank, N.A. demands this be included in the court order. Further, this Bank does not provide the court with any authority for why the court should abdicate and give such power to Wells Fargo Bank, N.A. Finally, Wells Fargo Bank, N.A. fails to provide the court with any authority for the proposition that if the Debtor was attempting a short sale, why this Bank has any greater rights to dictate the terms, as opposed to merely exercising its lien rights if so permitted under the deed of trust.

Wells Fargo Bank, N.A. appears to further admit that when a bankruptcy judge issues an order authorizing a sale of property pursuant to 11 U.S.C. § 363(b), the effect as to any lien of Wells Fargo Bank, N.A. (though for no other creditor with a secured claim) that its lien is removed from the property – prior to any sale occurring. In its Non-Opposition, Wells Fargo Bank, N.A. states that the following additional term is necessary in the order,

"In the event that the sale of the Real Property does not take place, the Respondent shall retain its lien for the full amount due under the Note."

Non-Opposition, p. 3; Dckt. 87. While Wells Fargo Bank, N.A. may well be admitting that for every other sale order in the nation for any property on which it has a lien, which order does not include the above language, that the order approving sale strips the Wells Fargo Bank, N.A. lien immediately and it is permanently removed from the property, such is not the law (at least for every other creditor who does not file such a pleading making apparently such an admission).

The Non-Opposition of Wells Fargo Bank, N.A. is overruled as being inconsistent with well established law, including the Bankruptcy Code and California real property law.

creditors holding claims secured by the property being sold or paying the fees and costs as allowed by this order, shall be disbursed to the Chapter 13 Trustee directly from escrow.

5. [16-22614-E-13](#) **PAULA GREER** **MOTION TO CONFIRM PLAN**
PGM-2 **Peter Macaluso** **7-22-16 [33]**

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, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 22, 2016. By the court’s calculation, 53 days’ notice was provided. 42 days’ notice is required.

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

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

Paula Ann Greer (“Debtor”) filed the instant Motion to Confirm Debtor’s First Amended Plan on July 22, 2016. Dckt. 33.

TRUSTEE’S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the Instant Motion on August 26, 2016. Dckt. 39. The Trustee opposes the confirmation on the following grounds:

1. The Debtor’s Plan may not be her best efforts:

- a. The Debtor lists herself as a self-employed book keeper. It is not clear if the income listed on Schedule I is her net or gross income. While the Debtor has provided the Trustee with a Profit and Loss statement from October 2015 through August 2016, the amounts conflict with the amounts listed in Schedule I. The Profit and Loss statement lists average gross income of \$6,575.00 and the average net income in the statement is \$5,616.10, but Schedule I indicates income of \$4,200.00. Additionally, Debtor's Declaration states she has a gross monthly income of approximately \$6,000.00.
- b. Expenses:
 - i. The Debtor's Amended Schedule J lists an expense in the amount of \$173.97 for additional mortgage expense for her residence. It is unclear why this expense appears on Schedule J.
 - ii. Schedule H lists an expense of \$550.00 per month for charitable contributions where Schedule I shows income of \$4,200.00. The information on the Statement of Financial Affairs conflicts with the amount listed on Schedule J, as she indicated she did not make any charitable contributions.

DEBTOR'S REPLY

The Debtor filed a reply to the Trustee's Opposition on September 6, 2016. Dckt. 42.

The Debtor's Reply states that the average gross income from October 2015 to April 2016 was \$6,575.00 rather than the \$6,000.00 anticipated for the year because anticipated income includes the slower season when income drops to the \$5,500.00 range. The Debtor states that this is supported by the 2015 tax return, which the Debtor is not averted to sending the Trustee a copy of during the pendency of the case.

The Reply also indicates that the expenses referenced by the Trustee are for the HOA that was missed in the original schedules. The expenses for charity have also been corrected as this is verified in the Debtor's 2015 tax returns. The Debtor states that she has corrected the Statement of Financial Affairs to correct this mistake, and an amendment will be filed before the hearing on this matter.

However, the "Reply" consists merely of Debtor's counsel making factual arguments for which there is no evidence presented. The court has addressed with Debtor's counsel on a number of occasions that actual "evidence" is required when he seeks to present the court with new facts. Counsel cannot merely make arguments, failing (or refusing) to provide evidence.

This being a continuing problem for Debtor's counsel, it begins to appear that this Debtor is one of Counsel's clients who may not be willing to so testify. Again, counsel may be trying to "slip it by" the court and parties in interest.

DISCUSSION

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

The Trustees objections are well-taken.

The plan, as presented, may not be the Debtor's best efforts giving the conflicting information apparent in the Debtor's Schedules. The Debtor indicates on Schedule I that her income is \$4,200.00, yet the Debtor's average gross income on the Profit and Loss statement is \$6,575.00, the average net income on the statement is \$5,616.10, and the Debtor's declaration indicates a gross monthly income of \$6,000.00. While the Debtor has offered an explanation for the discrepancy between the average gross income for that period listed in the Profit and Loss Statement and the amount stated in the Debtor's Declaration, the Debtor has not filed an amended Schedule I to date. Additionally, while the Debtor indicates that there was an error in the Statement of Financial Affairs that will be corrected in an amendment, no such amendment has been filed.

The court will not continue to engage in counsel's "game" of refusing to provide evidence to support his factual arguments. He, as every other attorney is doing, can and will provide evidence in support of his factual arguments. FN.1.

FN.1. Though counsel and his client may not believe that signing schedules under penalty of perjury is of any significance, when there are "mistakes" that need to be corrected when the Trustee has to dig through the documents and find the inconsistencies, there needs to be a good explanation as to why the Debtor stated under penalty of perjury to false or incorrect information. It may well be that Debtor has never read the Schedules, but merely signed whatever was put in front of her because it lets her "win." Given that Debtor's business is stated to be a bookkeeper, it is very concerning that such fundamental financial inconsistencies in the Schedules were missed by her.

It is further concerning for the court that Debtor and her counsel, though Debtor purports to have a business, failed to file the required business gross income and expense attachment to Schedule I. Debtor has elected to hide this information from the court and parties in interest. As the Trustee points out, additional financial information provided to the Trustee, but withheld from the court and creditors by Debtor, shows the Debtor having greater income. There is no reason given for Debtor and counsel for failing to properly complete Schedule I. The court may well infer that it was done intentionally to try to mislead the court and parties in interest.

The court is unsure whether Debtor's first statement of expenses listed on Schedule J under penalty of perjury (Dckt. 1) is correct, or whether Amended Schedule J subsequently filed stating different expenses under penalty of perjury (Dckt. 32) is true and correct. It appears that these Schedules J are created with expenses to yield a pre-determined Net Income figure, irrespective of the accuracy of the truthful information provided. While not marking it as amended, Debtor purports to say that her food and housekeeping supplies monthly expenses are actually 100% higher than she originally stated under penalty of perjury on Original Schedule J. Debtor offers no explanation as to why she now states that her clothing and her personal care products are each 250% higher than she originally stated under penalty of perjury on Original Schedule J.

On its face, the Schedule I and Amended J financial information states that Debtor pays no state or federal self-employment or income taxes. The court cannot identify any basis asserted by Debtor that

she is exempt from this state and federal taxation. The court notes that Debtor has a \$13,000 Class 5 priority tax claim to the Internal Revenue Service, indicating that the court's concern about failing to provide for paying post-petition taxes is not unwarranted.

Debtor also states on both Original Schedule J and Amended Schedule J that she makes charitable contributions of \$550.00 a month. In light of the other apparently "Made as Necessary to Reach a Predetermined Net Income Amount" changes in expenses, the Debtor's history of making such generous monthly contributions will need to be documented just to make sure that this is not a phony expense to divert \$550.00 a month improperly into Debtor's pocket.

It may be that Debtor has so damaged her credibility and her conduct sufficiently bad, that she cannot confirm any plan in this case.

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 without prejudice, and the proposed Chapter 13 Plan is not confirmed.

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

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

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

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, Debtors’ Attorney, and Chapter 13 Trustee on August 19, 2016. By the court’s calculation, 25 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.

SunTrust Mortgage, Inc., the Creditor, opposes confirmation of the Plan on the basis that:

1. Debtors’ Plan fails to provide for Creditor’s claim. The Plan does provide for arrears owed to the Creditor. Counsel for Debtors and Creditor have been negotiating a resolution, but one has not been reached yet.

The Creditor’s objection is well-taken.

Creditor holds a deed of trust secured by the Debtors’ residence. Creditor has filed a timely proof of claim in which it asserts pre-petition arrearage of \$4,769.42. 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 the Creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

the nature, the extent, and the value of such services, taking into account all relevant factors, including—

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

(i) unnecessary duplication of services; or

(ii) services that were not--

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

(II) necessary to the administration of the case.

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

Benefit to the Estate

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

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

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant were related to a Motion to Modify Plan, for which Applicant incurred \$1,125.00 in attorney's fees. No mention is made whether the estate has unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

“No-Look” Fees

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

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

...

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

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

(2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.

(3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that,

once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor's attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6)."

The Order Confirming the Chapter 13 Plan expressly provides that Applicant is allowed \$4,000.00 in attorney's fees, the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Dckt. 118. Applicant prepared the order confirming the Plan.

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

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

FEES REQUESTED

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

Motion to Modify Plan: Applicant spent 3.75 hours in this category. Applicant assisted Client with receiving and reviewing the Application to Dismiss (0.30 hours), preparing and sending letters to clients (0.20 hours), preparing and filing the Opposition (0.25 hours), reviewing case in preparation for meeting with clients (.40 hours), meeting with client to discuss the Application to Dismiss and formulate a new plan (0.50 hours), preparing and filing Motion to Modify (1.25 hours), receiving and reviewing the Notice of Withdrawal of the Motion to Dismiss (0.15 hours), reviewing rulings for Motion to Modify (0.25

The Motion for Allowance of Fees and Expenses filed by Peter Macaluso (“Applicant”), Attorney for 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 Peter Macaluso is allowed the following fees and expenses as a professional of the Estate:

Peter Macaluso, Professional Employed by Chapter 13 Debtors

Fees in the amount of \$1,125.00

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

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

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

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

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

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

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

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

JULY 19, 2016 HEARING

At the hearing, the court continued the matter to September 13, 2016, at 3:00 p.m. to allow Debtors time to provide missing and incomplete information to the Trustee and to the court. Dckt. 49.

DEBTORS' SUPPLEMENTAL DECLARATION

Debtors filed a supplemental declaration on August 23, 2016. Dckt. 52. Debtors state that their sixteen-year-old daughter was born with a deformed right foot, which is treated with prosthetic devices. Debtors state that they are required to pay the cost of prosthetic devices annually, totaling \$10,000.00. \$6,500.00 is paid by insurance, and \$3,500.00 is paid by the Debtors. Debtors state that they have health insurance and a health savings account.

