UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

September 19, 2017, at 3:00 p.m.

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1. **17-22802-E-13** **RITA PEACH** **MOTION TO CONFIRM PLAN**
GEL-2 **Gabriel Liberman** **8-3-17 [36]**

Final Ruling: No appearance at the September 19, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 3, 2017. By the court's calculation, 47 days' notice was provided. 42 days' notice is required. FED. R. BANKR. P. 2002(b); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Rita Peach ("Debtor") has filed evidence in support of confirmation. David Cusick ("the Chapter 13 Trustee") filed a Non-Opposition on August 15, 2017. The Amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

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

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

IT IS ORDERED that the Motion is granted, and Debtor's Amended Chapter 13 Plan filed on August 3, 2017, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to David Cusick ("the Chapter 13 Trustee") for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

2. 17-25903-E-13 PGM-1 | **CHRISTINE MCKAY** **Peter Macaluso** | **MOTION TO EXTEND AUTOMATIC STAY** **9-5-17 [9]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on September 2, 2017. By the court's calculation, 17 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). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Extend the Automatic Stay is denied.

Christine McKay ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond thirty days in this case. Debtor pleads that it is her second bankruptcy petition pending in the past year – but it is actually her third. Debtor's reported prior bankruptcy case (No. 16-21315) was dismissed on October 7, 2016, after Debtor failed to make plan payments. *See* Order, Bankr. E.D. Cal. No. 16-21315, Dckt. 36, October 7, 2016.

The unreported case was filed on November 16, 2016, and was dismissed on June 2, 2017, for failure to make plan payments. *See* Order, Bankr. E.D. Cal. No. 16-27603, Dckt. 84, June 2, 2017. Therefore, pursuant to 11 U.S.C. § 362(c)(4)(A)(i), the provisions of the automatic stay did not go into effect upon Debtor filing the instant case.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on September 6, 2017. Dckt. 13. The Chapter 13 Trustee is uncertain whether the current case has been filed in good faith. The Chapter 13 Trustee states that the current case is a skeleton petition with no Schedules, Statement of Financial Affairs, Plan, and incomplete Procedural History. He notes that Debtor has three previous Chapter 13 cases enlisting the services of current counsel.

Case No. 15-26026 was dismissed on January 11, 2016. Case No. 26-21315 was dismissed on October 7, 2016. Case No. 16-27603 was dismissed on June 2, 2017. The Chapter 13 Trustee argues that because two cases were dismissed within the previous year, the motion should be to impose the automatic stay. Additionally, the Chapter 13 Trustee notes that Debtor's Declaration does not support the Motion.

DISCUSSION

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed because the companies that Debtor and Debtor's spouse worked for experienced difficult times.

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). As this court has noted in other cases, Congress expressly provides in 11 U.S.C. § 362(c)(3)(A) that the automatic stay **terminates as to Debtor**, and nothing more. In 11 U.S.C. § 362(c)(4), Congress expressly provides that the automatic stay **never goes into effect in the bankruptcy case** when the conditions of that section are met. Congress clearly knows the difference between a debtor, the bankruptcy estate (for which there are separate express provisions under 11 U.S.C. § 362(a) to protect property of the bankruptcy estate) and the bankruptcy case. While terminated as to Debtor, the plain language of 11 U.S.C. § 362(c)(3) is limited to the automatic stay as to only Debtor. The subsequently filed case is presumed to be filed in bad faith if one or more of Debtor's cases was pending within the year preceding filing of the instant case. *Id.* § 362(c)(3)(C)(i)(I). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* § 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). An important indicator of good faith is a realistic prospect of success in the second case, contrary to the failure of the first case. *See, e.g.*, *In re Jackola*, No. 11-01278, 2011 Bankr. LEXIS 2443, at *6 (Bankr. D. Haw. June 22, 2011) (citing *In re Elliott-Cook*, 357 B.R. 811, 815–16 (Bankr. N.D. Cal. 2006)). 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:

A. Why was the previous plan filed?

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

In re Elliot-Cook, 357 B.R. at 814–15.

On the first point, there is no automatic stay to extend in this case.

Recasting Motion as Requesting Relief Pursuant to 11 U.S.C. § 362(c)(4)(B)

If the court recasts this as a motion to impose the stay pursuant to 11 U.S.C. § 362(c)(4)(B), Debtor has not sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to impose the automatic stay. Debtor's testimony consists of appearing to be basically the stock "testimony" one gives in a routine declaration to support confirmation of a Chapter 13 plan. Appended to the "stock testimony" is the following:

> 10. I am refiling bankruptcy due to financial hardship. The last case failed because the companies that my husband and I work for went through some hard times. My husband's company was a small "Mom and Pop" type business that due to a heavy, rainy winter, construction (solar company) stopped and they couldn't pay their employees. The company I work for went through new management from the company we are subcontracted through. We are assigned cases to investigate through that company and during the reorganization with the new management, cases stopped coming in.
>
> 11. Since my last case was dismissed, my situation has changed. This case will succeed because my husband transferred to a bigger company that not only sells/installs solar, but also windows, AC and heaters, artificial turf and roofs. He also just started a night job with Amazon. My company is back up to full case loads and is even considering expanding to become the first point of contact instead of being subcontracted."

Declaration, p. 2:19–28, 3:1–6; Dckt. 11.

In looking at the multiple prior bankruptcy cases filed by Debtor (with the assistance of her current counsel), the reasons for dismissal include:

A. Chapter 13 Case 16-27603

1. Filed.....November 16, 2016
2. Dismissed.....June 2, 2017

3. Grounds for Dismissal

a. $6,175.00 default in plan payments (approx. 1 ½ months when motion to dismiss filed)

b. As noted by the court in dismissing the prior case:

"This is Debtors fourth bankruptcy case filed since November 2014. Debtor appears to annually file bankruptcy cases, with one in 2014, the second in 2015, the third in 2016, and now this case in 2017. The first was a Chapter 7 case in which Debtor obtained her discharge on February 26, 2015. 14-31511, Dckt. 17. The second and third cases, filed under Chapter 13 with the assistance of her current counsel were both dismissed. 15-26026 and 16-21315. Those two prior cases were dismissed due to Debtors monetary defaults."

16-27603; Civil Minutes, Dckt. 82.

c. In the prior case, seeking to have the automatic stay imposed, in November 2016, Debtor provided a different story of income under penalty of perjury, stating:

"10. I am refiling bankruptcy due to financial hardship. Our financial issues began in July of 2014. My mom had just passed away after a long battle with breast cancer. My husband was working at a life insurance company with was 100% commission. Prior to that, he had worked in the mortgage business, but that business was still struggling. He had been recruited into the life insurance company with promises of large paychecks. After working in that industry for approximately 6 months, we could see it wasn't going to support us financially. We had to sell one of our vehicles to help catch up on past due bills (we still have only 1 car) . In August/September of 2014 my husband was hired as a claims adjuster. He was paid a salary and things were starting to turn around. Then in January 2015, his job transferred him to Colorado. He moved to Colorado and I got a job as a driving instructor because it was getting difficult to pay for two households.

13. In August 2015, we made the decision for my husband to come back home. His job in Colorado was indefinite and his children were struggling without their one available parent being present daily.

14. He came back and got a job at Solar City. He started working a sales job which required several months of training first. We got behind in our bills due to the training. Then since we were behind, my husband felt pressure to make sales and struggled at work.

15. In March/April of 2016, my husband was recruited to work for a family owned solar company in Roseville. It was agreed that he would be paid two months salary to get him going and then the position would be sales with commission only. Due to the pressure of a commission only position and a sub-contractor for the company who was not motivated to complete projects or get them started (my husband was paid when projects were complete), we fell behind in our bankruptcy case.

16. My husband saw the issues at his job with the sub-contractor, so he decided to take matters into his own hands. Besides doing sales, he started streamlining and handling the projects from beginning to completion. He did that so he and the other salesmen could get paid. His boss and the owner of the company saw his efforts and the extra work he put and promoted him. They are also paying for him to have more training and education no solar system installs. His promotion takes effect on December 1, 2016. He is being promoted to Project Manager and will be a salary based employee. He will now have a set paid schedule equaling approximately $5,000.00/month (plus or minus with taxes). He also has bonus pay since he is still able to sell solar.

[Second ¶] 16. In July and August of 2016 my driving school employer started cutting back my hours, so I got a new job as a private investigator. This job has increased my income as I went from a $16.00/hour employee to $35.00/hour. I will carry a caseload and the more cases I complete, the more I get paid.

Id.; Declaration, Dckt. 11.

B. Chapter 13 Case 16-21315

1. Filed.....March 2, 2016
2. Dismissed.....October 7, 2016

3. Grounds for Dismissal

   a. Default in $7,760.00 in plan payments (approximately 1 ½ months of payments) when the Notice of Default and Motion to Dismiss filed. 16-21315; Dckt. 31.

C. Chapter 13 Case 15-26026

1. Filed.....July 30, 2015
2. Dismissed.....January 11, 2016

3. Grounds for Dismissal

   a. Default in $14,676.00 in plan payments (four monthly payments) when the Notice of Default and Motion to Dismiss filed. 15-26026; Dckt. 32.

As discussed by the court in dismissing the prior case, Debtor has a cyclical pattern of filing bankruptcy cases, defaulting on the payments, getting the cases dismissed, and then filing yet another case, promising in each new case that "this time" I will actually make the payments I promised.

Though Debtor is well-experienced in filing bankruptcy cases, no Chapter 13 Plan has been filed in this case. Debtor has committed to nothing. The prior case was dismissed on June 2, 2017. Though having ninety-two days from the dismissal of the prior case to the filing of the latest case now before the court, Debtor has not come forward with any promise of what will be paid so the court can consider whether such promise is in good faith or merely another setup for a default and dismissal.

Though having the ninety-two days since the prior case was dismissed to prepare, no Schedules have been filed by Debtor. FN.1. There are no Schedules showing what Debtor asserts is her income and expenses. There is nothing more than a skeletal petition, devoid of any current financial information. In her Declaration (which consists of mostly stock language given in support of a routine motion to confirm a plan), Debtor carefully avoids providing any current financial information. At best, Debtor's financial testimony is merely, "trust me....this time."

FN.1. On the evening of Sunday September 17, 2017, when reviewing the final tentative and final rulings to be posted on September 18, 2017, for the September 19, 2017 hearing, the court notes that Schedules and a Plan were filed on Friday September 15, 2017. The court will attempt to review these documents filed on the eve of the hearing.

A review of Schedules I and J, and the Plan that Debtor promised to pay in the prior case, sheds some light on the trials that preclude Debtor from performing a plan. In the prior case Debtor stated under penalty of perjury that she and her husband had $9,836.67 in monthly gross wage/salary/commission income. 16-27603; Schedule I, Dckt. 18 at 20. After deductions for state and federal income taxes, medicare, and Social Security, Debtor stated under penalty of perjury that Debtor had $8,346.40 in take home income (which included $190.00 mileage reimbursement). On its face, Debtor purports to state that on $118,032 of gross income, Debtor's state and federal income tax, including the Social Security tax, was only 17%.

Debtor has four children listed as dependents. *Id.*; Schedule J, Dckt. 18 at 22. Allowing for $4,171.40 for expenses for two adults and four children, Debtor purported to have $4,175.00 per month to fund a plan. *Id.* Debtor needed to show a purported $4,175.00 in projected disposable income to fund a plan to support making the current monthly mortgage payment of $2,187.15 and the payment necessary to cure a $46,463.58 arrearage on the debt secured by Debtor's home. *Id.*; Chapter 13 Plan, Dckt. 17. Debtor also needed to pay delinquent federal and state taxes. *Id.*; Class 5 claims, Dckt. 17.