Debtors state that they are usually able to pay their health insurance deductible of \$2,000.00 from funds in the health savings account, but this year, they used those funds to pay for Debtor Connie Whitman's shoulder surgery. This year, Debtors state that they have had to repair their daughter's prosthetic device twice, with the last repair occurring approximately one (1) month before filing for bankruptcy. Debtors state that prior prosthetic devices either broke during sporting activities or became unusable once their daughter outgrew them. Debtors state that the current broken devices will need to be replaced, but Debtors state that they cannot specify an exact cost for those repairs because the new devices will need to be larger. One device that is used for daily walking and activity costs approximately \$2,000.00–3,000.00 according to Debtors.

Debtors state that the device provider will not take measurements for a new device until Debtors pay \$3,500.00. Debtors have been setting funds to reach that amount but have faced additional costs. For instance, Debtor Connie Whitman states that she began having severe headaches and would lose her

balance. She states that after falling three times, she went to a physician for tests, has had two MRIs conducted, and has had an MRA conducted. Debtor states that the first MRI revealed a 10 mm meningioma along the right frontal vertex of her brain, and that even though it is not cancerous, she will require surgery to remove it. Debtor Connie Whitman states that surgery will be performed at Stanford Medical Center, but a date has not been set yet. Debtors are unsure whether their health insurance will cover costs for surgery with a neurosurgeon.

Debtors state that because of the unanticipated medical costs, Debtors will not be able to maintain plan payments of \$2,048.82, but with plan payments of \$1,650.02, Debtors would have \$398.80 in additional funds to apply toward the newly-incurred medical expenses.

TRUSTEE'S RESPONSE TO DEBTORS' SUPPLEMENTAL DECLARATION

The Trustee filed a response on August 29, 2016. Dckt. 55. After reviewing Debtors' supplemental declaration and corresponding exhibits, Trustee states that Debtors' explanation of ongoing medical expenses is satisfactory, and the Trustee no longer opposes confirmation of the Amended Plan.

DISCUSSION

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Debtors have provided evidence related to ongoing medical expenses in support of confirmation. The Trustee's opposition to the Motion has been switched to non-opposition, and no creditor has filed opposition to the Amended Plan. 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 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 June 1, 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.

Final Ruling: No appearance at the September 13, 2016 Hearing is required.

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on August 15, 2016. By the court's calculation, 29 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 continue the Motion to Confirm the Modified Plan to September 20, 2016 at 3:00 p.m.

Maria Coleman ("Debtor") filed the instant Motion on August 15, 2016.

TRUSTEE'S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, has filed a Non-Opposition to Debtor's Motion for Order Confirming First Modified Chapter 13 Plan. Dckt. 45. The Trustee notes that there are conflicting hearing dates on the documents filed in relation to the Motion, however. The Motion, Exhibits, and Proof of Service indicate a hearing date of September 20, 2016, while the Notice and Declaration each list a hearing date of September 13, 2016.

The Trustee notes also that Debtor has proposed increased monthly payments of \$416.00 and that the unsecured dividend remain at no less than 0%. Trustee states that Debtor is current under the proposed modified plan and that the modified plan is feasible.

DISCUSSION

The various hearing dates listed in connection with this Motion appear to be a mere scrivener's error. The matter will be heard on September 20, 2016, in order to allow the Motion to comply with Federal Rule of Bankruptcy Procedure 2002(a)(5) and Local Bankruptcy Rule 3015-1(d)(2).

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

1. The Debtor failed to appear at the First Meeting of Creditors held on August 11, 2016. The Meeting has been continued to September 8, 2016, at 10:00 a.m.
2. The Plan exceeds sixty (60) months. According to the Trustee's calculations, the Plan completes in 133 months as opposed to the 60 months proposed. The Plan proposes payments of \$1,450.00 for 60 months which totals \$87,000.00. The Debtor is proposing to pay the following debts through the Plan: \$2,380.00 attorney's fees; \$24,000.00 Class 1 mortgage arrears; \$1,156.95 Class 1 mortgage payment; and 6.5% Trustee compensation. The sum of these debt's is \$100,622.80.

The Trustee's objections are well-taken.

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

The Trustee objects to confirmation of the Plan on the basis that the Debtor is in material default under the terms of the confirmed Plan, the Plan requires 133 months to complete. This is in excess of the sixty (60) month statutory maximum imposed by 11 U.S.C. §1322(d). This is reason to deny confirmation.

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.

11. [16-24437-E-13](#)
RMP-1

ANTHONY BARCELLOS
Matthew DeCaminada

**OBJECTION TO CONFIRMATION OF
PLAN BY DEUTSCHE BANK NATIONAL
TRUST COMPANY**
8-4-16 [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, party in interest, and Office of the United States Trustee on August 4, 2016. By the court's calculation, 40 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.

Deutsche Bank National Trust Company, the Creditor, opposes confirmation of the Plan on the basis that:

1. The Plan incorrectly reflects the pre-petition arrearages as \$52,000.00 when \$57,388.24 in pre-petition arrearages are due and owing under the Note and Deed of Trust as reflected in the Creditor's Proof of Claim.
2. The Plan fails to provide for the contract interest rate on the pre-petition arrearages due and owing to Creditor. Pursuant to the Note, Creditor is entitled to interest at the rate of 9.5% on the pre-petition arrearages. The Plan incorrectly provides for a 0% interest rate.

3. The Debtor's Plan may not be feasible.
 - a. Debtor's income appears to be overstated. Debtor's Schedule I reflects that Debtor receives \$1,218.00 in gross income. However, Schedule I also indicates that the remainder of income is derived from renting rooms. Of the \$1,800.00 stated in rental income, \$800.00 is speculative based on Debtor being able to rent a room for this amount sometime in the future.
 - b. Debtor's expenses appear to be understated. Schedule J understates the amount paid on the mortgages encumbering the property. Debtor states monthly payments on the first mortgage are only \$904.50 and fails to list any monthly payments on Creditor's second mortgage. Accordingly, Debtor has failed to account for the monthly mortgage payments due to Creditor under the Note and Deed of Trust in the amount of approximately \$630.64.

The Creditor's objections are well-taken. The first basis for the Creditor's Objection is that the Debtor incorrectly reflects the pre-petition arrearages. Section 2.04 of the Plan provides:

2.04. 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.

A review of the Claims Register shows Creditor filed a proof of claim in the amount of \$125,639.87 with pre-petition arrears of \$57,388.24 on July 21, 2016. Proof of Claim No. 1. The Proof of Claim is prima facie evidence of the obligation owed by the Debtor. Fed. R. Bankr. P. 3001(d). Thus, irrespective of the amount stated in the Plan, the proof of claim controls. The issue becomes whether the plan provides sufficient funding for the claim.

Additionally, 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 9.5% fixed rate. However, Creditor has not shown that it is entitled to that interest on the arrearage to be cured through the Plan.

The Debtor may not be able to make Plan payments or comply with the plan. Debtor's Schedule I indicates a that \$800.00 of Debtor's monthly income is from a future room rental. This is far too speculative for the court or any other party with interest to determine the feasibility and viability of the plan with certainty. Additionally, the Debtor's expenses are understated. Debtor has not accounted for the any monthly payments due to Creditor under the Note and Deed of Trust on Debtor's Schedule J. Payments due to the Creditor are approximately \$630.64 per month. Considering all these factors, the Plan is not feasible. 11 U.S.C. § 1325(a)(6). This is reason to deny confirmation.

Additionally, the financial information provided does not show that Debtor can pay the actual arrearage on Creditor's secured claim. This is reason to deny confirmation.

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

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

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

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

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

Tentative Ruling: The 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, creditors, and Office of the United States Trustee on August 5, 2016. By the court's calculation, 39 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.

Joe Porto and Melissa Porto ("Debtors") filed the instant Motion to Confirm Debtors' Modified Plan on August 5, 2016. Dckt. 41.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition to the Instant Motion on August 30, 2016. Dckt. 55. The Trustee opposes confirmation on the following grounds.

1. The Debtors' Plan is not in compliance with Section 2.08 of the Plan.
 - a. The Debtors are proposing to change creditor BSI Financial Services, Inc. from Class 1 to Class 4 based on a trial loan modification letter. Debtors have filed and set for hearing a Motion for Order Approving Trial Loan Modification, but no details have been provided other than a payment amount and due date.

- b. Under the currently Confirmed Plan, Class 1 includes a pre-petition arrears claim to be paid through the plan of which \$6,712.41 remains to be paid. No information has been provided in the trial loan letter regarding the arrears claim filed by the creditor or if the proposed payment includes escrow.
 - c. It is not known whether the Debtors will receive a permanent loan modification and what the terms of it might be.
 - d. The Trial Loan letter is offered by BSI Financial Services, Inc.. The letter gives notice that BSI Financial Services, Inc. is a licensed mortgage servicer and debt collector. Court claim #5 indicates the actual creditor is Ventures Trust 2013-I. A Notice of Mortgage Payment Change was filed July 5, 2016, indicating that the payment effective as of August 1, 2016, is \$2,566.22.
2. The Trustee is uncertain of the Debtors' ability to pay. The Debtors filed as Exhibits Amended Schedules I and J, however, the Debtors have not provided current information regarding income and expenses. Additionally, if the Amended Schedules were treated as a supplement, Debtors have not provided any explanation of changes in their declaration. The Debtors reported a salary increase from \$3,851.82 to \$5,904.09. Debtors also report a mandatory contribution for retirement plan on the Amended Schedule I that was not disclosed on the previous Schedule I. The Amended Schedule I also reports repayment of retirement loans of \$198.78, but Debtors have not provided any supporting information, such as pay advices.

DEBTORS' REPLY

The Debtors filed a Reply to the Trustee's Opposition on September 6, 2016. Dckt. 61. The Debtors' Reply indicates that the Debtors made all payments in the Trial Loan Modification and expect a permanent loan modification to be presented for approval. Additionally, the Reply states that the Debtors will provide recent pay advices to the Trustee for review in support of the Amendment.

DISCUSSION

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

The Trustee's objections are well taken.

The basis for the Trustee's objection is that the Debtors may not be able to make payments under the plan. The Trustee does not have current information regarding income and expenses and the Updated Schedules, which were filed as exhibits rather than supplements, are not accompanied by an explanation of the changes in Debtors' declaration. Without accurate Schedules and information regarding income and expenses, it is impossible to determine the viability or feasibility of the Debtors' Plan.

Further, Debtors and their counsel show no legal authority for Debtors presenting in good faith a plan that modifies the Plan to move a claim for which there are pre-petition defaults into a Class 4 claim status. Until a final loan modification is approved that cures the arrearage, such a change is improper.

This is not a new concept and has been part of the Chapter 13 Plan in this District for years, if not decades. Debtors' counsel is well aware of this.

Further, while professing to have been paying on a trial loan modification, no such post-petition financing has been approved by the court. Debtors' confirmed plan does not provide for Debtors to divert payments around the plan, in whatever amount and manner Debtors writes for themselves.