Proof of Claim No. 3 in the prior case filed by Bank of America, N.A., for the debt secured by Debtor's home told a bleaker story. The Claim is filed in the amount of $342,488.23. Debtor listed this debt as being only $315,219.37 on Schedule D. *Id.*, Dckt. 18 at 18. Proof of Claim No. 3 states the arrearage to be $50,188.50, four thousand dollars more than stated by Debtor in the Plan.

Looking at Schedule J in the prior case, it appears that the real problem is that Debtor cannot afford the home, for which there is no equity, and having two adults raising four teenage children.

Considering it on the merits, Debtor has not rebutted the presumption of bad faith arising under 11 U.S.C. § 362(c)(4)(D).

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 Extend the Automatic Stay filed by Christine McKay ("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.

3. 17-23504-E-13 DPC-2 — JOSEPH GAITHER — Timothy Stearns — OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS — 8-16-17 [37]

Final Ruling: No appearance at the September 19, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on August 16, 2017. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Objection to Claimed Exemptions is sustained, and the exemptions are disallowed in their entirety.

David Cusick ("the Chapter 13 Trustee") objects to Joseph Gaither's ("Debtor") use of the California exemptions without the filing of the spousal waiver required by California Code of Civil Procedure § 703.140. California Code of Civil Procedure § 703.140(a)(2), provides:

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

(emphasis added). The court's review of the docket reveals that the spousal wavier was been filed on August 24, 2017. Dckt. 43.

The Chapter 13 Trustee also objects on the grounds that no amount of exemption has been listed in Schedule C for Debtor's vehicle or real property, and 45 U.S.C. § 231m has been incorrectly used to exempt a 401K. The Trustee's Objection is sustained, and the claimed exemptions are disallowed.

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 Claimed Exemptions filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
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> **IT IS ORDERED** that Objection is sustained, and the claimed exemptions are disallowed in their entirety.

4. **12-20006-E-13** **KEITH/KELLY RYAN** **CONTINUED MOTION FOR OMNIBUS**
PGM-3 **Peter Macaluso** **RELIEF UPON DEATH OF DEBTOR**
7-13-17 [88]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on July 13, 2017. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

The Motion to Substitute is denied.

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

Debtor filed for relief under Chapter 13 on January 2, 2012. On February 24, 2012, Debtor's Chapter 13 Plan was confirmed. Dckt. 17. On February 25, 2014, Debtor Keith Ryan passed away. Joint Debtor asserts that she is the lawful successor and representative of Debtor.

Pursuant to Federal Rule of Bankruptcy Procedure 1004.1, Joint Debtor requests authorization to be substituted in for the deceased debtor and to perform the obligations and duties of the deceased party in addition to performing her own obligations and duties. A renewed Notice of Death was filed on July 13, 2017. Dckt. 88. Joint Debtor is the spouse of the deceased party and is the successor's heir and lawful representative. Joint Debtor states that she will continue to prosecute this case in a timely and reasonable manner.

ORDER CONTINUING HEARING

On July 28, 2017, the court entered an Order continuing the hearing on this matter to 3:00 p.m. on September 19, 2017. Dckt. 97. The court instructed Kelly Ryan, as the surviving debtor, to file and serve

supplemental pleadings in support of the Motion before August 25, 2017, and responses, if any, by September 8, 2017.

CHAPTER 13 TRUSTEE'S RESPONSE

David Cusick ("the Chapter 13 Trustee") filed a Response on August 1, 2017. Dckt. 100. The Chapter 13 Trustee noted that "UPDATED SCHEDULES I & J" were filed as an exhibit. The Chapter 13 Trustee opines that Debtor's counsel may have filled out the wrong form because he checked the box labeled "An amended filing," rather than "A supplement showing postpetition chapter 13 income as of the following date: (MM/DD/YYYY)." The Chapter 13 Trustee notes that the way the schedules were filed indicates that income and expenses as of the date of the case were different than what was on the original Schedules I & J.

The Chapter 13 Trustee also notes that if the new schedules are supplemental based on a date that was at earliest the month after the Deceased Debtor passed away in February 2014, then the schedules may cover the last thirty-five months of the Plan.

As the Chapter 13 Trustee has noted before, the schedules reflect that as much as $700.00 per month has been income in the form of family assistance. Over the course of the Plan, the total family assistance contributions would equal $7,000.00 from Joint Debtor's father and $17,500.00 from her daughter.

Even though Joint Debtor has not disclosed when her relatives began assisting her financially, the Chapter 13 Trustee notes that her ability to make plan payments is finally clear. Where the surviving debtor did not have $125,580.00 of the projected income, she received $50,000.00 in insurance proceeds, had $69,502.65 less in expenses, and received family assistance as much as $24,500.00.

DEBTOR'S SUPPLEMENTAL PLEADINGS

Debtor filed Supplemental Pleadings on August 24, 2017. Dckt. 108. Debtor provides a financial analysis of how the Plan was funded. Debtor reports that sixty payments of Debtor's disposable income at $1,922.00 per month totaled $115,320.00. Debtor states that the disposable income came from a combination of the two debtors' incomes—$3,588.00 monthly gross for Keith Ryan and $4,618.20 for Kelly Ryan, which netted $2,959.54 and $3,423.25, respectively. The combined total average monthly income was $6,382.79.

At confirmation, Debtor's average monthly expenses were $4,460.79. Joint Debtor's monthly net income was $1,922.00.

After Deceased Debtor's death, Joint Debtor's total net income decreased to approximately $3,697.58, and she reduced her expenses to $2,475.00, resulting in a shortage $1,222.58. The total shortage was ($44,012.88).

After the death, Joint Debtor also received life insurance proceeds of $50,000.00, which she pleads were used for funeral expenses (more than $12,000.00), her two children's college tuition (in an

unspecified amount), food, school supplies, books, and gas for the children to travel to and from college. Dckt. 104. Any remaining funds were used for Joint Debtor's living expenses. *Id.*

Since Deceased Debtor's passing, Joint Debtor states that she has received "several promotions and pay increases which have contributed to [her] ability to successfully pay and complete the payment of $1,922.00 a month." *Id.*

Debtor admits that the "smarter decision" would have been to present the life insurance proceeds to the court, Trustee, and other parties in interest, and request permission to use them, but Joint Debtor instead buried her deceased husband and support her children. Joint Debtor presents that the amount of life insurance is approximately the net income subsequently supplied by her father and daughter to the Plan.

CHAPTER 13 TRUSTEE'S RESPONSE

The Chapter 13 Trustee filed a Response on September 1, 2017. Dckt. 113. He states that after reviewing Debtor's Supplemental Pleadings, he has no opposition to the Motion.

DISCUSSION

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

Federal Rule of Bankruptcy Procedure 7025 incorporates Federal Rule of Civil Procedure 25, which provides that "[i]f a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed." *Hawkins v. Eads*, 135 B.R. at 384.

The application of Rule 25 and Rule 7025 is discussed in COLLIER ON BANKRUPTCY, 16th Edition, § 7025.02, which states:

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

> suggested on the record. The suggestion of death may be filed only by a party or the representative of such a party. The suggestion of death should substantially conform to Form 30, contained in the Appendix of Forms to the Federal Rules of Civil Procedure.
>
> The motion for substitution must be made not later than 90 days following the service of the suggestion of death. Until the suggestion is served and filed, the 90 day period does not begin to run. In the absence of making the motion for substitution within that 90 day period, paragraph (1) of subdivision (a) requires the action to be dismissed as to the deceased party. However, the 90 day period is subject to enlargement by the court pursuant to the provisions of Bankruptcy Rule 9006(b). Bankruptcy Rule 9006(b) does not incorporate by reference Civil Rule 6(b) but rather speaks in terms of the bankruptcy rules and the bankruptcy case context. Since Rule 7025 is not one of the rules which is excepted from the provisions of Rule 9006(b), the court has discretion to enlarge the time which is set forth in Rule 25(a)(1) and which is incorporated in adversary proceedings by Bankruptcy Rule 7025. Under the terms of Rule 9006(b), a motion made after the 90 day period must be denied unless the movant can show that the failure to move within that time was the result of excusable neglect. The suggestion of the fact of death, while it begins the 90 day period running, is not a prerequisite to the filing of a motion for substitution. The motion for substitution can be made by a party or by a successor at any time before the statement of fact of death is suggested on the record. **However, the court may not act upon the motion until a suggestion of death is actually served and filed.**
>
> The **motion for substitution together with notice of the hearing is to be served on the parties in accordance with Bankruptcy Rule 7005 and upon persons not parties in accordance with Bankruptcy Rule 7004 . . . .**

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

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

Here, Kelly Ryan has not provided sufficient evidence to show that administration of the Chapter 13 case is possible and in the best interest of creditors after the passing of the deceased debtor. The original Motion was filed within the ninety-day period specified in Federal Rule of Bankruptcy Procedure 1016, following the simultaneous filing of the Notice of Death. Dckt. 42. Then, Debtor's second Motion was

denied without prejudice after the court found Debtor's explanations for what has happened in the case since the death of her husband to be lacking. Dckt. 79.

Debtor's credibility has been significantly impaired up through this third attempt to substitute Joint Debtor for Deceased Debtor and to continue in administration of this case. On Original Schedule B, no life insurance policies were disclosed. Dckt. 1 at 24. On Schedules I and J, Debtor and her late spouse were able to squeeze out only $1,922.00 in net monthly income to fund a plan. *Id.* at 35–37. That was based on average monthly take home income of $6,382.79.

The confirmed Chapter 13 Plan (Dckt. 5) used the $1,922.00 per month to make the monthly mortgage payment, the monthly mortgage arrearage cure payment, the car loan payment, and the nondischargeable taxes. After paying Debtor's counsel's fees and the Chapter 13 Trustee fees, there was a minimum dividend of 0.00% for creditors holding general unsecured claims.

No supplemental Schedules I or J have been filed by Debtor. Debtor attached Amended Schedules I & J as exhibits to her Motion, but Debtor did not sign them under penalty of perjury, and she marked the Schedules as being amended, and as the Chapter 13 Trustee notes, that means Debtor is saying that the numbers on the schedules go all the way to the commencement of case—an outcome that is certainly implausible. *See* Exhibit 3, Dckt. 91.

The late co-debtor passed away on February 25, 2014. In October 2015, Debtor and her current counsel first came to this court, disclosing the death of the co-debtor twenty-two months earlier. In supporting that Motion, Debtor testified under penalty of perjury:

> "12. I received $50,000.00 in life insurance proceeds from the death of my husband. The money has been used for funeral costs, college tuition for my two college aged children, and the remainder is supplementing my income now that I am the sole provider for my family."

Declaration, ¶ 12; Dckt. 44. While stating that conclusion, Debtor and Debtor's counsel offered no current income and expense information. Even though losing half of the family income, Debtor's attitude shown in the prior motion and declaration was merely, "Judge, I say I can do it, so you just sign the order."

The court addressed this shortcoming in the ruling on the prior motion, holding:

> "The court nor any other party in interest can determine, based on the evidence presented, whether it is possible for the Debtor to continue the administration of the estate when the Debtor no longer has the income of the deceased debtor, does not provide supplemental Schedules evidencing both the current income and expenses, nor does the Debtor provide supplemental Schedules B and C as to the life insurance proceeds. Instead, the Debtor merely mentions the life insurance proceeds in passing in the Motion and then states, in generalities, how the Debtor used those funds without providing specifics or what remains of the funds.
> . . .

> In substance, Debtor and her counsel seek to rewrite the Bankruptcy Code to be one in which the Code is what the Debtor says it is. The Debtor can have significant financial changes, but accurate information as to the changes is nobody's business but the Surviving Debtor. Even though almost 50% of the gross monthly income has been lost with the death of the Deceased Debtor, the Surviving Debtor has somehow been able to continue performing the plan which required the now missing income. Schedule I, Dckt. 1. Looking at Schedule J, Surviving Debtor and the Deceased Debtor provided financial information showing that the Deceased Debtors income was necessary to generate the projected disposable income to fund the Plan with $1,922.00 a month. Even with the now missing income, the Surviving Debtor and Deceased Debtor could provide for only a 0.00% dividend for creditors holding general unsecured claims, while making the mortgage payment, curing the pre-petition mortgage arrearage to keep their home and pay nondischargeable taxes. Plan, Dckt. 5. How that could occur is nobody's business except that of the Surviving Debtor no explanation to be provided.
>
> The Surviving Debtor has elected to wait until the money has been spent and the however I did it without half our income operation of the plan over the past twenty-one months (since the February 24, 2014 passing of the Deceased Debtor) to bring this to the intention of the court. This effectively frustrates the exercise of judicial power of the court to properly apply the Bankruptcy Code, as written by Congress and not as dictated by the Surviving Debtor, to this case."

November 17, 2015 Civil Minutes, Dckt. 52 at 3–4.

Rather than promptly addressing these shortcomings and providing honest, truthful current financial information, Debtor and her counsel have employed a strategy of ignoring the court while demanding relief until realizing that nothing but candid honesty will be accepted by the court. That may well be a preconceived strategy to try to "jam the court," contending that the sixty months have been completed and it would be "unfair" for this poor widow to be denied her and her late husband's discharge. Unfortunately, Debtor's lack of action, candor, and truthful testimony is causing her to lose her discharge.

In her most recent declarations (Dckts. 90 & 104), the court does not find her newly proffered testimony that she "was extremely distraught" and that "After the passing of my husband . . . , I had a lot of personal and financial matters to tend to" to be exculpatory. Dckt. 90 at 3; Dckt. 104 at 2–3. Rather, it is damning. Debtor admits that irrespective of whatever legal obligations she had, she was going to spend the money as she pleased. Now, she professes to having been preoccupied by finances and emotions. She did not so contend in 2015 with her original declaration, and then she did not in 2016, choosing to ignore the issue.

In her 2015 testimony, Debtor clearly states that not all of the money had been spent. Declaration, ¶ 12; Dckt. 44 (stating that Debtor is using the money to "supplement her income"). But by her April 2017 declaration, she states under penalty of perjury that of the 2015 declaration all of the money had been spent—telling the court that her prior testimony under penalty of perjury was false. Declaration, ¶ 13; Dckt. 68.

Using the schedules provided as exhibits (and overlooking that they are not filed in this case, are listed as amended back to the petition date, and are not signed under penalty of perjury), Debtor's ability to complete the Plan came from contributions from her father and her daughter, providing as much as $24,500.00. *See* Exhibit 3, Dckt. 91.

Another financial abnormality arises in reviewing the only Schedules I and J filed in this case and Debtor's testimony that college tuition was being paid. When this case was filed in January 2012, Debtor listed the children's ages as 16 and 18. Schedule I, Dckt. 1 at 35. Not surprisingly, no tuition expense is provided on Schedule J (presumably both children were still in high school). *Id.* at 37.

However, no explanation is provided for how in 2013 tuition was paid for the older child, nor in 2014 (prior to receiving the insurance monies). The income and expenses when there were two debtors did not have any leeway for having such additional substantial expense.

Even more troubling for Joint Debtor is that the declarations of Lynzie Ryan (Joint Debtor's daughter) and Jim Sanders (Joint Debtor's father) do not entirely match up to the story that Joint Debtor has presented to the court about family contributions. Joint Debtor has not provided any actual testimony under penalty of perjury as to what amounts she received in family assistance that allowed her to complete plan payments. In fact, none of her supplemental pleadings delineate what exact amounts were contributed at what times that allowed her to complete plan payments. Only in the troublesome, alleged Schedule I does Joint Debtor indicate that she received $500.00 from "daughter's rental" and $200.00 from "dad's help." Exhibit 3, Dckt. 91.

The declarations filed by Joint Debtor's daughter and father do no corroborate Joint Debtor's assertions, however. Joint Debtor's daughter testifies that her "boyfriend paid $250 each month and myself I would assist with any other financial short comings." Dckt. 105 at 2:5–6. Joint Debtor's father testifies that he "contributed approximately $300 to $500 most months over the past two to two and a half years." Dckt. 106 at 2:1–2. Coincidentally, all of the father's contributions "were in cash," so that there is no financial trail for Joint Debtor to provide for the court's review. *Id.* at 2:3.

In reviewing the Declarations, it appears that they have been treated as merely perfunctory documents, with no real testimony required. As counsel is well aware, the court needs real evidence and real testimony to grant relief. Here, the declaration of Debtor's Daughter and Father are merely "notes" to the court saying "we did something." Though given time, Debtor and Debtor's counsel have failed (or intentionally refused) to provide the court with actual testimony and evidence of the support purported to have been given. There are no copies of cancelled checks. There are no receipts for bills paid. There is nothing more than:

a. Debtor's father stating:

   i. "My daughter . . . asked me to write a letter. . ."

   ii. That he provided some type of financial help "approximately $300 to $500 most months over the past two to two and a half years as stated above [it not clear to what 'stated above' is being referenced]."

Declaration, Dckt. 106. There has been no evidence of the monies provided, no testimony of what the monies were provided for, and no specific information. It appears that Debtor's father does not even appreciate that he is providing testimony in this case, but that what he signed is merely a "letter."

b. Debtor's daughter offers little more, stating:

i. She and her boyfriend moved into Debtor's home.

ii. Debtor's boyfriend paid only $250 per month for living in Debtor's home.

iii. Debtor's daughter paid nothing on a regular basis, and would "assist" with other unidentified "financial shortcomings."

Declaration, Dckt. 105.

Rather than providing support, it appears that Debtor's daughter's boyfriend and Debtor's daughter were subsidized by Debtor.

The declarations were prepared with the assistance of Debtor's experienced counsel. The court believes that if such evidence actually existed, such counsel would have presented it to the court. If the witnesses were acting in good faith, they would have cooperated with Debtor's counsel, provided evidence in support of the contentions, documented the support, and worked with Debtor and her counsel to come up with a good faith resolution of Debtor's misuse of the monies.

Denial of Motion

Based on the evidence provided, the court determines that further administration of this Chapter 13 case is not in the best interests of all parties. As the court addressed on November 17, 2015, Joint Debtor waited until the insurance proceeds had been spent before moving to be substituted as the successor in interest, effectively frustrating the exercise of judicial power to properly apply the Bankruptcy Code, as written by Congress and not as dictated by Joint Debtor. Now, after being ordered by the court on her third attempt to be substituted to provide truthful, credible evidence of how money was obtained, Joint Debtor has once again failed to provide sworn, credible testimony as to how she was able to complete the Plan.

Unfortunately for Joint Debtor, she operated outside of the Code following the death of her spouse, but that is not a justification for her actions. Now, at the end of her case, the Chapter13 Trustee has noted that she was able to complete the Plan without modifying it, despite contributing slightly more than half of the household income. That ability to continue payments and complete the Plan suggests to the court that Joint Debtor has continued to operate outside of the Code and may have hidden assets and income from the court. The specter of mismanagement and poor decisions by Joint Debtor in this case indicates to the court that substitution as Deceased Debtor's successor in interest is not in the best interest of creditors.

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

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

The Motion for Substitute After Death filed by Kelly Ryan ("Joint 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.

5. **12-20006-E-13 DPC-2** | **KEITH/KELLY RYAN** **Peter Macaluso** | **CONTINUED MOTION TO DISMISS CASE** **6-27-17 [82]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on June 27, 2017. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The Motion to Dismiss is granted, and the bankruptcy case is dismissed as to Debtor Keith Ryan. The case is not dismissed as to Co-Debtor Kelly Ryan.

The Trustee argues that Debtor did not file a Motion for Omnibus Relief following the court's denial Debtor's prior two motions for omnibus relief on December 2, 2015, and June 12, 2017. The Trustee states that more than 635 days have passed since the Notice of Death for Keith Ryan was filed, and he notes that the court has not issued an order allowing substitution and continued administration of this case.

If this Motion is denied, then the Trustee intends to submit an order approving the Final Report and Account to the Court that has been filed. *See* Dckt. 62.

The Trustee moves that the Motion be granted as to decedent debtor Keith Ryan ("Deceased Debtor"). Kelly Marie Ryan is the "Surviving Debtor" who has been prosecuting the Chapter 13 Plan since

the Deceased Debtor's passing in February 2014 (twenty-fourth month of the sixty-month confirmed Chapter 13 Plan).

The court refers to the Surviving Debtor and the Deceased Debtor collectively as"Debtor."

SURVIVING DEBTOR'S OPPOSITION

Surviving Debtor filed an Opposition on July 11, 2017. Dckt. 86. Surviving Debtor promises to file a renewed Motion for Omnibus Relief in this case.

JULY 26, 2017 HEARING

At the hearing, Surviving Debtor's counsel argued, notwithstanding the substantial defects in Surviving Debtor's testimony and prosecution of this case, that Surviving Debtor should be allowed an opportunity to correct the defective testimony in connection with the Omnibus Motion and credibly explain Surviving Debtor's prosecution of this case. Dckt. 93. The court continued the hearing on this matter to 3:00 p.m. on September 19, 2017, and ordered Surviving Debtor to file and serve Supplemental Pleadings on or before August 25, 2017, and Responses, if any, on or before September 8, 2017. Dckt. 96.

SURVIVING DEBTOR'S SUPPLEMENTAL OPPOSITION

Surviving Debtor filed a Supplemental Opposition on August 24, 2017. Dckt. 110. Surviving Debtor provides a financial analysis of how the Plan was funded. Debtor reports that sixty payments of Debtor's disposable income at $1,922.00 per month totaled $115,320.00. Debtor states that the disposable income came from a combination of the two debtors' incomes—$3,588.00 monthly gross for Keith Ryan and $4,618.20 for Kelly Ryan, which netted $2,959.54 and $3,423.25, respectively. The combined total average monthly income was $6,382.79.

At confirmation, Debtor's average monthly expenses were $4,460.79. Surviving Debtor's monthly net income was $1,922.00.

After Deceased Debtor's death, Surviving Debtor's total net income decreased to approximately $3,697.58, and she reduced her expenses to $2,475.00, resulting in a shortage $1,222.58. The total shortage was ($44,012.88).

After the death, Surviving Debtor also received life insurance proceeds of $50,000.00, which she states were used for funeral expenses (more than $12,000.00), her two children's college tuition, food, school supplies, books, and gas for the children to travel to and from college. Dckt. 104. Any remaining funds were used for Surviving Debtor's living expenses. *Id.*

Since Deceased Debtor's passing, Surviving Debtor states that she has received "several promotions and pay increases which have contributed to [her] ability to successfully pay and complete the payment of $1,922.00 a month." *Id.*

Surviving Debtor admits that the "smarter decision" would have been to present the life insurance proceeds from the court and request permission to use them, but Surviving Debtor instead buried her deceased husband and support her children. Surviving Debtor presents that the amount of life insurance is approximately the net income subsequently supplied by her father and daughter to the Plan.