This raises serious good faith issues in the filing and prosecution of this case, as well as any plan that is or may be proposed by the Debtors.

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

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

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

The Motion to Confirm the Chapter 13 Plan filed by the 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 denied, and the proposed Chapter 13 Plan is not confirmed.

13. [13-31140-E-13](#)
PGM-2

JOE/MELISSA PORTO
Peter Macaluso

MOTION TO APPROVE LOAN
MODIFICATION
8-5-16 [47]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, and Office of the United States Trustee on August 5, 2016. By the court's calculation, 39 days' notice was provided. 28 days' notice is required.

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

The Motion to Approve Loan Modification is denied without prejudice.

The Motion to Approve Loan Modification filed by Joe Porto and Melissa Porto ("Debtors") seeks court approval for Debtors to incur post-petition credit. BSI Financial Services, Inc., the loan servicer for Ventures Trust 2013-I ("Creditor"), whose claim the confirmed plan provides for in Class 1 and the amended plan provides for in Class 4, is stated to have agreed to a loan modification that will increase Debtor's mortgage payment from \$1,454.76 per month to \$1,788.21 per month.

The Motion is supported by the Declaration of Debtors. Dckt. 49. The Declaration affirms Debtor's desire to obtain the post-petition financing and states that the loan modification will not affect the distribution to unsecured creditors who were originally to be paid no less than four percent under the confirmed plan.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response on August 30, 2016. Dckt. 58. The Trustee states that Creditor is provided for in Class 1 of the confirmed plan, and the Trustee believes that the trial payments should have been made through the confirmed plan.

Trustee notes that Claim #5 indicates that the name of the creditor is Ventures Trust 2013-I, and BSI Financial Services, Inc., is listed as the name and address for notices and payments.

Trustee reminds the court that he has filed opposition to Debtors' Motion to Modify Plan.

Lastly, Trustee notes that on page four of the Exhibit (Dckt. 50), the trial loan payment is based upon total monthly gross income of \$5,774.53, which differs from the total monthly gross income reported on Schedule I as \$7,729.09.

DEBTORS' REPLY

Debtors' filed a Reply to Trustee's Response on September 6, 2016. Dckt. 63. Debtors state that they were performing the confirmed plan through March 2016. On March 17, 2016, Creditor sent to Debtors a direct and unsolicited trial loan with a new payment of \$1,788.21.

Debtors state that on July 5, 2016, Creditor filed a Notice of Mortgage Payment Change that is inconsistent with the loan modification. Debtors emphasize again that they have made all payments for the trial loan already.

Debtors state that they took advantage of the opportunity that Creditor provided to them and ended up paying to the Trustee the difference between the plan payment and the changed mortgage payment with the understanding that the Trustee was being notified of the change by the Creditor. Debtors state that they filed the instant Motion when they learned of the proper procedure for a loan modification.

Debtors state that both \$5,774.53 and \$7,729.09 are correct statements of total monthly gross income due to Debtors' inconsistent work as a mason.

DISCUSSION

Review of Motion

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

- A. Debtors have been offered a trial loan modification of the claim secured by the Derwood Court Property.
- B. Upon completion of the three trial loan modification payments, the loan modification will automatically become permanent.
- C. Debtors (unilaterally and without court authorization) began making the trial loan modification payments in May 2016 (and unilaterally and without court authorization

modified the loan payments made under the confirmed plan, putting the plan in default and causing the Chapter 13 Trustee to incur otherwise unnecessary costs and expenses in having to file a motion to dismiss this case because of the Debtors' defaults).

- D. The court is instructed by Debtors in the Motion to "refer to" Exhibit A to figure out the actual loan modification terms (which are not stated in the Motion).
- E. Once modified, the unstated interest rate and unstated payments will be fixed for the life of the loan.
- F. The loan modification, on unstated terms, with unstated monthly payments, will not have any impact on the estate or creditors (or presumably on Debtors' obligation to fund the plan with the projected monthly income).

Motion, Dckt. 47. This is woefully inadequate. In substance, the grounds stated in the Motion consist of: (1) Debtors have already decided that he is going to modify the loan, (2) Debtors have already modified the loan to unstated terms; (3) Debtors have already modified his plan for unstated terms and just lowered his payments, and (4) if the court and Creditor want to know the "real terms and grounds," then the court and creditors "can go to Exhibit A."

First, no attempt is made to address the Debtors' violation of the confirmed plan or order confirming the Plan. Rather, it merely summarily requests that the unstated terms of a loan modification be approved prospectively.

Second, Debtors' statement in the Motion that all Debtors have to do is make three trial loan modification payments and then the loan is automatically, permanently modified is not true. Taking Debtors and Debtors' counsel up on the challenge to "refer to" the modification document filed as Exhibit A, the court notes the following provisions:

- A. "Congratulations! You are **approved to enter into a trial period plan** under the Home Affordable Modification Program."
- B. "This is the first step toward qualifying for more affordable mortgage payments."
- C. "To accept this offer, you must make your first monthly "trial period payment."
- D. "To qualify for a permanent modification, you must make the following trial period payments in a timely manner:"
- E. "After all trial period payments are timely made **and you have submitted all the required documents**, your mortgage will be permanently modified."
- F. "Q. When will I know **if my loan can be modified permanently** and how will the modified loan balance be determined?"

Once you make all of your trial period payments on time, **we will send you a modification agreement detailing the terms of the modified loan.** Any difference between the amount of the trial period payments and your regular mortgage payments will be added to the balance of your loan along with any other past due amounts as permitted by your loan documents. While this will increase the total amount that you owe, it should not significantly change the amount of your modified mortgage payment.”

- G. No interest rate is stated in the Trial Loan Modification payment letter, no arrearage amount is stated, and no actual terms of any modification is stated. FN.1.

Exhibit A, Dckt. 50 (double emphasis added).

FN.1. It is very concerning to the court that Debtors and their counsel represent that a modification has been made permanent upon making the unauthorized payments, but they fail to provide no terms for the actual modification to the court. If Debtors and counsel believe that the only concern is what the new monthly payment will be for now and move the claim, whatever it may be from Class 1 of the Plan, irrespective of any additional amounts added on or balloon payment, Debtors may well be dooming themselves to financial purgatory.

The Motion does not comply with the requirements of Federal Rules of Bankruptcy Procedure 9013 and 4001(c)(1)(B), and the court will not waive the defect because the declaration filed in this matter fails to provide the required information.

**Debtors Fail to Remedy the Existing Breaches and
Their Violation of the Confirmed Plan and Confirmation Order**

In this Motion, Debtors and their counsel ignore that the Debtors have violated the confirmed plan, violated the confirmation order, and violated the promise they made for payments to be made in the plan. A debtor proceeding in good faith would come forward in good faith with his counsel to seek a order retroactively approving a trial loan modification and also retroactively authorize the debtor having previously made a portion of the monthly plan payment to the creditor directly, as well as retroactively authorizing the Chapter 13 Trustee to make no payment to the creditor to whom Debtor made the direct payments.

Here, Debtors do not seek such retroactive authorization. Making such request as an afterthought following the court’s tentative ruling in this matter is not appropriate.

At this point, to grant the Motion would merely being the court condoning Debtors’ decision to write their own bankruptcy code, the Debtors unilaterally change their plan terms, the Debtors hiding/not disclosing the actual terms fo the modified loan, and ignore and failing to remedy their prior violations of the confirmed plan and confirmation order.

No final loan modification or terms are presented to the court. In the declaration in support (Dckt. 49), Debtors appears to admit that the terms of the actual loan modification are not known, stating, “We have completed all of the trial payments timely and are awaiting the permanent modification.” There was, as of the filing of the Motion, no final loan modification.

There is no loan modification presented to the court to approve. It may be that there is no loan modification to be approved. At best, there was a trial loan modification presented to Debtors – with final terms to follow if Debtors provided all of the non-specified documents.

The court will not authorize the Debtors to enter into some non-specific post-petition financing, as Debtors’ counsel well knows. Though the Motion could be denied with prejudice, the court will deny this Motion without prejudice and allow Debtors and Debtors’ counsel to focus on addressing with creditor whether there is an actual loan modification which can be presented to the court.

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

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

The Motion to Approve the Loan Modification filed by Joe Porto and Melissa Porto (“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 court denies without prejudice the Motion to Approve Loan Modification.

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 Chapter 13 Trustee and Office of the United States Trustee on August 23, 2016. By the court’s calculation, 21 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 granted.

Avelino Santos (“Debtor”) seeks 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 Debtor’s second bankruptcy petition pending in the past year. The Debtor’s prior bankruptcy case (No. 16-25099) was dismissed on August 22, 2016, after Debtor failed to timely file documents. *See* Order, Bankr. E.D. Cal. No. 2016-25099, Dckt. 13, August 22, 2016. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor thirty days after filing of the petition.

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty 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. Debtor filed the previous case *pro se* on August 3, 2016, to stop a foreclosure on his residence. He then obtained legal counsel and determined that he had not completed the required credit counseling certificate prior to the filing of his case. Therefore, that case had to be dismissed, and the new case was filed subsequently.

The Debtor has 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 motion is granted, and the automatic stay is extended for all purposes and parties, unless terminated by operation of law or further order of this court.

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

IT IS ORDERED that the Motion is granted, and the automatic stay is extended pursuant to 11 U.S.C. § 362(c)(3)(B) for all purposes and parties, unless terminated by operation of law or further order of this court.

15. [16-24146-E-13](#) STANLEY/KATHLEEN HART **OBJECTION TO CONFIRMATION OF**
DPC-1 Matthew DeCaminada **PLAN BY DAVID P. CUSICK**
8-17-16 [[40](#)]

Final 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 Debtors and Debtors' Attorney on August 17, 2016. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The only basis for the Objection having been resolved by the Debtors prior to the hearing, and upon review of the Motion and supporting pleadings, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion. The defaults of the non-responding parties in interest are entered.

The court's decision is to overrule the Objection to Confirmation.

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

- A. The Debtors cannot make the payments under the Plan or comply with the Plan. The Debtors' Plan relies on a Motion to Value Collateral of Patelco Credit Union.

- B. Where the Plan provides for the debt to be valued at \$0.00 but is scheduled for \$32,709.59, the Plan will not complete within sixty (60) months unless the Motion to Value is granted. The Motion to Value was continued to October 18, 2016, to allow the Debtors time to get an appraisal.

The Debtors have pending a Motion to Value the Secured Claim of Patelco Credit Union, with the continued hearing on that motion set for October 28, 2016. Order, Dckt. 52. The hearing was continued to allow the Credit Union time to investigate the value and file an opposition, if any.

On September 6, 2016, Patelco Credit Union filed a withdrawal of its opposition to the Motion to Value its secured claim at \$0.00. Withdrawal, Dckt. 54. There being no opposition to that Motion, the court removes it from the October 18, 2016 calendar and shall issue a separate order thereon granting the Motion to Value and valuing the secured claim of Patelco Credit Union at \$0.00 pursuant to 11 U.S.C. § 506(a).