DISCUSSION

A review of the docket shows that Surviving Debtor filed a new Motion for Omnibus Relief on July 13, 2017. Dckt. 88. That motion was continued to September 19, 2017, and was denied at the hearing.

The Trustee has submitted a Final Report in this case, and all that appears to be remaining is for the court to hear Surviving Debtor's latest Motion for Omnibus Relief.

PRIOR RULINGS OF THE COURT IN THE CURRENT BANKRUPTCY CASE

This bankruptcy case was filed on January 3, 2012. Debtor's Chapter 13 Plan was confirmed on February 24, 2012. Dckt. 17. The Plan requires Debtor (with the then-income from both Surviving Debtor and Deceased Debtor) to fund it with $2,500.00 per month. After payment of secured and priority unsecured claims, and the administrative expenses, Debtor could promise only a 0.00% dividend for creditors holding general unsecured claims.

In addressing the prior Motion to have Surviving Debtor appointed as the personal representative for Deceased Debtor and for the court to allow discharges to be entered, the court's ruling includes the following:

> "In substance, Debtor and her counsel seek to rewrite the Bankruptcy Code to be one in which the Code is what the Debtor says it is. The Debtor can have significant financial changes, but accurate information as to the changes is nobody's business but the Surviving Debtor. Even though almost 50% of the gross monthly income has been lost with the death of the Deceased Debtor, the Surviving Debtor has somehow been able to continue performing the plan which required the now missing income. Schedule I, Dckt. 1. Looking at Schedule J, Surviving Debtor and the Deceased Debtor provided financial information showing that the Deceased Debtors [*sic*] income was necessary to generate the projected disposable income to fund the Plan with $1,922.00 a month. Even with the now missing income, the Surviving Debtor and Deceased Debtor could provide for only a 0.00% dividend for creditors holding general unsecured claims, while making the mortgage payment, curing the pre-petition mortgage arrearage to keep their home and pay nondischargeable taxes. Plan, Dckt. 5. How that could occur is nobody's business except that of the Surviving Debtor no explanation to be provided.
>
> The Surviving Debtor has elected to wait until the money has been spent and the however I did it without half our income operation of the plan over the past twenty-one months (since the February 24, 2014 passing of the Deceased Debtor) to

> bring this to the intention of the court. This effectively frustrates the exercise of judicial power of the court to properly apply the Bankruptcy Code, as written by Congress and not as dictated by the Surviving Debtor, to this case.
>
> It is unfortunate as to how this case has been prosecuted and the Surviving Debtors [*sic*] summary information approach to this Motion. It is very unfortunate that Debtor chose to operate outside of the Bankruptcy Code following the passing of her husband. Few losses can have such significant impact on one and a family. But such does not create the justification for the Surviving Debtor operating outside the Code or failing (or refusing) to provide financial information as to how she has continued to perform the plan and basis for her electing how to disburse the additional assets of the bankruptcy estate (the insurance proceeds)."

Civil Minutes, Dckt. 52.

Performance of the confirmed Chapter 13 Plan was based on Deceased Debtor's gross income of $3,588.00 and Surviving Debtor's gross income of $4,618.20. Schedule I, Dckt. 1. Debtor's monthly expenses, exclusive of a mortgage payment, were stated under penalty of perjury to be $4,100.00 per month and the Plan was confirmed based on that financial information. That allowed Debtor to make the required $2,500.00 per month payments.

But Surviving Debtor reports that the co-debtor passed away in February 2014, well before the January 2017 end of the Plan term. That caused a loss of 43% of the gross income from which the Plan would be funded.

Surviving Debtor's entire opposition rests on the new motion to substitute Surviving Debtor as the personal representative for Deceased Debtor. Motion, Dckt. 88. It is alleged that notwithstanding losing 43% of the gross income necessary to fund the plan, Surviving Debtor was able to make payments totaling $90,000.00 (thirty-six payments at $2,500 each). The "lost" income due to the death of Deceased Debtor totals $129,168.00 for the final thirty-six months of the Plan.

In her Declaration, Surviving Debtor only provides testimony under penalty of perjury that:

A. She received $50,000.00 of insurance proceeds upon the death of Deceased Debtor.

B. The money was spent for Deceased Debtor's funeral ($15,000) and for Debtor's children's college expenses ($32,000). Those purported payments exhausted 94% of the life insurance proceeds leaving next to nothing to supplement Surviving Debtor's expenses and provide for the $90,000.00 in required plan payments after loss of $129,168.00 of Deceased Debtor's income.

C. Surviving Debtor's adult children, for whom Surviving Debtor was using the life insurance proceeds, were providing Surviving Debtor with "financial support" (in unstated amounts and timing).

D. It is also stated that Surviving Debtor's father helped (in unstated amounts) and that one of Surviving Debtor's dependent children also paid Surviving Debtor rent to enable Surviving Debtor to make the Plan payments.

E. Though Deceased Debtor passed in February 2014, it was not until November 2015 when Surviving Debtor notified her former attorney's office of the death. Surviving Debtor offers no testimony of notifying her attorney of the insurance proceeds or seeking any instruction of her legal responsibilities with respect to the $50,000.00.

F. Surviving Debtor notes for the court that Amended Schedules A/B, C, I, and J have been filed in 2017 in connection with the latest Motion for the continued prosecution of this case in the name of Deceased Debtor. As stated below, no such amended Schedules I & J have been filed.

Declaration, Dckt. 90.

What Surviving Debtor fails to provide is any testimony of the actual finances, how she was able to make the Plan payments, and how the Plan was properly performed. Instead, Surviving Debtor merely dictates to the court that such occurred, therefore it is proper.

On Amended Schedule C, filed on May 22, 2017, Surviving Debtor seeks to state an exemption in all $50,000.00 in proceeds of the theretofore undisclosed life insurance policy. Dckt. 73. On Original Schedule B, Question 20, Surviving Debtor and Deceased Debtor stated under penalty of perjury that they had no interests in any life insurance policies. Dckt. 1 at 24. No exemption is claimed in any life insurance policy on Original Schedule C. *Id.* at 26.

No amended or supplemental Schedules I and J have been filed in this case. Schedules I and J forms have been included as Exhibit 3 (Dckt. 91), but they are not signed by Surviving Debtor under penalty of perjury. Surviving Debtor fails to provide testimony in any of her declarations attesting under penalty of perjury to that financial information.

On the Schedule I Exhibit, Surviving Debtor states that her gross income has been $5,654.13 since this case was commenced in 2012 and that there was no income from deceased co-debtor. The amended box on the Schedule I form is checked, not the supplemental form box, which means that Surviving Debtor and her counsel are stating that the amount stated on Original Schedule I was incorrect from the start of this case.

On the Schedule I form, Surviving Debtor states that "Debtor 1," not this surviving debtor, is receiving $500 per month in "daughter's rents" and $200 in "dad's help." This yields Surviving Debtor $4,297.58 per month in net income after taxes and required deductions.

On the Schedule J form filed as an Exhibit, Surviving Debtor "corrects" what is stated in Original Schedule J and lists that Surviving Debtor's expenses have been only $2,475.00 since the commencement of this case. That includes a rent mortgage expense of $1,289.00, resulting in Surviving Debtor purporting to have only $1,186.00 in all other expenses for Surviving Debtor and her two children since the

commencement of this case. This stands in stark contrast to the $4,100.00 in "reasonable" and "necessary" monthly expenses (which does not include any mortgage payment) that Surviving Debtor and Deceased Debtor stated under penalty of perjury on Original Schedule J.

The Schedule J form filed as an Exhibit lists Surviving Debtor and her two "dependant" daughters (one of whom purportedly pays "rent") having expenses, excluding mortgage payment, of:

A. Home Maintenance.....($ 50.00)
B. Electricity/Gas/Heating.....($ 80.00)
C. Water/Sewer/Garbage.....($210.00)
D. Phone.....($ 60.00)
E. Cell Phone.....($190.00)
F. Cable & Internet.....($160.00)
G. Food/Housekeeping Supplies.....($200.00)
H. Clothing/Laundry.....($ 75.00)
I. Personal Care Products.....($ 25.00)
J. Medical Expenses.....($ 12.00)
K. Transportation.....($100.00)
L. Entertainment/Recreation.....($ 14.00)
M. Vehicle Insurance.....$ 0.00
N. Vehicle Registration.....($ 12.00)

Exhibit 3, p. 10–11; Dckt. 91. These expenses total $1,186.00—for Surviving Debtor and two dependents.

The court has created the chart below, which are the "actual" "reasonable" and "necessary" expenses that the surviving debtor and deceased debtor stated under penalty of perjury on Original Schedule J filed in this case.

Expense For Surviving Debtor, Deceased Debtor, and Two Dependants	Amount Stated on Original Schedule C (Dckt. 1)	Percentage Greater/(Percentage Less) than stated on Schedule J form filed as an Exhibit
Electricity/Gas/Heating	($260.00)	225.00%
Water/Sewer/Garbage	($280.00)	33.33%
Telephone	($60.00)	0.00%
Cell Phone	($190.00)	0.00%
Cable & Internet	($160.00)	0.00%
Home Maintenance	($125.00)	150.00%
Food	($875.00)	337.50%
Clothing	($160.00)	113.33%

Laundry/Dry Cleaning	($40.00)	-46.66%
Personal Care	($175.00)	600.00%
Medical/Dental	($50.00)	316.66%
Transportation	($680.00)	580.00%
Recreation	($125.00)	792.92%
Auto Insurance	($480.00)	Disappears on Schedule J Form Exhibit
Auto Registration	($58.46)	387.16%
Pet Food & Expenses	($100.00)	Disappears on Schedule J Form Exhibit
School Expenses	($144.00)	Disappears on Schedule J Form Exhibit

Surviving Debtor offers no explanation as to why or how the Original Schedule J amounts should be "amended" and be "corrected" to state the much lower amounts than previously stated under penalty of perjury. This would also mean that Surviving Debtor and Deceased Debtor had substantially more projected disposable income than disclosed (and relied upon by the court) in confirming the Plan in this case.

Surviving Debtor offers no explanation how there can be such dramatic drops in basic expenses, such as food and transportation even assuming that there are now only three adults (Surviving Debtor and two dependent adult daughters) and before it was two adults and two minor dependent daughters. Assuming $50.00 per month for housekeeping supplies, the Schedule J form Exhibit purports to state that these three adults exist spending $0.55 per meal during a thirty-day month. FN.1. No explanation is given for how Surviving Debtor, even if she has retained only one of the cars, manages to operate it without paying for auto insurance or can pay for all of the fuel, maintenance, and repairs on $100 per month.

FN.1. This is computed as follows:

$200 Food/House Keeping Expense – $50 for House Keeping Expenses= $150.00 For Food

$150 Food Expense ÷ 3 Adults = $50.00 Per Adult Per Month

$50 Food Expense ÷ 30 Day ÷ 3 Meal Per Day = $0.55 Per Meal Per Person

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Looking at the Schedule J form Exhibit, the court concludes that it is merely a "false concoction" intentionally created by Surviving Debtor, with the assistance of counsel, to affirmatively misstate Surviving Debtor's expenses to mislead the court and parties in interest. It appears that this bad faith conduct has pervaded this case, from the filing of the first documents (with prior counsel) through the latest document filed with the assistance of current counsel.

On Original Schedule I, Surviving Debtor and Deceased Debtor state under penalty of perjury that Surviving Debtor has $106.00 per month being withheld to repay a "TSA Loan" and $200.52 per month withheld to repay a "Plan B Loan." Dckt. 1 at 36. On the Schedule I form Exhibit, $161.34 is listed as "required repayments of retirement fund loans." Dckt. 91 at 9. That amount is not consistent with what has been stated under penalty of perjury on Original Schedule I.

On Original Schedule B filed in this case, no retirement accounts, to which repayments could be made, are listed as assets. Dckt. 1 at 23–25. Surviving Debtor and Deceased Debtor go further to state that no such retirement accounts exists, answering "None" to Question 12 on Original Schedule B. *Id.* at 23. To the extent that such asset exists, it remains hidden from the court.

On Amended Schedule A/B, Surviving Debtor once again states under penalty of perjury that she has no interests in any retirement accounts. Amended Schedule A/B Question 21, Dckt. 73 at 7. Also, no life insurance policy, except for the one from which Surviving Debtor received and has diverted $50,000.00 in proceeds is listed on Amended Schedule A/B.

The present Motion only requests that the court dismiss the case as to the deceased debtor, Keith Gregory Ryan. Cause has been shown for granting that Motion. Surviving Debtor offers no opposition to the Motion but merely states that Surviving Debtor seeks to have the court "sanction" further misstatements and inaccurate statements under penalty of perjury in this case. Surviving Debtor and her counsel have not attempted to diligently appear in this case and prosecute it for Deceased Debtor.

This Motion to Dismiss and the conduct of Surviving Debtor raise serious issues concerning the filing, prosecution, and performance of the Plan in this case. It appears Surviving Debtor, and counsel for Surviving Debtor, have a loose association with *accurate* and *truthful* financial information and actual expenses of Surviving Debtor.

The Chapter 13 Trustee has not requested in this Motion that the case should be dismissed as to Surviving Debtor, but only as to Deceased Debtor. That may be because, notwithstanding the shortcomings discussed by the court above, based on the evidence presented to the court by Surviving Debtor, the Chapter 13 Trustee may well have other information from which he has properly made such a decision.

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 granted, and the Chapter 13 Case is dismissed as to late Keith Gregory Ryan, one of the two debtors in this bankruptcy case. This order does not dismiss the case as to Co-Debtor Kelly Marie

Ryan, which case shall proceed in this court, such relief not having been requested in the Motion.

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

Final Ruling: No appearance at the September 19, 2017 hearing is required.

David Cusick ("the Chapter 13 Trustee") having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(I) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Motion to Dismiss the Bankruptcy Case was dismissed without prejudice, and the matter is removed from the calendar.**

7.	**16-25208-E-13** **DPC-4**	**WILLIAM MARKLEY AND SANDRA GORDON-MARKLEY** **Len ReidReynoso**	**OBJECTION TO CLAIM OF TWO JINN, INC., CLAIM NUMBER 9-1** **7-27-17 [72]**

Final Ruling: No appearance at the September 19, 2017 hearing is required.

Local Rule 3007-1 Objection to Claim—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor, Debtor, Debtor's Attorney, and Office of the United States Trustee on July 27, 2017. By the court's calculation, 54 days' notice was provided. 44 days' notice is required. FED. R. BANKR. P. 3007(a) (requiring thirty days' notice); LOCAL BANKR. R. 3007-1(b)(1) (requiring fourteen days' notice for written opposition).

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Objection to Proof of Claim Number 9-1 of TWO JINN INC DBA ALADDIN BAIL BONDS is sustained, and the claim is disallowed in its entirety.

David Cusick, the Chapter 13 Trustee, ("Objector") requests that the court disallow the claim of TWO JINN INC DBA ALADDIN BAIL BONDS ("Creditor"), Proof of Claim No. 9-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $4,250.00. Objector asserts that the Claim has not been timely filed. *See* FED. R. BANKR. P. 3002(c). The deadline for filing proofs of claim in this case was December 14, 2016. Notice of Bankruptcy Filing and Deadlines, Dckt. 70.

DISCUSSION

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of a proof of claim, and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright*

v. Holm (In re Holm), 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

The deadline for filing a proof of claim in this matter was December 14, 2016. Creditor's Proof of Claim was filed on February 22, 2017. No order granting relief for an untimely-filed proof of claim for Creditor has been issued by the court.

Based on the evidence before the court, Creditor's claim is disallowed in its entirety as untimely. The Objection to the Proof of Claim 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 Claim of TWO JINN INC DBA ALADDIN BAIL BONDS ("Creditor") filed in this case by David Cusick ("the Chapter 13 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Proof of Claim Number 9-1 of TWO JINN INC DBA ALADDIN BAIL BONDS is sustained, and the claim is disallowed in its entirety.

8.	**16-25208-E-13** **DPC-5**	**WILLIAM MARKLEY AND SANDRA GORDON-MARKLEY** **Len ReidReynoso**	**OBJECTION TO CLAIM OF SACRAMENTO COUNTY OF DEPT. OF RECOVERY, CLAIM NUMBER 8-1** **7-28-17 [77]**

Final Ruling: No appearance at the September 19, 2017 hearing is required.

Local Rule 3007-1 Objection to Claim—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor, Debtor, Debtor's Attorney, and Office of the United States Trustee on July 28, 2017. By the court's calculation, 53 days' notice was provided. 44 days' notice is required. FED. R. BANKR. P. 3007(a) (requiring thirty days' notice); LOCAL BANKR. R. 3007-1(b)(1) (requiring fourteen days' notice for written opposition).

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Objection to Proof of Claim Number 8-1 of Sacramento County of Dept of Recovery is sustained, and the claim is disallowed in its entirety.

David Cusick, the Chapter 13 Trustee, ("Objector") requests that the court disallow the claim of Sacramento County of Dept of Recovery ("Creditor"), Proof of Claim No. 8-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $4,241.00. Objector asserts that a debt characterized as a court fine does not appear entitled to priority under 11 U.S.C. § 507(a)(8), and no supporting documents have been provided to prove the validity of the debt as required under Federal Rule of Bankruptcy Procedure 300(c)(1), which states that if the claim is based on a writing, a copy of the writing be filed with the claim.

DISCUSSION

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof

of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of a proof of claim, and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

The Yvette Sanders Declaration also seeks to introduce evidence that Debtor's confirmed plan filed on August 8, 2016, does not provide for this Claim to be paid as Class 5, and no supporting documents were filed with the Claim to show validity of a priority debt. Additionally, 11 U.S.C. § 507(a)(8) allows for priority only to a limited extent and is for taxes and certain types of penalties as indicated on the official form.

Based on the evidence before the court, Creditor's claim is disallowed in its entirety. The Objection to the Proof of Claim 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 Claim of Sacramento County of Dept of Recovery ("Creditor") filed in this case by David Cusick ("the Chapter 13 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Proof of Claim Number 8-1 of Sacramento County of Dept of Recovery is sustained, and the claim is disallowed in its entirety.

9. 17-24511-E-13 DANIEL MANN
DPC-1 Mark Shmorgon

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
8-24-17 [22]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on August 24, 2017. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

David Cusick ("the Chapter 13 Trustee") opposes confirmation of the Plan on the basis that Daniel Mann ("Debtor") failed to file tax returns.

The Chapter 13 Trustee's objections are well-taken. Debtor admitted at the Meeting of Creditors on August 17, 2017, that federal income tax returns for the 2015 and 2016 tax years have not been filed still. Filing of the return is required. 11 U.S.C. § 1308. Failure to file a tax return is grounds to deny confirmation. 11 U.S.C. § 1325(a)(1).

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 David Cusick ("the Chapter 13 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

10. 17-24515-E-13 DPC-1 | **NIKOLAY KALMYKOV** **Gabriel Liberman** | **OBJECTION TO DISCHARGE BY DAVID P. CUSICK** **8-1-17 [13]**

Final Ruling: No appearance at the September 19, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on August 1, 2017. By the court's calculation, 49 days' notice was provided. 28 days' notice is required.

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

The Objection to Discharge is sustained.

David Cusick, the Chapter 13 Trustee, ("Objector") filed the instant Objection to Nikolay Kalmykov's ("Debtor") discharge on August 1, 2017. Dckt. 13.

Objector argues that Debtor is not entitled to a discharge in the instant bankruptcy case because Debtor previously received a discharge in a Chapter 7 case in a bankruptcy case filed in 2016.

Debtor filed a Chapter 13 bankruptcy case on August 15, 2016, which was converted to Chapter 7 on January 5, 2017. Case No. 16-25355. Debtor received a discharge on April 11, 2017. Case No. 16-25355, Dckt. 66.

The instant case was filed under Chapter 13 on July 10, 2017.

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

Here, Debtor received a discharge under 11 U.S.C. § 727 on April 11, 2017, which is less than four years preceding the date of the filing of the instant case. Case No. 16-25355, Dckt. 66. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), Debtor is not eligible for a discharge in the instant case.

Therefore, the Objection is sustained. Upon successful completion of the instant case (Case No.17-24515), the case shall be closed without the entry of a discharge, and Debtor shall receive no discharge in the instant case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Discharge filed by David Cusick ("the Chapter 13 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to Discharge is sustained, and upon successful completion of the instant case, Case No. 17-24515, the case shall be closed without the entry of a discharge.

11. **17-24515-E-13** **NIKOLAY KALMYKOV** **OBJECTION TO CONFIRMATION OF**
DPC-1 **Gabriel Liberman** **PLAN BY DAVID P. CUSICK**
8-24-17 [23]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, and Debtor's Attorney on August 24, 2017. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

David Cusick ("the Chapter 13 Trustee") opposes confirmation of the Plan on the basis that Nikolay Kalmykov ("Debtor") cannot afford the plan payments.

The Chapter 13 Trustee's objection is well-taken. Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor has insufficient income to support proposed plan payments. Debtor's Plan calls for payments of $4,730.00 for sixty months, and it relies heavily on $2,765.00 from Debtor's children.

However, Debtor's children, at twenty-two and twenty-three years old, are not shown to be in the financial position to support Debtor's plan payments. One child works part-time during college, earning $17.00 per hour, while the other child works for a delivery service business, and does not have verified paystubs in the record. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

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

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

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

12.	**17-24515-E-13** **EGS-1**	**NIKOLAY KALMYKOV** **Gabriel Liberman**	**OBJECTION TO CONFIRMATION OF PLAN BY BAYVIEW LOAN SERVICING, LLC** **8-23-17 [18]**

ATTENDANCE AT HEARING REQUIRED FOR EDWARD SCHLOSS, COUNSEL FOR OBJECTING CREDITOR TELEPHONIC APPEARANCE PERMITTED

THE COURT SHALL SCHEDULE FURTHER BRIEFING AND A CONTINUED HEARING ON WHETHER A DIRECTION BY A PARTY FOR THE COURT TO ACT "*SUA SPONTE*" IS THE PROPER BASIS FOR THE COURT ISSUING AN ORDER AND THE BASIS FOR JOINING A REQUEST TO DISMISS A BANKRUPTCY CASE WITH AN OBJECTION TO CONFIRMATION

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on August 23, 2017. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The hearing on the Objection to Confirmation of Plan is continued to 3:00 p.m on xxxxxxxx, 2017. Bayview Loan Servicing, LLC shall file and serve on or before **xxxxxxxxx, 2017**, Supplemental Pleadings addressing: (1) how joining a direction to the court to *sua sponte* dismiss the bankruptcy case with an Objection to Confirmation is permitted under the Federal Rules of Bankruptcy Procedure, and (2) the basis for a party directing the court to act *sua sponte* and what Due Process requires a court to do when it chooses to act *sua sponte* to dismiss a case or otherwise terminate rights of a party. Appearance of Edward G. Schloss, Esq., counsel for Bayview Loan Servicing, LLC, required at the continued hearing—No Telephonic Appearance Permitted.