The Objection to confirmation is overruled.

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 overruled. 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.

ADDITIONAL ORDER VALUING SECURED CLAIM - DCN: SJS-1

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the August 16, 2016 (Dckt. 44) hearing on this Motion and as stated in this Order.

The Motion to Value the Secured Claim of Patelco Credit Union (“Creditor”) filed by Stanley Hart and Kathleen Hart (“Debtors”) has been presented to the court. The evidence presented is that the value of the real property securing the claim is less than the obligation owing the creditor holding the senior lien against the property. Further, on September 6, 2016, Patelco Credit Union filed a withdrawal of its opposition to the Motion to Value. Withdrawal, Dckt. 54. Upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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 17, 2016. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

- A. The Debtor has failed to provide the Trustee with a tax transcript or a copy of his Federal Income Tax Return with attachments for the most recent pre-petition tax year for which a return was required, or a written statement that no such documentation exists.
- B. The Internal Revenue Service filed a claim that states that the Debtor has failed to file income taxes for 2015. The Debtor is required by the conclusion of the Meeting of Creditors to have filed all tax returns due during the four-year period preceding the

filing of the Petition. The Meeting of Creditors was continued to September 22, 2016, at 11:00 a.m.

- C. The Debtor has failed to provide the Trustee with his Employer Payment Advices received sixty (60) days prior to filing. The Debtor provided two pay advices to the Trustee at the First Meeting of Creditors held August 11, 2016, but the full sixty (60) days prior to filing have not been provided to the Trustee.
- D. The Debtor cannot make the payments under the Plan or comply with the Plan. The Debtor proposes to value to secured claims of River City Bank and Key Bank, but has not filed motions to value to date.
- E. Debtor owns 50% Master Tech Automotive, Inc. The Debtor has failed to provide the Trustee with the requested information about the business including a Business Questionnaire, six months of Bank Statements, and a Corporate Income Tax Return.
- F. Debtor's Plan fails to provide for all of the secured debts listed on Schedule D, namely: Green Tree Servicing First Deed of Trust; Hilton Grand Vacations; Nation Star Mortgage Deed of Trust; and Selene Finance LP, Second Mortgage.
- G. The Plan may not be the Debtor's best effort or may not be filed in good faith. The Debtor is over the median income and proposes Plan payments of \$775.00 for sixty (60) months with a 0% dividend to unsecured creditors. The Debtor's Official Form 122C-1 reflects projected disposable income of \$34.93 for sixty (60) months for a total of \$2,095.80.

The Trustee deducts \$958.00 from line #17 of Debtor's Form 122C-1 as it appears to be a voluntary retirement contribution which Debtor is not eligible to claim. The Debtor should not be allowed to deduct this expense on Official Form 122-C1. The unsecured creditors should be entitled to \$993.00 per month for sixty (60) months, totaling \$59,580.00

- H. The Debtor lists a 2004 Mastercraft Boat, Camping Trailer, and Toyota Prius all being paid by Master Tech Auto, Inc. in Class 4, which is the Debtor's corporation, which he owns with Ismael Resendeiz. It is not clear whether the Corporation will make these payments and why it will make these payments.

A claim has been filed for the trailer and the debt does not appear to be a corporate debt based on the Trustee's review of the claim. If the Debtor is simply diverting corporate income to pay personal debts rather than through the plan, all these claims should be paid through the plan so that the court can verify the claims are owed, paid, and that no extra income is available for creditors.

The Trustee's objections are well-taken.

The basis for the Trustee's objection is that the Debtor has failed to 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); Fed. R. Bankr. P. 4002(b)(3). Additionally, the Debtor has failed to provide all necessary employer payment advices for the 60-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv). Failure to provide all necessary pay stubs and the tax transcript is reason to deny confirmation. 11 U.S.C. § 1325(a)(1).

The Debtor is also required to have filed all tax returns due during the four-year period preceding the filing of the petition. 11 U.S.C. §§ 1308 and 1325(a)(9). The Debtor has failed to file income taxes for 2015. Debtor's failure to file is an independent ground to deny confirmation.

The Debtor may not be able to make Plan payments or comply with the Plan. The Debtor's Plan relies on Motions to Value Collateral of River City Bank and Key Bank, but the Debtor has not filed such a motion. Without valuing the claim, the plan is not feasible. 11 U.S.C. § 1325(a)(6).

The Debtor has failed to timely provide the Trustee with business documents including: the Business Questionnaire; six months of Profit and Loss Statements; and a Corporate Income Tax Return. 11 U.S.C. § 521(e)(2)(A); Fed. R. Bankr. P. 4002(b)(3). These documents are required seven days before the date set for the first Meeting. 11 U.S.C. § 521(e)(2)(A)(i). Without the Debtor submitting the required documents, the court and the Trustee are unable to determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325.

The Plan fails to provide for all of Debtor's secured debts. Debtor's Schedule D lists the following secured debts that are not accounted for in the Plan: Green Tree Servicing First Deed of Trust; Hilton Grand Vacations; Nation Star Mortgage Deed of Trust; and Selene Finance LP, Second Mortgage. Without including these debts in the Plan, it is impossible for the court to determine whether Debtor can afford the plan payments. This is reason to deny confirmation. 11 U.S.C. § 1325(a)(6).

The Plan may not be the Debtor's best effort or may not have been filed in good faith. The Debtor is over the median income and proposes plan payments of \$775.00 for 60 months with a 0% dividend to unsecured creditors. The Debtor's Official Form 122C-1 reflects projected disposable income of \$34.93 for 60 months for a total of \$2,095.80. However, Debtor includes in his Involuntary Deductions on Official Form 122C-1 a \$958.00 voluntary retirement contribution. The Trustee in Debtor's prior case made the same objection when Debtor listed the same \$958.00 as a voluntary retirement contribution, and that objection was sustained. The Debtor now attempts to take the same deduction in this case. This is an indication of bad faith by the Debtor and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(7).

The Debtor lists a 2004 Mastercraft Boat, Camping Trailer, and Toyota Prius all as being paid by Debtor's business, Master Tech Auto, in Class 4. Claim #7 has been filed for a N 2008 Rockwood RLT8319SS, which appears to be the trailer. It appears as if the Debtor is attempting to divert corporate income to pay personal debts rather than directly through the Plan.

The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained, and the Plan is not confirmed. Debtor's failure to file tax returns is an independent ground to deny confirmation.

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

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

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

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

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

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

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

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, Chapter 13 Trustee and Office of the United States Trustee on August 8, 2016. By the court's calculation, 36 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.

HSBC Bank USA, National Association, Creditor, opposes confirmation of the Plan on the basis that:

- A. The Plan fails to provide for the maintenance of ongoing monthly payments or otherwise provide treatment of Creditor's claim.
- B. The Plan is not funded adequately. The Plan fails to include arrearages for Creditor's claim. The Creditor estimates that arrearages are approximately \$20,690.13. The actual arrearage amount will be disclosed in a timely filed proof of claim.

The Creditor's objections are well-taken. The basis for the Creditor's objection is that the Plan does not provide for the full value of the Creditor's claim because it fails to provide for ongoing post-petition payments.

Though Creditor has not yet filed a proof of claim, the declaration of Nicole Norsworthy (Dckt. 19) is filed with the Objection. Ms. Norsworthy testifies as an employee of Nationstar Mortgage, LLC, the servicing agent for HSBC Bank, USA, N.A. This employee provides testimony that the arrearage on the claim is approximately \$20,690.13. The Plan does not provide for the ongoing payments of this debt. Because the Plan does not provide for the surrender of the collateral for this claim, the Plan must provide in payment in full of the arrearage as well as maintenance of the ongoing note installments. *See* 11 U.S.C. §§ 1322(b)(2), (5) and 1325(1)(5)(B). Because it fails to cure the arrearage or provide for maintenance of the ongoing note installments, the Plan cannot be confirmed.

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

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

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

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

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

19.	15-29147-E-13 DPC-1	JOHN QUIROZ Richard Kwun	AMENDED OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK 3-4-16 [83]
-----	--	------------------------------------	---

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 – Continued hearing.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and creditor on March 4, 2016. By the court's calculation, 193 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 failed to provide the Trustee with copies of Employer Payment Advices.
2. The Debtor failed to provide the Trustee with a tax transcript or a copy of his Federal Income Tax Return with attachments for the most recent pre-petition tax year.
3. The Debtor amended Schedules B, C, I, and J, the day before the meeting of creditors.
4. The Debtor is delinquent \$100.00 in plan payments and the Trustee has not received any plan payments from the Debtor.

DECLARATION FROM TRUSTEE

Christina Lloyd, an employee of Chapter 13 Trustee, filed a supplemental declaration on January 13, 2016. Dckt. 25. Ms. Lloyd states that the Debtor has still failed to provide the payment advices and the tax return information.

Ms. Lloyd does state that on January 7, 2016, an e-mail was sent from Debtor's counsel office that contained the 2014 Federal tax transcript and Earning Statements period ending October 15, 2015 and October 30, 2015.

The Trustee restates that the Debtor remains \$100.00 delinquent in plan payments.

FEBRUARY 9, 2016 HEARING

At the hearing, the court continued the matter to March 1, 2016. Dckt. 37.

MARCH 1, 2016 HEARING

At the hearing, the court continued the matter to September 13, 2016. Dckt. 75.

TRUSTEE'S AMENDED OBJECTION

The Trustee filed an amended objection on March 4, 2016. Dckt. 83. The Trustee opposes confirmation of the plan on three grounds:

- A. All priority claims are not provided for as required under 11 U.S.C. § 1322(a)(2);
- B. The Plan may not be Debtor's best efforts under 11 U.S.C. § 1325(b) based on the failure to commit a likely tax refund and the uncertainty of income based on commissions from new employment; and
- C. Debtor may not be able to make plan payments as required under 11 U.S.C. § 1325(a)(6).

The Trustee states that Debtor is over the median income and proposes plan payments of \$100.00 per month for sixty (60) months, with a 0% dividend to the unsecured creditors. Trustee notes that the original Schedule I shows the Debtor at a job for two years and two months, but the latest Schedule I shows the Debtor at a new job for the last three months (as of March 4, 2016). Trustee states that Debtor received a total refund of \$4,849.00 for the 2012 tax year, \$10,608.00 for the 2013 tax year, and approximately \$9,049.00 for the 2014 tax year. Debtor admitted at the First Meeting of Creditors that he received approximately \$6,000.00 from his 2014 federal refund. No future tax refund income is projected on Schedule I. Finally, Trustee states that he has not requested the 2015 tax return yet.

DEBTOR'S RESPONSE

Debtor filed a response on August 31, 2016. Dckt. 112. Debtor states that the proper provision for priority claims not yet classified is moot because Debtor and his ex-spouse have reached an agreement. Debtor's attorney states that he will file a "9019" motion when the agreement is approved by the county judge who has jurisdiction. Debtor states that Creditor Patricia Costley will withdraw her priority claims.