Bayview Loan Servicing, LLC, as servicing agent for The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificateholders CWABS, Inc. Asset Backed Certificate, Series 2006-IM1 ("Creditor") holding a secured claim opposes confirmation of the Plan on the basis that:

A. The Plan does not cure the arrearage on Creditor's secured claim, causing the Plan to be infeasible, and

B. Nikolay Kalmykov ("Debtor") cannot afford the plan payments.

Creditor's objections are well-taken. The objecting creditor holds a deed of trust secured by Debtor's residence. Creditor has not filed a timely proof of claim, but in the Esther Suarez declaration—sworn under penalty of perjury—it is asserted that there are pre-petition arrearages of $456,446.04. Dckt. 20 at 3:16. The Plan does not propose to fully cure those arrearages. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments because it does not provide for the surrender of the collateral for this claim. *See* 11 U.S.C. §§ 1322(b)(2) & (5), 1325(a)(5)(B). The Plan cannot be confirmed because it fails to provide for the full payment of arrearages.

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor's Schedule I indicates that Debtor's children provide as much as $2,765.00 to the Plan. Any change to those contributions would affect Debtor's disposable income and ability to fund the Plan at all. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

As discussed below, Creditor has chosen to join multiple claims for relief in one Objection (a contested matter). That is fatally defective to the Objection.

Though overruled, it is of little moment because the court has denied confirmation based on the Chapter 13 Trustee's Objection.

IMPROPER REQUEST FOR DISMISSAL

In the Objection, Creditor requests in the prayer that the Chapter 13 case be dismissed, "with prejudice." Objection, p. 6:4. On page 5 of the Objection, Creditor advances the argument that the court

should *sua sponte*, at the behest of Creditor, dismiss this bankruptcy case, which the prayer demand must be "with prejudice." Creditor's instruction to the court to act *sua sponte* is made in the pleading filed on August 23, 2017. Dckt. 18 at 5:7–9, 21.

Creditor does not provide the court with any argument or legal authority for including such a direction to the Court in the Objection. The Objection before the court is to confirmation of a Chapter 13 Plan, not a motion to dismiss. This request for relief by order of the court fails on several grounds. As Creditor knows, relief in the form of an order must be sought by motion (or "application" when specially authorized) from the court. FED. R. BANKR. P. 9013. Federal Rule of Bankruptcy Procedure 1017(f) requires that a request for dismissal of a Chapter 13 case "shall be on motion filed and served as required by Rule 9013."

Federal Rule of Civil Procedure 18 and Federal Rule of Bankruptcy Procedure 7018 allowing for the joining of multiple claims for relief are not incorporated into the Contested Matter practice pursuant to Federal Rule of Bankruptcy Procedure 9014. The Bankruptcy Appellate Panel for the Ninth Circuit ruling cited by Creditor, *Tennant v. Rojas (In re Tennant)*, 318 B.R. 860 (B.A.P. 9th Cir. 2004), has been cited recently by the Ninth Circuit in an unpublished, non-precedential decision for the position that a bankruptcy court has authority to dismiss a case *sua sponte* for cause. *Jonas v. Jonas*, 599 F. App'x 803, 804 (9th Cir. 2015).

In *Jonas*, the Ninth Circuit Court of Appeals states that a court acts "*sua sponte*," it does so where no party in interest or the United States trustee has filed a motion to dismiss a bankruptcy case. *Id.* Here, Creditor has requested the dismissal of this case by purporting to "join it" with the Objection to Confirmation. Thus, if the court were to act on this request, then the court would not be acting *sua sponte*.

A close look at the underlying bankruptcy case in *Jonas* shows that the foundation for the Circuit's decision rests upon a stipulation that had been entered in the bankruptcy case that stated (among other things) that the case would be dismissed with prejudice if a Chapter 11 Plan and Disclosure Statement were not entered by a certain date. *In re Jonas*, No. 10-60248-11, 2012 Bankr. LEXIS 3247, at *8–9 (Bankr. D. Mont. July 17, 2012).

The scenario in *In re Jonas* is a good example of there being a basis for a court to act *sua sponte* to dismiss a case. In that case, there was a court-approved stipulation that included language that the case would be dismissed with prejudice if specified conditions were not satisfied by a certain date. Stipulation, Bankr. D. Mont. No. 10-60248-RBK, Dckt. 198, July 13, 2011. When the conditions were not satisfied, the court had authority to issue an order dismissing the case pursuant to a stipulation between parties in the case. Order, Bankr. D. Mont. No. 10-60248-RBK, Dckt. 314, July 17, 2012. Debtor was given notice by the court, in issuing the order approving the stipulation, that the court would dismiss the case upon specified events occurring.

In this case, there has not been any pleading on the docket indicating that Debtor's case could be dismissed for cause. The court has not specified any grounds upon which the case would be dismissed, and Debtor has not been afforded the opportunity to respond to any grounds advanced by the Court. Instead, Creditor has merely argued the legal conclusion that the court can dismiss a case *sua sponte*, with no notice or grounds stated by the court, and no opportunity for Debtor to respond to grounds stated by the court. As

advanced by Creditor, Debtor need not be afforded Due Process in having grounds stated by the court and being afforded the opportunity to respond to the grounds stated by the court. Rather, Creditor's procedure is one in which Creditor states the grounds and Debtor is not afforded the opportunity to respond to the grounds stated by Creditor.

RULING

The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The Objection 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 Bayview Loan Servicing, LLC, as servicing agent for The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificateholders CWABS, Inc. Asset Backed Certificate, Series 2006-IM1 ("Creditor") holding a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is overruled.
>
> **IT IS FURTHER ORDERED** that the hearing is continued to 3:00 p.m on **xxxxxxxx, 2017.**
>
> **IT IS FURTHER ORDERED** that Bayview Loan Servicing, LLC, shall file and serve on or before **xxxxxxxxxxx, 2017**, Supplemental Pleadings addressing: (1) how joining a direction to the court to *sua sponte* dismiss the bankruptcy case with an Objection to Confirmation is permitted under the Federal Rules of Bankruptcy Procedure, and (2) the basis for a party directing the court to act *sua sponte* and what Due Process requires a court to do when it chooses to act *sua sponte* to dismiss a case or other wise terminate rights of a party.
>
> **IT IS FURTHER ORDERED** that Edward G. Schloss, Esq., counsel for Bayview Loan Servicing, LLC, shall appear at the continued hearing in person—No Telephonic Appearance Permitted.

13. 14-27118-E-13 MJD-1 | **MELVYN/RITA LIBMAN** **Matthew DeCaminada** | **MOTION FOR WAIVER OF THE CERTIFICATION REQUIREMENTS FOR ENTRY OF DISCHARGE** **8-16-17 [83]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on August 16, 2017. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

The Motion for Waiver of 11 U.S.C. § 1328 Certification Requirement has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Waiver of 11 U.S.C. § 1328 Certification Requirement is denied without prejudice.

Joint Debtor, Melvyn Libman, seeks an order waiving the certification requirement of 11 U.S.C. § 1328 for Incapacitated Debtor, Rita Libman (collectively, "Debtor"). Joint Debtor relates that Incapacitated Debtor suffered a stroke on May 27, 2017, and was admitted to a hospital. Additionally, she was diagnosed with encephalopathy and has lost use of her limbs and cannot control her hands. In fact, he states that she cannot perform daily functions. Dckt. 85.

CHAPTER 13 TRUSTEE'S RESPONSE

David Cusick ("the Chapter 13 Trustee") filed a Response on September 1, 2017. Dckt. 87. The Chapter 13 Trustee does not oppose the Motion, but he is uncertain that a discharge is in either debtor's best interest due to possible post-petition medical bills. He notes that Joint Debtor has not sought to be substituted or for a determination that further administration of the Estate is possible and in the best interest of the parties under Federal Rule of Bankruptcy Procedure 1016.

The Chapter 13 Trustee notes that the final plan payment was received on July 19, 2017, and he has not issued his Final Report and Accounting.

DEBTOR'S REPLY

Debtor filed a Reply on September 8, 2017. Dckt. 90. While Debtor agrees with the Chapter 13 Trustee that there is a concern about post-petition medical bills, Debtor notes that a motion to value for a secured claim of Citibank, N.A., in the amount of $79,087.72 was granted on August 21, 2014. *See* Dckt. 39. Debtor states that any conversion of the case would nullify that order, which they want to prevent.

Also, Debtor's counsel alleges that further administration of the Estate is possible and in the best interest of Debtor and requests that the case proceed to allow Debtor to receive a discharge, especially with a final plan payment being made on July 19, 2017.

DISCUSSION

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

Federal Rule of Bankruptcy Procedure 7025 incorporates Federal Rule of Civil Procedure 25(b), which provides that "[i]f a party becomes incompetent, the court may, on motion, permit the action to be continued by or against the party's representative."

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

Here, Joint Debtor has not requested an order substituting him in the place of Incapacitated Debtor. Joint Debtor has only requested that the court issue an order waiving the certification requirements of 11 U.S.C. § 1328. The court has not presented with any argument why Joint Debtor or another person cannot, and must not, be substituted under Federal Rule of Bankruptcy Procedure 1016 and complete the certification requirements for both debtors in this case. More significantly, the rights and interests of the incapacitated Debtor. What Joint Debtor requests is that the rights and interests of an incapacitated party be effected, impaired, and possibly damaged without there being any competent party having the legal responsibility to be the representative of the incapacitated Debtor.

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 for Waiver of 11 U.S.C. § 1328 Certification Requirement filed by Melvyn Libman ("Joint 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 requested waiver of 11 U.S.C. § 1328 Certification provided for Incapacitated Debtor Rita Libman is denied without prejudice.

14. 17-20220-E-13 HLG-1 | **WILLIAM/FAYE THOMAS** **Kristy Hernandez** | **OBJECTION TO CLAIM OF DALE WASHINGTON, CLAIM NUMBER 9** **8-4-17 [40]**

Final Ruling: No appearance at the September 19, 2017 hearing is required.

William Thomas Jr. and Faye Thomas ("Debtor") having filed a Notice of Withdrawal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(I) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Objection to Claim No. 9 of creditor Dale Washington was dismissed without prejudice, and the matter is removed from the calendar.**

15. 17-20220-E-13 HLG-2 | **WILLIAM/FAYE THOMAS** **Kristy Hernandez** | **OBJECTION TO CLAIM OF GLEN A. VAN DYKE, CLAIM NUMBER 10** **8-4-17 [46]**

Final Ruling: No appearance at the September 19, 2017 hearing is required.

William Thomas Jr. and Faye Thomas ("Debtor") having filed a Notice of Withdrawal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(I) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Objection to Claim No. 10 of creditor Glen Van Dyke was dismissed without prejudice, and the matter is removed from the calendar.**

16. **17-20220-E-13** **WILLIAM/FAYE THOMAS** **OBJECTION TO CLAIM OF VAN DYKE LAW GROUP, PC, CLAIM NUMBER 11**
HLG-3 **Kristy Hernandez** **8-4-17 [51]**

Final Ruling: No appearance at the September 19, 2017 hearing is required.

William Thomas Jr. and Faye Thomas ("Debtor") having filed a Notice of Withdrawal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(I) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Objection to Claim No. 11 of creditor Van Dyke Law Group, P.C., was dismissed without prejudice, and the matter is removed from the calendar.**

17. **15-25641-E-13** **FRANK DAVIS** **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK**
DPC-2 **Dale Orthner** **8-23-17 [92]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on August 23, 2017. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

David Cusick ("the Chapter 13 Trustee") opposes confirmation of Frank Davis's ("Debtor") Plan on the basis that:

A. He is not sure that the Plan can be confirmed without a hearing under Local Bankruptcy Rule 3015-1(c) because the original plan was confirmed on November 9, 2015, before the case was converted to Chapter 7 on July 15, 2015, and then converted back to Chapter 13 on July 6, 2017;

B. There are thirty-six months remaining for a sixty-month plan measured since the petition date, but the Plan requires at least sixty payments for the claim of David Mercurio ("Creditor"); and

C. The Plan proposes paying a 0.00% interest rate to Creditor, but under the prior confirmed plan, the Chapter 13 Trustee has already disbursed $7,806.76 in interest to Creditor, and the Plan does not account for those payments.

CREDITOR'S SUPPORT OF OPPOSITION

Creditor filed a "Joinder" on August 30, 2017, concurring in opposition to the Plan. Dckt. 97. Creditor argues that the Plan is not feasible based upon its length, that it fails to provide any interest to Creditor's secured claim, that it fails to pay the full amount due to Creditor, and that it fails to provide for taxes on Debtor's residence.

Creditor argues that the original confirmed plan lasted for nineteen months before the case was converted to Chapter 7, which leaves forty-one months remaining for Debtor to complete a sixty-month plan. Creditor (relying on the court's civil minutes for Debtor's motion to reconvert to Chapter 13) notes that Debtor will need to make monthly payments of $1,458.68 to complete the Plan with a total of $87,520.80. So far, Debtor has paid $13,300.00 under a plan, leaving $74,220.80 to be paid over forty-one months at $1,810.26 per month. Debtor's Schedules I and J show that he can afford only $1,523.00 per month, though.

Creditor states that he holds a senior deed of trust on Debtor's residence with an interest rate of 12%. He notes that the Plan does not propose to pay any interest to him, however. The property has a value of $170,000.00, and Creditor is owed $71,801.40.

Additionally, Creditor notes that Debtor has not paid property taxes for several years. As of July 18, 2017, the unpaid taxes, interest, and penalties for 2012–16 totals $16,972.92. The Plan does not account for those unpaid taxes.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on September 1, 2017. Dckt. 104. Debtor first relies on two bankruptcy court decisions as support for his proposition that he can propose a new sixty-month Plan in this case. *See Povah v. Hansbury & Finn, Inc. (In re Povah)*, 455 B.R. 328 (Bankr. D. Mass. 2011); *In re Green*, 169 B.R. 480 (Bankr. S.D. Ga. 1994). Debtor relies upon *In re Green* for the proposition that an order

converting a case from Chapter 13 to Chapter 7 "nullifie[s] the order confirming the original plan." 169 B.R. at 481–82 (citations omitted).

Then, Debtor argues that in line with *In re Povah*, a debtor who converts from Chapter 13 to Chapter 7 and then back to Chapter 13 cannot continue under the prior confirmed plan, but must propose a new plan that satisfies 11 U.S.C. § 1325. 455 B.R. at 341 (citation omitted). When looking at how long the new plan has to last, Debtor argues from *In re Green* that "the Code does not require a new plan under reconversion to remain within the original 60 month framework." 169 B.R. at 483 n. 8.

Debtor argues that his new sixty-month plan completely pays the remaining balance owed to Creditor, the Internal Revenue Service, and the Franchise Tax Board. He argues that a new sixty-month plan does not present an unreasonable delay and that it is in good faith because it pays nearly all of his debts.

Debtor's rationale for being able to present a sixty-month plan now is that the reconversion from Chapter 7 to Chapter 13 nullified his original Chapter 13 plan, thus allowing him to present a plan that calls "for any amount of payments consistent with the bankruptcy code, including up to 5 years' worth of payments." Dckt. 104 at 4:9–10.

Debtor also argues that judicial efficiency favors considering a sixty-month plan in the current case, instead of voluntarily dismissing this case and filing a new case. The new case would require a motion to extend the automatic stay as to Debtor, along with a new plan, a new meeting of creditors, a new plan confirmation hearing, new proofs of claim filed, and other procedures required in Chapter 13.

Debtor does not dispute the $7,806.76 paid to Creditor already, and he states that he would offer wording to an order confirming to account for that money. Additionally, Debtor points out that the procedure in Local Bankruptcy Rule 3015-1(c) is being followed or is inapplicable because conversion nullified the confirmed original plan.

Regarding orders for relief, Debtor begins by noting that 11 U.S.C. § 348(a) states that "[c]onversion of a case from a case under one chapter of this title to a case under another chapter of this title constitutes an order for relief," and it "does not effect a change in . . . the order for relief." Debtor notes that the most recent order for relief was issued upon conversion to Chapter 13 on July 6, 2017, and that order is same as the two prior orders for relief in this case. When determining what order a plan refers to, Debtor argues that the most recent order is used.

Debtor dismisses the Chapter 13 Trustee's reference to *In re Ramirez* by stating that it is not in opposition to Debtor's reliance on the July 6, 2017 order for relief. Dckt. 104 at 7:14–18 (citing 188 B.R. 431 (B.A.P. 9th Cir. 1995)). Debtor argues that 11 U.S.C. § 348 is "not a source of disruption," and that "'[l]eav[ing] matters as they existed on the date of conversion' does not negate the presence of a new order for relief." *Id.* at 7:15–18.

Debtor contends that he has not violated 11 U.S.C. § 1322(b)(2) & (e) by not paying interest on Creditor's claim. Instead, Debtor argues that the underlying mortgage has matured already and is being treated as nothing but arrears in the Plan. Also, Debtor believes that determining compliance with 11 U.S.C.

§ 1322(e) is infeasible because Creditor has not provided documentation establishing the underlying agreement.

As a final point, Debtor notes that despite the Chapter 13 Trustee's citation to *In re Nolan* for the proposition that Debtor may not be able to change the interest rate owed to Creditor with the Plan because of the prior confirmed plan, *In re Green* states that conversion "nullifie[s] the order confirming the original plan," leaving nothing to control the current plan. *Chrysler Financial Corp. v. Nolan (In re Nolan)*, 232 F.3d 528 (6th Cir. 2000); *In re Green*, 169 B.R. at 481–82.

PREVIOUS CONVERSION

Debtor initially filed this case under Chapter 13 on July 15, 2015. Dckt. 1. A Plan was confirmed on November 9, 2015, by the court wherein Debtor agreed to either refinance or sell his house within eighteen months to pay off his mortgage. At the expiration of eighteen months, Debtor did not refinance or sell his house. Dckt. 64.

On February 3, 2017, Chapter 13 Trustee David Cusick moved to dismiss Debtor's case due to default on terms of the Plan. Dckt. 41. On February 22, 2017, the order to dismiss was granted, but the case was converted by the court to one under Chapter 7 to allow the Trustee to administer assets of the bankruptcy estate. Dckt. 45.

DISCUSSION

The Chapter 13 Trustee's and Creditor's objections are well-taken. Creditor objects to the confirmation of the Plan on the basis that the Plan calls for adjusting the interest rate on its loan with Debtor to 0.00%. Creditor's claim is secured by Debtor's residence. Creditor argues that this interest rate is outside the limits authorized by the Supreme Court in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004). In *Till*, a plurality of the Court supported the "formula approach" for fixing post-petition interest rates. *Id.* Courts in this district have interpreted *Till* to require the use of the formula approach. *See In re Cachu*, 321 B.R. 716 (Bankr. E.D. Cal. 2005); *see also Bank of Montreal v. Official Comm. of Unsecured Creditors (In re American Homepatient, Inc.)*, 420 F.3d 559, 566 (6th Cir. 2005) (*Till* treated as a decision of the Court). Even before *Till*, the Ninth Circuit had a preference for the formula approach. *See Cachu*, 321 B.R. at 719 (citing *In re Fowler*, 903 F.2d 694 (9th Cir. 1990)).

The court agrees with the court in *Cachu* that the correct valuation of the interest rate is the prime rate in effect at the commencement of this case plus a risk adjustment. Because the creditor has only identified risk factors common to every bankruptcy case, the court fixes the interest rate as the prime rate in effect at the commencement of the case, 3.25%, plus a 1.25% risk adjustment, for a 4.50% interest rate. The objection to confirmation of the Plan on this basis is sustained. *See* 11 U.S.C. § 1325(a)(5)(B)(ii).

As the court discussed at the July 6, 2017 hearing on Debtor's motion to convert this case back to one under Chapter 13, Debtor faces a fundamental problem in this reconverted case (as opposed to a new Chapter 13 case). Debtor must have a sixty-month plan. However, this case was filed on July 15, 2015—two years ago. Debtor spent eighteen months in a Chapter 13 Plan already in this case before it was converted to one under Chapter 7, despite Debtor's argument that conversion nullified the order confirming.

The order confirming may have been nullified, but only because no plan could effectively exist in Chapter 7. Conversion did not eliminate the eighteen months of payments made under a confirmed plan, merely that there was no longer an effective, confirmed plan in this case while in Chapter 7.

Debtor's reliance on *In re Green* turns out to be unpersuasive for Debtor's proposition that a new sixty-month plan can be confirmed. In that case—which has not been cited with approval in the Ninth Circuit—the court found that Debtor had already paid under a confirmed plan for forty-five months and that there were only fifteen months remaining to pay. *In re Green*, 169 B.R. at 483. The court noted that any proposal to pay beyond that limit could be evidence of unreasonable delay and bad faith by a debtor. *Id.* (citing *In re Hunter*, No. 93-41649 at 9 (Bankr. S.D. Ga. Mar. 31, 1994)).

While the *Green* court was "mindful of policy considerations" to allow a debtor an opportunity to repay debts, that court was more persuaded by preventing,

> "the potential for abuse and delay through multiple conversions, especially if the debtor is given sixty (60) months with each new plan."

Id. (citing *In the Matter of Johnson*, 116 B.R. 224, 226 (Bankr. D. Idaho 1990)). The *Green* court ruled that the debtor could not continue under the original confirmed Chapter 13 plan and had to propose a new plan because the case had been converted from Chapter 13 to Chapter 7 and back to Chapter 13, but the court allowed the debtor only fifteen months from confirmation of a new plan to complete the new plan, thus keeping the Chapter 13 portion of the case within the sixty-month limit of the Code. The very language of the case relied on the Debtor states:

> "The statutorily proscribed time limit for payments under a plan is sixty (60) months. In this case, Debtor paid under the original plan for forty-five (45) months, counting from the time payments were commenced in November 1989, to the time the case was converted to Chapter 7 in August 1993. A time period longer than fifteen (15) months, i.e., the time remaining under the original sixty (60) month time limit, could be considered unreasonable delay and evidence of bad faith. **Unreasonable delay as grounds for dismissal in tandem with the good faith requirement for confirmation forbids Debtor from circumventing the rules of the Bankruptcy Code and receiving a fresh sixty (60) months each time a case is reconverted to Chapter 13**, especially considering the time interval during which the case was pending in Chapter 7 status. Also, as stated in *In re Hunter*, No. 93-41649, slip op. at 9 (Bankr. S.D. Ga. March 31, 1994), '**if a proposed plan in a series would allow a debtor to remain under the protection of chapter 13 for longer than the statutory limit for a single plan, this is evidence of bad faith**.'"