Debtor states that he has received and exempted his tax refund in the amount of approximately \$1,000.00. Debtor states that he will file amended Schedules B and C. Debtor states that because the tax refund is lower than in previous years, the plan payment is a true and accurate measure of Debtor's actual disposable income.

DISCUSSION

No supplemental Schedules or documents reflecting an agreement between Debtor and Creditor Patricia Costley have been filed since August 31, 2016. A review of the proofs of claim indicates that Creditor Patricia Costley's claim is on file still.

Debtor commenced this case almost a year ago, seeking to have this court wrestle jurisdiction away from the family law state court to address marital dissolution issues. This federal court declined the opportunity to take over the family law dispute from the state court. *See* Civil Minutes, Dckt. 75.

Though continued, it appears that Debtor's efforts toward confirmation of a plan have languished, with no reporting to the court of the status or any affirmative action being taken in this court.

At this juncture, the court sustains the objection and denies confirmation of the proposed plan. Maybe Debtor needs to start fresh with a plan and move something to confirmation. Clearly, continuing the hearings on this Objection has not moved Debtor toward actively confirming a plan.

The Trustee's objections are well-taken.

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.

20. [16-24147-E-13](#)
DPC-1

KATHLEEN MCKELVIE
Peter Macaluso

**OBJECTION TO CONFIRMATION OF
PLAN BY DAVID P. CUSICK
8-17-16 [12]**

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 17, 2016. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

- A. The Debtor is \$2,010.00 delinquent in plan payments to the Trustee to date, and the next scheduled payment of \$2,110.00 is due on August 25, 2016. The case was filed on June 27, 2016. The Debtor has paid \$100.00 into the Plan to date.
- B. The Debtor has failed to provide business documents to the Trustee. The Debtor owns Child Action, which appears to be a child care business, but has failed to provide the Trustee with the Business Questionnaire, six months of Profit and Loss Statements, and a business attachment to Schedule I.

- C. The Plan may not be the Debtor's best effort. The Debtor is over the median income and proposes plan payments of \$2,110.00 for sixty (60) months with a 0% dividend to unsecured creditors. The Debtor lists a \$200.00 expense for property taxes twice on Schedule J. It appears the Debtor has an additional \$200.00 to pay into the Plan each month.
- D. The Debtor filed a prior case on June 28, 2013. No. 13-28663. The Schedules in this case appear to have the same values as the prior case. With no change in value or income in three years, the Debtor's testimony in the Schedules does not appear credible.

The Trustee's objections are well-taken.

The Trustee opposes confirmation offering evidence that the Debtor is \$2,010.00 delinquent in plan payments. This is strong evidence that the Debtor cannot afford the plan payments or abide by the Plan and is cause to deny confirmation. 11 U.S.C. §1325(a)(6).

The Debtor has failed to timely provide the Trustee with business documents including: the Business Questionnaire; six months of Profit and Loss Statements; and a Business Attachment to Schedule I. 11 U.S.C. § 521(e)(2)(A); Fed. R. Bankr. P. 4002(b)(3). These documents are required seven days before the date set for the First Meeting of Creditors. 11 U.S.C. § 521(e)(2)(A)(i). Without the Debtor submitting the required documents, the court and the Trustee are unable to determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325.

The Plan may not be the Debtor's best effort. The Debtor is over the median income and proposes plan payments of \$2,110.00 per month with a 0% dividend to unsecured creditors. Debtor has listed a \$200.00 property tax expense twice on Schedule J. Debtor has an additional \$200.00 each month, which should be paid into the Plan. The Plan does not appear to be the Debtor's best effort. 11 U.S.C. §1325(b).

Additionally, the Debtor's Schedules appear to have the same values as when Debtor filed her prior case three years ago. The concern of the Trustee, as well as the court, is that neither the court nor any other parties in interest can determine the viability and feasibility of the plan when the Debtor has failed to provide updated and accurate information as to the Debtor's finances. The court finds it hard to believe that in the past three years, the Debtor's expenses and income has not changed. Without this information, the court is unable to confirm the Plan.

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

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

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

- C. Debtor has attempted to avoid paying Creditor interest on its secured claim. The Proposed Plan proposes an interest rate of 0.00%.

The Creditor's objections are well-taken.

The Creditor objections on the first basis that the Plan does not properly state the value of the collateral securing Creditor's claim. Section 2.04 of the Plan provides:

2.04. 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.

A review of the Claims Register shows Creditor filed a proof of claim in the amount of \$9,204.34 on August 16, 2016. Proof of Claim No. 2. The Proof of Claim is prima facie evidence of the obligation owed by the Debtor. Fed. R. Bankr. P. 3001(d). Thus, irrespective of the amount stated in the Plan, it is the proof of claim that controls. The issue becomes whether the plan provides sufficient funding for the claim.

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 9.99% fixed rate. The Plan attempts to alter this interest rate by providing for adequate protection payments, but the Creditor also asserts that the proposed adequate protection and interest payments are insufficient to protect the asset.

However, the court granted John Burgess, III's ("Debtor") Voluntary Motion to Dismiss Case on September 9, 2016 (Dckt. 46), thereby rendering the Objection moot.

The bankruptcy case having been dismissed. The objection is overruled as moot.

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

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

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

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

22. [16-23950-E-13](#) JOHN BURGESS
DPC-1 Pro Se

OBJECTION TO CONFIRMATION OF
PLAN BY DAVID P. CUSICK
8-17-16 [28]

Final Ruling: No appearance at the September 13, 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 on August 17, 2016. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

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

The court's decision is to overrule the Objection as moot, this bankruptcy case having been previously dismissed.

The court having granted John Burgess, III's ("Debtor") Voluntary Motion to Dismiss Case on September 9, 2016 (Dckt. 46), the Objection is overruled as moot.

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

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

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

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

Final Ruling: No appearance at the September 13, 2016 Hearing is required.

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 27, 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 hearing on the Motion to Confirm the Amended Plan is continued to 1:30 p.m. on September 20, 2016 (specially set to the 1:30 p.m. calendar) to be heard in conjunction with the hearing on Debtor's motion to reconsider the order granting relief from the automatic stay.

THE COURT POSTED THE FOLLOWING TENTATIVE RULING WHICH WAS PREPARED FOR THE SEPTEMBER 13, 2016 HEARING FOR THE INFORMATION OF THE PARTIES.

Dianne L. Akzam ("Debtor") filed the instant Motion to Confirm Amended Plan July 29, 2016. Dckt. 82.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition to the Instant Motion August 24, 2016. Dckt. 97. The Trustee objections on the following grounds:

- A. The Debtor has filed six prior cases from 2010 to 2015. Jeffrey Akzam and his sister, the Debtor, have filed a series of coordinated Chapter 13 cases without either of them engaging in the good faith prosecution of those cases. The U.S. Trustee has commenced an Adversary Proceeding seeking injunctive relief to preclude Diane Akzam from filing further non-productive cases.
- B. The Debtor lists real property on Schedule A as 802 Ohio Street, Vallejo, California. The Debtor fails, however, to provide for this debt in the Plan on Schedule D. The Debtor lists the value of the property at \$240,000.00 and indicates that she is a co-owner, but Schedule H does not list a co-debtor.

C. Debtor cannot make the payments required under the plan. Debtor filed an amended Schedule J on March 10, 2015, making the following changes without any explanation:

1. Rent expense decreased from \$300.00 to \$0.00;
2. Electricity expense increased from \$0.00 to \$130.00;
3. Water expense increased from \$0.00 to \$100.00; and
4. Phone expense increased from \$0.00 to \$70.00.

Debtor's budget is insufficient for the maintenance and support of the Debtor.

DISCUSSION

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

The Trustee's objections are well-taken.

One basis for the Trustee's objection is that Debtor is a serial bankruptcy filer. The Debtor has filed the following cases since 2010:

Case Number	Date Filed	Result
10-45216	September 22, 2010	Dismissed
11-20282	January 4, 2011	Dismissed
11-43187	September 27, 2011	Dismissed
12-37369	September 27, 2012	Dismissed
14-23825	April 14, 2014	Dismissed
14-28272	August 14, 2014	Dismissed
15-29555	December 11, 2015	Current Case

The court is cognizant of the significant impact the filing of a bankruptcy case has on not only the Debtor, but creditors and other persons. Even if, due to the repeated filings and the provisions that Congress has placed in a subparagraph of a subsection of the Bankruptcy Code, the automatic stay does not go into effect, the mere presentation of a petition and the significant sanctions imposed on someone violating the stay can work to prevent creditors from legitimately enforcing their rights. In these cases, the Debtor has filed a series of nonproductive Chapter 13 cases, which appear to exist only for the purpose of deterring a creditor from proceeding with a foreclosure on real property. The Debtor has been afforded multiple opportunities to advance a Chapter 13 plan to cure defaults on the obligation owing to the creditor and restructure the debt through the Chapter 13 plan. While obtaining

the benefit of the automatic stay, whether actual or improperly represented to exist, the Debtor has been unable or refused to properly prosecute a Chapter 13 Plan. This is an indication the plan has not been proposed in good faith and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(3).

Additionally, the Plan may not be the Debtor's best effort. Debtor's Schedule A includes real property, however the Debtor fails to provide for this debt both in the Plan and in Debtor's Schedule D. The Debtor also indicates that she is a co-owner of the property, but no co-owner is listed on Schedule H. Further, Debtor filed an amended Schedule J, but failed to file a declaration explaining the changes. As such, the proposed plan does not appear to be the Debtor's best efforts. 11 U.S.C. §1325(b).

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 hearing on the Motion to Confirm the Plan is continued to 1:30 p.m. on September 20, 2016 (specially set to the 1:30 p.m. calendar).

24.	11-44656-E-13 DPC-9	PAUL/DIANE DUMETZ Jasmin Nguyen	CONTINUED MOTION TO DISMISS CASE 4-20-16 [55]
-----	--	------------------------------------	--

Final Ruling: No appearance at the August 10, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, and Office of the United States Trustee on April 20, 2016. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The court's decision is to deny without prejudice the Motion to Dismiss.

David Cusick, the Chapter 13 Trustee, filed the instant Motion to Dismiss on April 20, 2016. Dckt. 55. The Trustee seeks dismissal due to the Debtors' delinquency in plan payments.

DEBTOR'S REPLY

The Debtors filed a reply on May 4, 2016. Dckt. 59. The Debtors state that both Debtors' income were reduced, and medical illnesses arose. This caused the Debtors to fall behind on their payment beginning February 2016. The Debtors state that Debtor Paul Anthony Dumetz was laid off in early 2015 and is now collecting Social Security income. Debtor Diane Dumetz was diagnosed with cancer in 2013, which led to her ending her employment and collecting disability.