Id. Debtor's own authorities support the court's conclusion that sixty months for the plan (however amended or modified) means sixty months. Not fifty-nine months for the original plan, forty-five months for the first amended plan, twenty-five months for a second amended plan, and so on. Congress has specified the maximum term of sixty months for the plan, as amended or modified, in a Chapter 13 case.

Not counting the Chapter 7 period of this case, Debtor would have only forty-two Chapter 13 Plan months left in this case. Debtor has not shown any basis for having greater than sixty months for a Chapter 13 plan because Debtor defaulted on the first plan and now wants to modify the terms. Debtor has not requested that the court extend the plan term. With a new sixty-month Plan, Debtor would effectively have a seventy-eight-month Chapter 13 Plan, which exceeds the "not for a period longer than 5 years" limitation for Chapter 13 plans found in 11 U.S.C. § 1322(d).

The Bankruptcy Code provides that a confirmed plan in a Chapter 13 case may be modified, but that such modification cannot extend the time beyond five years from when the first payment under the confirmed plan in the case was due. 11 U.S.C. § 1329(c). When modifying a confirmed plan (11 U.S.C. § 1329) Congress expressly provides that the court may not approve a modified plan for which the period for payments exceeds the original five-year maximum period for the original plan confirmed in the case. *See In re Jacobs*, 263 B.R. 39, 49 (Bankr. N.D.N.Y. 2001); *see also Christensen v. Black (In re Black)*, 292 B.R. 693, 700–01 (B.A.P. 10th Cir. 2003) ("[T]he practice of allowing a plan modification that deems many months of payments to be a 'lump sum contribution' that is counted as consuming at most a few months of the five-year plan limit would permit plans that in fact last much longer than five years, the outside limit Congress sought to impose.").

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 David Cusick ("the Chapter 13 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

18. **17-24045-E-13** **PAULINE ABBOTT** **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK**
DPC-1 **Harry Roth** **8-16-17 [25]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on August 16, 2017. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

A. The Plan proposes to use money from a thrift savings plan without a plausible explanation, and

B. The Plan fails the liquidation analysis.

PROPOSED STIPULATION

On August 28, 2017, the parties filed a Stipulation to continue the hearing on this matter to 3:00 p.m. on September 19, 2017. Dckt. 37.

ORDER GRANTING STIPULATION

On August 30, 2017, the court entered an order granting the parties' Stipulation and continuing the hearing to 3:00 p.m. on September 19, 2017. Dckt. 38.

RULING

The Chapter 13 Trustee's objections are well-taken. Pauline Abbott ("Debtor") may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Part of the Plan calls for Debtor to pay from a Thrift Savings Plan, withdrawn at $900.00 per month, for expenses that may arise and to fund the Plan when other funds are not available. Over the plan term, Debtor would withdraw $32,400.00, but from the income on Schedule I—$1,407.00 from Social Security; $1,005.00 from pension or retirement income; and $1,577.00 from Debtor's spouse's annuity paid by Social Security—no additional funding seems required. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtor's plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). The Chapter 13 Trustee states that Debtor claimed two properties as one exempt unit in the amount of $165,000.00, but she admitted at the meeting of creditors that the value of one of the lots may be $25,000.00. Debtor proposes a 0.00% dividend to unsecured claims in this case.

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 David Cusick ("the Chapter 13 Trustee"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

19. 17-24045-E-13 DPC-2 | **PAULINE ABBOTT** **Harry Roth** | **OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS** **8-16-17 [29]**

Final Ruling: No appearance at the September 19, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on August 16, 2017. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Objection to Claimed Exemptions is sustained, and the exemptions are disallowed in their entirety.

David Cusick ("the Chapter 13 Trustee") objects to Pauline Abbott's ("Debtor") claimed exemptions under California law because Debtor claimed $165,000.00 under C.C.P. § 704.730 for real property located at 2957 10th Street, Biggs, California ("Property A") and for a lot located at 2961 10th Street, Biggs, California ("Property B"). Debtor admitted at the First Meeting of Creditors that the value of the lot may be $25,000.00. The Chapter 13 Trustee states that Debtor is not entitled to claim the equity at Property B because it is not Debtor's residence. Under C.C.P. § 704.730 , Debtor has the burden of proof as to the exemption.

The Chapter 13 Trustee also notes that Debtor improperly used C.C.P. §§ 704.730 and 703.140(b)(5) to exempt assets. Finally, the Chapter 13 Trustee argues that Debtor has used the wrong exemption code for a Declared Homestead, C.C.P. § 704.950, to exempt replacement windows for the home installed in July 2015.

The Chapter 13 Trustee's Objection is sustained, and the claimed exemptions are disallowed.

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 Claimed Exemptions filed by David Cusick ("the Chapter 13 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Objection is sustained, and the claimed exemptions are disallowed in their entirety.

20. 16-26447-E-13 CK-5 | **DOUGLAS TOOLEY** **Catherine King** | **MOTION TO CONFIRM PLAN** **8-1-17 [95]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 1, 2017. By the court's calculation, 49 days' notice was provided. 42 days' notice is required. FED. R. BANKR. P. 2002(b); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is denied.

Douglas Tooley ("Debtor") seeks confirmation of the Amended Plan because he is pursuing a refinance loan and because he has reduced his business expenses. Dckt. 97. The Amended Plan proposes plan payments of $3,000.00 per month beginning in August 2017, with $21,780.00 paid through July 2017. The Plan also contemplates seeking a loan modification or refinance within eighteen months of

confirmation. If not obtained during that window, then Debtor shall immediately surrender real property. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on August 15, 2017. Dckt. 101. Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). The Chapter 13 Trustee is not aware of any pending loan modification or refinance applications, and he notes that the Plan does not require Debtor to seek such an application before eighteen months from confirmation. The Chapter 13 Trustee opposes confirmation, unless he is provided with a copy of any application every three months and a written explanation for what progress has been made.

The Chapter 13 Trustee also questions Debtor's ability to increase plan payments because there is no budget for his business, no proof that marketing expenses have decreased, and no information about whether the corporation can increase Debtor's salary. Debtor's net income listed on Schedule J is $2,178.00. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

CREDITOR'S OPPOSITION

Lee S. Raphael, Cassandra J. Richey, Melissa Vermillion, Bonni S. Mantovani, Anna Landa, Diana Torres-Brito, and Alexander G. Mesissner, all attorneys of record for HSBC Bank USA, National Association as Trustee for Ellington Loan Acquisition Trust 2007-2, Mortgage Pass-Through Certificates, Series 2007-2, its assignees and/or successors in interest, ("Creditor") holding a secured claim, filed an Opposition on August 28, 2017. Dckt. 104. The objecting Creditor holds a deed of trust secured by Debtor's residence. Creditor has filed a timely proof of claim in which it asserts $96,222.30 in pre-petition arrearages. The Plan does not propose to cure those arrearages fully. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments because it does not provide for the surrender of the collateral for this claim. *See* 11 U.S.C. §§ 1322(b)(2) & (5), 1325(a)(5)(B). The Plan cannot be confirmed because it fails to provide for the full payment of arrearages.

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Creditor notes that Debtor is already providing all disposable income to the Plan, and it questions how he will be able to increase plan payments. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

RULING

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

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

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

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

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

21.	**17-24453-E-13 MWB-1**	**MICHELLE QUINLIVAN Mark Briden**	**CONTINUED MOTION TO VALUE COLLATERAL OF PNC BANK 7-12-17 [10]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Creditor, and Office of the United States Trustee on July 12, 2017. By the court's calculation, 34 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

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 hearing on the Motion to Value Secured Claim is continued to 3:00 p.m. on October 17, 2017.

The Motion to Value filed by Michelle Quinlivan ("Debtor") to value the secured claim of PNC Bank ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 2685 Boneset Street, Redding, California ("Property"). Debtor seeks to value the Property at a fair market value of $70,000.00 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).

CREDITOR'S RESPONSE

Creditor filed a Response on July 28, 2017. Dckt. 22. Creditor opposes Debtor's valuation of the Property and states that it obtained a valuation on May 16, 2017, showing that the Property could be listed for $181,000.00 and sold for $179,000.00. Creditor states that if the court is not satisfied with the BPO valuation, then it requests that the hearing be continued for it to conduct a full appraisal.

AUGUST 15, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on September 19, 2017, and ordered supplemental opposition pleadings to be served by September 5, 2017, and replies by September 12, 2017. Dckts. 37 & 39. The court also ordered Debtor to serve David Cusick ("the Chapter 13 Trustee") by August 22, 2017. Dckt. 39.

CHAPTER 13 TRUSTEE'S RESPONSE

The Chapter 13 Trustee filed a Response on September 1, 2017. Dckt. 43. The Chapter 13 Trustee states that he was served on August 23, 2017, and he notes that Creditor has not filed a claim in this case.

STIPULATION TO CONTINUE HEARING

On September 6, 2017, the parties filed a Stipulation to Continue Hearing to October 17, 2017, and they agreed that Creditor would have until October 3 to file a supplemental opposition, and Debtor would have until October 10, 2017, to file a reply. Dckt. 49.

ORDER GRANTING STIPULATION TO CONTINUE HEARING

On September 6, 2017, the court entered an order granting the Stipulation and continuing the hearing on this Motion to 3:00 p.m. on October 17, 2017, with supplemental opposition due by October 3, 2017, and replies by October 10, 2017. Dckt. 50.

APPLICABLE LAW

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

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

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

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

NO PROOF OF CLAIM FILED

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

BROKER'S PRICE OPINION NOT AUTHENTICATED

Creditor requests that the court deny the Motion based on the "evidence" in the form of a Broker's Price Opinion that is filed as Exhibit A, Dckt. 23. No declaration is filed in which the alleged broker provides any personal knowledge or expert testimony under penalty of perjury. FED. R. EVID. 601, 602, 701, 702. The court is merely presented with an exhibit that no person has authenticated, or may be willing to authenticate as required by Federal Rules of Evidence 901 and 902. The court declines the opportunity to make rulings based merely on factual arguments of counsel, no basis having been given for the Federal Rules of Evidence not applying to Creditor.

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $73,367.00. Creditor's second deed of trust secures a claim with a balance of approximately $69,832.00.

If the court were to accept Debtor's valuation of the Property, Creditor's claim secured by a junior deed of trust would be completely under-collateralized. Creditor has demonstrated though, that the Property's value may be as much as $179,000.00–181,000.00, which would provide at least some equity to support Creditor's secured claim. Creditor has requested time to conduct an appraisal, and the court concurs because this Motion depends upon an accurate valuation of the Property. Additionally, the parties have stipulated to a continuance, which the court has granted. The hearing on the Motion is continued to 3:00 p.m. on October 17, 2017, by prior order.

22. **17-24453-E-13** **MICHELLE QUINLIVAN** **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY PNC BANK, N.A.**
RSA-1 **Mark Briden** **8-10-17 [28]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 10, 2017. By the court's calculation, 33 days' notice was provided. 14 days' notice is required.

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

The hearing on the Objection to Confirmation of Plan is continued to 3:00 p.m. on October 17, 2017.

PNC Bank, N.A., Successor by Merger to National City Bank, Creditor with a secured claim, opposes confirmation of the Plan on the basis that it relies upon the court granting a motion to value, specifically of Michelle Quinlivan's ("