The Debtors state that Debtor Diane Dumetz inherited a portion of a residence in San Francisco along with her two other siblings. The Debtors state that the Debtors anticipate that the residence will be listed for sale in June 2016.

The Debtors request that the court continue the motion to provide the Debtors the opportunity to sell the property and get current under the plan.

MAY 18, 2016 HEARING

The Trustee seeks dismissal of the case on the basis that the Debtors are \$6,289.12 delinquent in plan payments, which represents multiple months of the \$3,144.56 plan payment. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

However, in light of the recent inheritance and the substantial amount of funds the Debtors have paid into the plan to date, the court continued the instant Motion to 10:00 a.m. on June 22, 2016.

In continuing the hearing, the court first noted that this bankruptcy case was filed in October 2011. The sixty month plan maximum will be expiring this calendar year. While there is time for Debtors to act, Debtors must act promptly.

Second, Debtors will have to address the sale of the newly acquired property (the interest in the house) as permitted by the Plan (which does not yet provide for the sale) and the Bankruptcy Code (for which court approval is required not only for the sale, but also for hiring the real estate broker). The court could not tell if the property is being sold as part of a probate or by Debtors and two siblings personally.

The court continued the hearing to 10:00 a.m. on August 10, 2016.

DEBTOR'S REPLY

The Debtors filed a reply on August 1, 2016. Dckt. 79. The Debtors filed and set for hearing a Motion to Sell Real Property and a Motion to Confirm First Modified Plan for 3:00 p.m. on September 13, 2016.

The Debtors requested that the instant Motion be continued to the same date to be heard in conjunction.

AUGUST 10, 2016 HEARING

In light of the Debtor having taken affirmative steps to sell and confirm a plan, the court continued the instant Motion to 3:00 p.m. on September 13, 2016.

DISCUSSION

No supplemental pleadings have been filed. The court having granted the subsequent Motion to Sell and Motion to Confirm Modified Plan, this Motion is denied without prejudice.

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

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

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

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

25. [11-44656-E-13](#)
JTN-2

PAUL/DIANE DUMETZ
Jasmin Nguyen

MOTION TO SELL
7-29-16 [[67](#)]

Tentative Ruling: The Motion to Sell Property 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 Debtors, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 29, 2016. By the court's calculation, 46 days' notice was provided. 28 days' notice is required.

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

The Motion to Sell Property is granted.

The Bankruptcy Code permits the Chapter 13 Debtors ("Movants") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movants propose to sell real property commonly known as 548 Plymouth Avenue, San Francisco, California ("Property"). The Motion states that Movants have inherited this property.

The Motion states that on May 24, 2016, Movants filed a motion for authorization to employ a real estate broker.

The proposed purchaser of the Property is Jun Sheung Lin, and the terms of the sale are:

- A. \$808,000.00 purchase price;
- B. Escrow to close thirty (30) days after acceptance;

- C. Sold through seller's agent Keller Williams San Francisco and buyer's agent Century 21 Realty Alliance;
- D. Initial deposit of \$24,240.00;
- E. First loan of \$520,000.00;
- F. Balance of \$263,760.00 to be deposited with escrow holder;
- G. Seller paying cost of natural hazard zone disclosure report, smoke alarm and carbon monoxide device installation, water heater bracing, and county transfer tax or fee;
- H. Buyer paying cost of escrow fee and owner's title insurance policy;
- I. Sale to include all existing fixtures;
- J. Property sold "as-is;" and
- K. Compensation to brokers to be paid separately upon close of escrow. Exhibit A, Dckt. 70.

Movants anticipate receiving \$759,523.79 in net proceeds after fees and costs. Exhibit B, Dckt. 70. Those fees and costs include the following:

- A. Title fee for Fidelity National Title Company in the amount of \$300.00;
- B. Recording fee for Fidelity National Title Company in the amount of \$100.00;
- C. County transfer tax for Fidelity National Title Company in the amount of \$5,494.40;
- D. 3R report reimbursement for Charlene Delaney in the amount of \$155.00;
- E. 2.25% commission for Century 21 Realty Alliance in the amount of \$18,180.00;
- F. 2.75% commission for Keller Williams Realty in the amount of \$22,220.00;
- G. Energy and water conservation for Re Inspection Services in the amount of \$1,336.00;
- H. Hazards disclosure for Disclosure Source in the amount of \$89.00; and
- I. Locksmith fee for Metro Locksmith, Inc. in the amount of \$601.81. Exhibit B, Dckt. 70.

Movants' Motion states that the Property is held by the Ella Durham Living Trust and that proceeds from the proposed sale will go to the Trust directly. Then, the Trust's trustee will disburse

proportionate funds to Debtor Diane Dumetz. Movants state that then they will give to the Chapter 13 Trustee the amount required to pay 100% of unsecured claims and any applicable fees or arrears necessary to the complete the Chapter 13 Plan.

Movants have filed a Modified Chapter 13 Plan to account for the sale of the Property and payment for unsecured claims. Dckt. 76.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response on August 17, 2016. Dckt. 84. The Trustee does not oppose the proposed sale and believes that the proceeds will complete Movants' plan. The Trustee states that the amount needed to complete the plan—\$102,000.00—could be disbursed from escrow to the Trustee directly.

TRUSTEE'S SUPPLEMENTAL RESPONSE

The Trustee filed a supplemental response on August 19, 2016. Dckt. 86. Trustee states that he has learned that it will not be possible for the remaining \$102,000.00 in plan payments to be disbursed from escrow to the Trustee directly. Trustee refers to an August 18, 2016 e-mail from Fidelity National Title Company stating that all proceeds "must" go to the Ella Durham Living Trust because it is the seller of the Property.

Trustee states that Movants' attorney received confirmation from the Trust's trustee that Movants' portion of the funds could be disbursed to the Chapter 13 Trustee.

MOVANTS' REPLY

Movants filed a reply to the Trustee's Response and Supplemental Response on August 29, 2016. Dckt. 91. Movants emphasize that Trustee does not oppose the sale and would be able to be paid by the Ella Durham Living Trust trustee once funds are received from the sale.

DISCUSSION

At the time of the hearing the court announced the proposed sale and requested that all other persons interested in submitting overbids present them in open court. At the hearing, the following overbids were presented in open court: XX.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because the proceeds will complete Movants' plan payments.

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 Sell Property filed by Paul Dumetz and Diane Dumetz, the Chapter 13 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 Paul Dumetz and Diane Dumetz, the Chapter 13 Debtors, are authorized to sell pursuant to 11 U.S.C. § 363(b) to Jun Sheung Lin or nominee (“Buyer”), the Property commonly known as 548 Plymouth Avenue, San Francisco, California (“Property”), on the following terms:

1. The Property shall be sold to Buyer for \$808,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 70, and as further provided in this Order.
2. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.
3. The Chapter 13 Debtors be, and hereby are, authorized to execute any and all documents reasonably necessary to effectuate the sale.
4. The Chapter 13 Debtors be and hereby are authorized to pay a real estate broker’s commission in an amount equal to two and three-quarters percent (2.75%) of the actual purchase price upon consummation of the sale. The two and three-quarters percent (2.75%) commission shall be paid to the Chapter 13 Debtors’ agent, Keller Williams San Francisco.
5. No proceeds of the sale, including any commissions, fees, or other amounts, shall be paid directly or indirectly to the Chapter 13 Debtor. Within fourteen (14) days of the close of escrow the Chapter 13 Debtor shall provide the Chapter 13 Trustee with a copy of the Escrow Closing Statement. Any monies not disbursed to creditors holding claims secured by the property being sold or paying the fees and costs as allowed by this order, shall be disbursed to the Chapter 13 Trustee directly from escrow.

26. [11-44656-E-13](#)
JTN-3

PAUL/DIANE DUMETZ
Jasmin Nguyen

MOTION TO MODIFY PLAN
7-29-16 [73]

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, creditors, parties requesting special notice, and Office of the United States Trustee on July 29, 2016. By the court's calculation, 46 days' notice was provided. 35 days' notice is required.

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

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

Paul Dumetz and Diane Dumetz filed the instant Motion on July 29, 2016. Dckt. 73.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response on August 29, 2016. Dckt. 88. The Trustee states that he does not oppose the Motion. Trustee notes that Debtors' are proposing proceeds from the sale of real property, an approximate amount of \$102,000.00 to complete the Chapter 13 Plan and pay a 100% dividend to the unsecured creditors.

DISCUSSION

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

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

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

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

IT IS ORDERED that the Motion is granted, Debtor's Chapter 13 Plan filed on July 29, 2016 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

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

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

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

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 17, 2016. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The court's decision is to continue the hearing on the Objection to Confirmation to 3:00 p.m. on October 25, 2016.

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

- A. Debtor failed to appear at the First Meeting of Creditors held on August 11, 2016. The Trustee was advised that Debtor was under medical care. The Meeting has been continued to October 6, 2016, at 11:00 a.m.

The Trustee's objection is well-taken. The Debtor failed to appear at the First Meeting of Creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. To attempt to confirm a plan while failing to appear and be questioned by the Trustee and any creditors who appear

represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). This is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

However, in his Opposition, the Trustee requests that the court continue the hearing on this Objection, to afford Debtor the opportunity to appear at the continued Meeting in light of the circumstances.

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 of the Plan is continued to 3:00 p.m. on October 25, 2016.

28. [16-23259-E-13](#) **CHRISTOPHER/LORA CLARK**
DPC-1 **Robert Fong**

**CONTINUED OBJECTION TO
CONFIRMATION OF PLAN BY DAVID
P. CUSICK**
7-6-16 [25]

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 Debtors and Debtor's Attorney on July 6, 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.

The court's decision is to overrule the Objection to Confirmation.

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

- A. The Debtor's plan relies on the Motion to Value Collateral of GM Financial at \$10,950.00.
- B. The Debtor has failed to file all pre-petition tax returns required for the four years preceding the filing of the Petition. On July 1, 2016, The Internal Revenue Service filed Court Claim #1, which indicates that Debtor's have not filed tax returns for 2012 and 2015.

AUGUST 16, 2016 HEARING

At the hearing, the court continued the matter to September 13, 2016, at 3:00 p.m.

TRUSTEE'S SUPPLEMENTAL DECLARATION

The Trustee filed a supplemental declaration regarding the updated status of the Trustee's Objection to Confirmation. The Trustee states that both grounds for Trustee's objection have been resolved.

The Trustee states that he has reviewed the Plan and its claims and has determined that the Plan is feasible and confirmable as proposed. The Trustee no longer objects to confirmation and requests that the court overrule Trustee's Objection to Confirmation.

DISCUSSION

The Trustee's objections having been resolved, and the Trustee having stated that he no longer objects to confirmation, the Trustee's objections are overruled.

The Plan complies with 11 U.S.C. §§ 1322 and 1325(a). The objection is overruled, and the Plan is confirmed.

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

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

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

IT IS ORDERED that the Objection is overruled, Debtor's Chapter 13 Plan filed on May 19, 2016, is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

29. [16-23267-E-13](#) **GEORGE NJENGE AND RACHEL EKINDESONE** **MOTION TO VALUE COLLATERAL OF BANK OF AMERICA, AS SERVICED BY FAYE SERVICING, LLC**
DRE-1 **D. Randall Ensminger** **8-9-16 [28]**

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

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

Below is the court’s tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, and Office of the United States Trustee on August 4, 2016. By the court’s calculation, 40 days’ notice was provided. 28 days’ notice is required.

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

The Motion to Value secured claim of Bank of America (“Creditor”) is denied without prejudice.

The Motion to Value filed by George Njenge and Rachel Ekindeone (“Debtors”) to value the secured claim of Bank of America, as serviced by Faye Servicing, LLC (“Creditor”) is accompanied by Debtor’s declaration. Debtor is the owner of the subject real property commonly known as 3513 Domich Way, Sacramento, California (“Property”). Debtor seeks to value the Property at a fair market value of \$250,000.00 as of the petition filing date. As the owner, Debtor’s opinion of value is evidence of the asset’s value. *See Fed. R. Evid. 701; see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

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

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

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

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

TRUSTEE'S OPPOSITION

Trustee has filed an opposition asserting that Debtor has not correctly identified the property to be valued. Dckt. 46. Debtor's Motion and Declaration both identify the property as 3513 Domich Way, Sacramento, California. However, Debtor's Schedule A/B and D, and the Note and Deed of Trust attached to Creditor's proof of claim, all indicate that the Debtors own property located at 550 Wilson Avenue, Sacramento, California, which is not the address listed in the Motion. The Trustee requests that the motion be denied.

DISCUSSION

The Trustee's opposition is well-taken. The court notes that Debtors have failed to properly identify what real property they are trying to value in the instant Motion. Accordingly, the Motion is denied without prejudice.

Additionally, Debtors are seeking to value the claim of some entity named "Bank of America." There are multiple federally insured financial institutions and multiple California corporations and limited liability companies (in addition to the other 49 states and the District of Columbia) with the words "Bank of America" in their names. The Motion inadequately names any specific person against whom the relief is sought.

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 George Njenge and Rachel Ekindesone ("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 denied without prejudice.

30. [11-36470-E-13](#) **WASIF/IRUM ASGHAR** **MOTION TO DISBURSE FUNDS**
DPC-1 **Mark Wolff** **8-19-16 [169]**

Tentative Ruling: The Motion to Disburse Funds 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, Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on August 19, 2016. By the court's calculation, 25 days' notice was provided. 14 days' notice is required.

The Motion to Disburse Funds 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 Disburse Funds is granted.

David Cusick, the Chapter 13 Trustee, filed the instant Motion on August 19, 2016. Dckt. 169. The Trustee requests a court order to disburse \$994.95 that the Trustee was ordered by the court to hold for disbursement pursuant to a confirmed plan or as further ordered by the court. Dckt. 134. Trustee states that Wasif Asghar and Irum Asghar's ("Debtors") Plan is now complete, and Trustee requests authorization to disburse the funds to the Debtors.

These monies are those returned to the estate which Debtor paid, without court authorization, to special counsel.

The Trustee gives no reason why the monies should be disbursed to the Debtor as opposed to disbursed through the Chapter 13 Plan. For the Class 7 general unsecured claims, the Debtor did not guarantee that those creditors would get no more than 0% disbursed on their claims, but that those creditors would receive not less than 0% for a dividend.

However, in light of the amount of the general unsecured claims, a dividend built on \$994.95 would be approximately two-tenths of one percent, likely costing more to distribute than what each creditor would receive.

11 U.S.C. § 1326(a)(2) states that the trustee shall retain a payment made under subsection (a)(1)(A) until confirmation or denial of confirmation. The section continues to say that “[i]f a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan as soon as is practicable.”

The Declaration of Ed Weedman has been provided in support of the instant Motion. Dckt. 171. The Declaration notes the following:

- A. Debtors’ case is complete;
- B. Debtors made plan payments totaling \$26,399.80, with \$418.98 balance on hand;
 - 1. Those figures do not include the \$994.95;
- C. No dividend was required to unsecured claims (Dckt. 149);
- D. The secured claim of Wells Fargo bank for a 2006 Toyota Avalon was paid in full;
- E. The priority claim of the Internal Revenue Service was paid in full;
- F. Approved attorney’s fees were paid in full;
- G. The priority claim of the State Board of Equalization was paid \$1,152.42 and will not be discharged according to the confirmed plan.

Debtors’ plan having been completed, the Motion is granted, and the Trustee is authorized to disburse \$994.95 to the Debtors.

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 Disburse Funds filed by David Cusick (“Chapter 13 Trustee”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion pursuant to 11 U.S.C. § 1326(a)(2) is granted, and the Chapter 13 Trustee is authorized to disburse \$994.95 to Wasif Asghar and Irum Asghar (“Debtors”).

31. [13-25172-E-13](#) **RODNEY/MARSHA ROBINSON** **MOTION TO MODIFY PLAN**
DJC-2 **Diana Cavanaugh** **7-28-16 [43]**

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 28, 2016. By the court’s calculation, 47 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.

Rodney Robinson and Marsha Robinson (“Debtors”) filed the instant Motion to Confirm Second Modified Chapter 13 Plan on July 28, 2016. Dckt. 43.

TRUSTEE’S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the Instant Motion on August 30, 2016. Dckt. 55. The Trustee objects on the basis that the Debtors are \$2,250.00 delinquent under the proposed Second Modified Plan. The payment due on August 25, 2016, has not been received.

DISCUSSION

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

The Trustee's objection is well-taken.

The basis for the Trustee's objection that the Debtors are \$2,250.00 delinquent in plan payments. This is evidence that the Debtors cannot afford the plan payments or abide by the Plan and is cause to deny confirmation. 11 U.S.C. §1325(a)(6).

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

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

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

The Motion to Confirm the 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 denied.

32.

[16-20475-E-13](#)
MMM-1

JAVIER/DELORES LARA
Mohammad Mokarram

**OBJECTION TO NOTICE OF
POST-PETITION MORTGAGE FEES,
EXPENSES, AND CHARGES
7-19-16 [17]**

Final Ruling: No appearance at the September 13, 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 Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on July 19, 2016. By the court's calculation, 56 days' notice was provided. 28 days' notice is required.

The Objection to Notice of Post-petition Mortgage Fees, Expenses, and Charges 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 Objection to Notice of Post-petition Mortgage Fees, Expenses, and Charges of Bank of America, N.A. is sustained.

Bank of America, N.A. ("Creditor") filed a Notice of Post-petition Mortgage Fees, Expenses, and Charges on July 14, 2016. Javier Lara and Delores Lara ("Debtors") filed the instant Objection to Creditor's notice of \$800.00 in attorney's fees on July 19, 2016. Dckt. 17.

Debtors object on the ground that the claimed fees do not seem justified and may be improper. Debtors request that Creditor provide the court with an explanation of why Creditor believes that the charges are reasonable, and if Creditor cannot provide such explanation, Debtors ask the court to deny the post-petition fees.

CREDITOR'S "WITHDRAWAL"

Creditor filed a Notice of "Withdrawal" on July 26, 2016. Dckt. 21. Creditor does not state any legal ground for a withdrawal, however. The court interprets the "Withdrawal" as a statement of non-opposition to Debtors' objection.

DISCUSSION

Debtors have filed a timely and reasonable objection to Creditor's Notice of Post-petition Mortgage Fees, Expenses, and Charges, and Creditor has stated essentially that it does not oppose Debtors' objection. The Objection is sustained.

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

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

The Objection to Notice of Post-petition Mortgage Fees, Expenses, and Charges of Bank of America, N.A., Creditor, filed in this case by Javier Lara and Delores Lara, Chapter 13 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 Objection to Notice of Post-petition Mortgage Fees, Expenses, and Charges of Bank of America, N.A. ("Creditor") is sustained given Creditor's notice of "Withdrawal" that the court treats as a statement of non-opposition, and the \$800.00 in attorneys' fees and expenses are disallowed entirely.

33. [14-30278-E-13](#) **GARY SHREVES AND KAREN** **MOTION TO MODIFY PLAN**
WW-8 **BAYSINGER- SHREVES** **7-27-16 [152]**
Mark Wolff

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, creditors, parties requesting special notice, and Office of the United States Trustee on July 27, 2016. By the court's calculation, 48 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.

Gary Shreves and Karen Baysinger-Shreves ("Debtors") filed the instant Motion to Confirm Third Modified Chapter 13 Plan July 27, 2016. Dckt. 152.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on August 30, 2016. Dckt. 171. The Trustee objects based on the following grounds:

- A. The Debtors are \$746.00 delinquent under the proposed Third Modified Plan. The payment due on August 25, 2015, has not been received.

- B. The Additional Provisions contain a scrivener's error. The Additional provisions currently state the "total paid as of July 21, 2016 is \$7,0765.20." The total paid as of July 21, 2016, should be \$7,076.20. The Trustee would have no objection to this being corrected in the order confirming.

DISCUSSION

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

The Trustee's objections are well-taken.

The basis for the Trustee's objection is that the Debtors are \$746.00 delinquent under the proposed Plan. The Debtors have not provided any evidence to show that they have cured the delinquency. As such, the delinquency is evidence of the Debtors being unable to make the payments under the Plan. Therefore, the Plan is not confirmable. *See* 11 U.S.C. § 1325(a)(6).

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

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

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

The Motion to Confirm the 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 denied.

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 18, 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.

Wells Fargo Bank, N.A., a Secured Creditor, opposes confirmation of the Plan on the basis that:

- A. Debtor's Plan does not provide for the full value of Creditor's claim. Creditor's secured claim is in the amount of \$88,773.20, but the Debtor's Plan fails to provide for ongoing post-petition payments on Creditor's claim.
- B. The Debtor's Plan is not feasible. Debtor's Schedule J indicates that Debtor has disposable income of \$301.65 per month, all of which is dedicated to the Plan. However, when the Creditor's claim is accounted for, there will be insufficient funds to maintain post-petition payments to Creditor.

The Creditor's objections are well-taken. The basis for the Creditor's objection is that the Plan does not provide for the full value of the Creditor's claim because it fails to provide for ongoing post-petition payments.

The Creditor has filed a timely proof of claim in which it asserts an \$87,083.25 claim. The Plan does not provide for the ongoing payments of this debt. Because the Plan does not provide for the surrender of the collateral for this claim, the Plan must provide in payment in full of the arrearage as well as maintenance of the ongoing note installments. *See* 11 U.S.C. §§ 1322(b)(2), (5) and 1325(1)(5)(B). Because it fails to provide for maintenance of the ongoing note installments, the Plan cannot be confirmed.

Additionally, another basis for the Creditor's objection is that the Debtor will not have sufficient income to fund the Plan once the ongoing payments are included. Debtor's Schedule J indicates a monthly net income of \$301.65, \$300.65 of which is being paid into the Plan. Once Creditor's claim is accounted for in full, the Debtor will not be able to make monthly payments or comply with the terms of the Plan. This is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

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

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

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

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

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

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

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

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

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 17, 2016. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

- A. The Debtor's Plan may not be Debtor's best effort.
 - 1. Debtor is over median income and proposes to pay \$300.65 per month for sixty (60) months with a guaranteed dividend of 100% to the estimated \$3,810.88 of general unsecured claims but with no interest proposed to unsecured claims.

2. The Debtor admitted at the First Meeting of Creditors held on August 11, 2016, that she was no longer paying the \$1,000.00 expense on Schedule J for an additional contribution to her 457 Plan. The debtor's projected disposable

Monthly income listed on Schedule J should reflect income of \$1,301.65. Debtor's proposed Plan's monthly payment is \$300.00. If all of this disposable income is contributed toward the plan, Debtor's Plan will complete in approximately twenty-seven (27) months.

3. The Debtor's gross income on Schedule I reflects \$6,819.66. However based on the pay stubs provided to the Trustee for the month of June 2016, the gross income appears to be \$7,139.00. It appears the Debtor also has additional income to pay into the Plan.

The Trustee's objections are well-taken. It appears that based on the Schedules I and J filed by the Debtor as well as the testimony of the Debtor at the Meeting of Creditor, there is additional income that should be applied to the Plan. Debtor is no longer paying the \$1,000.00 expense on Schedule H for an additional contribution to her 457 Plan. With this additional income, the Plan can be completed in as few as twenty-seven (27) months. In addition, based on Debtor's pay stubs, there is an additional \$319.34 in gross income what could be payed into the Plan. This is reason to deny confirmation. *See* 11 U.S.C. §1325(b).

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.

36. [16-23984-E-13](#)
DPC-1

ANGELICA CASTILLON
HERNANDEZ
Robert Gimblin

CONTINUED OBJECTION TO
CONFIRMATION OF PLAN BY DAVID
P. CUSICK
8-4-16 [14]

Final Ruling: No appearance at the September 13, 2016 Hearing is required.

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

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.

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

The court's decision is to overrule the Objection to Confirmation of Plan and to confirm the Plan.

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.

AUGUST 30, 2016 HEARING

At the hearing, the court noted that Debtor filed a Motion to Value Collateral of Capital One Auto Finance on August 11, 2016. The court continued the instant Objection to September 13, 2016, at 3:00 p.m. to coincide with the Motion to Value Collateral.

DISCUSSION

The court having granted Debtor's Motion to Value Collateral of Capital One Auto Finance, Trustee's opposition has been satisfied. The Plan complies with 11 U.S.C. §§ 1322 and 1325(a). The objection is overruled, and the Plan is confirmed.

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

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

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

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

37. 16-23984-E-13 ANGELICA CASTILLON MOTION TO VALUE COLLATERAL OF
RSG-1 HERNANDEZ CAPITAL ONE AUTO FINANCE
 Robert Gimblin 8-11-16 [18]

Final Ruling: No appearance at the September 13, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, and Office of the United States Trustee on August 11, 2016. By the court's calculation, 33 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 \$5,157.00.

The Motion filed by Angelica Castillon Hernandez ("Debtor") to value the secured claim of Capital One Auto Finance ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2012 Toyota Yaris ("Vehicle"). The Debtor seeks to value the Vehicle at a replacement value of \$5,157.00

as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The lien on the Vehicle's title secures a purchase-money loan incurred in October 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 \$11,313.00. 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 \$5,157.00. *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 Angelica Castillon Hernandez ("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 Capital One Auto Finance ("Creditor") secured by an asset described as 2012 Toyota Yaris ("Vehicle") is determined to be a secured claim in the amount of \$5,157.00, 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 \$5,157.00 and is encumbered by liens securing claims which exceed the value of the asset.

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(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 27, 2016. By the court's calculation, 48 days' notice was provided. 35 days' notice is required.

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

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

Gregg Schiller and Nanita Schiller ("Debtors") filed the instant Motion to Confirm Second Modified Chapter 13 Plan July 28, 2016. Dckt. 58.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition to the instant Motion on August 30, 2016. Dckt. 69. The Trustee objects on the following grounds:

- A. The Debtors propose a monthly dividend of \$359.00 payable to creditor Pennymac Loan Services, LLC for pre-petition and post-petition arrears in Section 6.02 of the Plan. These must be treated as separate claims, and a monthly dividend is needed for each claim.

- B. The Motion does not cite to the applicable sections of the Bankruptcy Code, such as 11 U.S.C. § 1329, as required by Local Bankruptcy Rule 9014-1(d) and Federal Rule of Bankruptcy Procedure 9013.

DEBTOR' RESPONSE

The Debtors filed a Response to Trustee's Opposition September 6, 2016. Dckt. 72. The Debtors' Response states that Debtors would like to propose an Order Amending the Plan to separate the dividend paid to pre-petition and post-petition mortgage arrears: "From August, 2016 to July, 2018, monthly dividend for pre-petition mortgage arrears shall be \$157.00 and a final payment of \$88.00 on August, 2018. From August, 2016 to July, 2018, monthly dividend for post-petition mortgage arrears shall be \$202.00 and a final payment of \$116.00 on August, 2018."

The Response also attempts to address the Trustee's second objection by inserting the language:

11 U.S.C. § 1329(a) permits debtor to modify the plan any time after confirmation and 11 U.S.C. § 1322(b) permits debtor to modify a confirmed plan to cure post-confirmation delinquency on mortgage and car payments by amortizing the delinquency over the life of the plan.

DISCUSSION

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Trustee opposes confirmation on the basis that the Modified Plan did not separate the dividend payable to Pennymac Loan Services, LLC into pre-petition and post-petition arrears. Debtors propose to cure the error in the order confirming plan. This amendment resolves the Trustee's objection, and the court confirms the plan.

The modified Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed. FN.1.

FN.1. The Motion to Confirm also fails to comply with the requirements of Fed. R. Bankr. Proc. 9013 and Local Rule 9013-1(d) because it fails to state with particularity the grounds upon which the requested relief is based. The Motion merely states that the court should confirm the plan. While the Debtor's Response added the requisite citations to legal authority, the actual grounds need to be properly pleaded in the motion itself.

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,

Debtor filed this instant Motion to Vacate stating as grounds for the relief requested and to reinstate the dismissed bankruptcy case the following:

“This petition is based on forms and publication found in caeb.uscourts.gov HOME PAGE, and on such other and further evidence, both oral and documentary, as may be submitted at the hearing.

The Debtor seeks to have the order dismissing the case vacated, per Rule 60(b).”

TRUSTEE’S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response on August 25, 2016. Dckt. 18. The Trustee notes two grounds: 1) Debtor’s problems with filing the instant Motion, and 2) Debtor does not appear to be a candidate for Chapter 13.

As to the first ground, the Trustee notes Debtor did not file a Proof of Service with the instant Motion as required by Federal Rule of Bankruptcy Procedure 9006(d) and Local Bankruptcy Rule 9014-1(d)(5). Additionally, the Trustee identifies that the Motion does not state grounds with particularity in compliance with Federal Rule of Bankruptcy Procedure 9013. Finally, Trustee notes that Debtor has not filed a declaration signed under penalty of perjury or other form of evidence that would satisfy Local Bankruptcy Rule 9014-1(d)(7).

As to the second ground, the Trustee does not believe that Debtor can propose a confirmable Chapter 13 plan because none had been filed so far and Debtor’s Schedules indicated more expenses and costs than income. Trustee states the following:

- A. Schedules I and J show that Debtor is losing \$21,605.24 each month in his business, but he has \$1,063.00 in monthly Social Security income;
- B. Schedule B shows that Debtor had only \$243.99 in the bank, with another bank account overdrawn by \$335.00;
- C. Debtor owns no real property, and his newest vehicle is a 2009 Ford pickup truck; and
- D. Debtor claims \$21,605.24 in accounts receivable, but shows negative monthly income for his business and refers to “a case management conference with a defiant client.

Trustee notes that Debtor may be eligible for relief because of lack of credit counseling under 11 U.S.C. § 109(h), although the Debtor claims exigent circumstances.

Trustee requests that the court deny the instant Motion to Vacate Dismissal of Case.

APPLICABLE LAW

Federal Rule of Bankruptcy Procedure 9006(d) states: “A written motion, other than one which may be ex parte, and notice of any hearing shall be served not later than seven days before the time specified for such hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion. Except as otherwise provided in Rule 9023, any written response shall be served not later than one day before the hearing, unless the court permits otherwise.”

Local Bankruptcy Rule 9014-1(d)(5) states: “When notice of a motion is served without the motion or supporting papers, the notice of hearing shall also succinctly and sufficiently describe the nature of the relief being requested and set forth the essential facts necessary for a party to determine whether to oppose the motion. However, the motion and supporting papers shall be served on those parties who have requested special notice and those who are directly affected by the requested relief.”

Local Bankruptcy Rule 9014-1(e) contains the court’s rules for providing Proofs of Service. The Rule states the following:

A. (e) Service and Proof of Service.

1. Service of all pleadings and documents filed in support of, or in opposition to, a motion shall be made on or before the date they are filed with the Court.
2. A proof of service, in the form of a certificate of service, shall be filed with the Clerk concurrently with the pleadings or documents served, or not more than three (3) days after they are filed.
3. The proof of service for all pleadings and documents filed in support or opposition to a motion shall be filed as a separate document and shall bear the Docket Control Number. Copies of the pleadings and documents served shall not be attached to the proof of service. Instead, the proof of service shall identify the title of the pleadings and documents served.

Federal Rule of Bankruptcy Procedure 9013, which incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b) requires that a moving party plead with particularity the grounds upon which the requested relief is based. Law-and-motion practice in bankruptcy court demonstrates why this particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a creditor’s secured claim, determination of a debtor’s exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay, motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

Federal Rule of Civil Procedure Rule 60(b), as made applicable by Bankruptcy Rule 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, allows 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.

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, 196-197 (9th Cir. 2004); *Sallie Mae Servicing, LP v. Williams (In re Williams)*, 287 B.R. 787, 792 (B.A.P. 9th Cir. 2002).

Debtor has not given the court any ground upon which to grant the instant Motion. Not only has Debtor not plead grounds with particularity in his Motion, but Debtor also has not followed proper procedure in bringing this Motion. The court’s Order Dismissing the Case was served on twenty-one (21)

parties, including Debtor. Debtor has failed to serve twenty (20) necessary parties to the instant Motion. Debtor has not provided any admissible evidence that would influence the court to vacate its Order Dismissing the Case.

Therefore, in light of the foregoing, the Motion is denied.

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

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

The Motion to Vacate Dismissal of Case filed by Howard Little (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied.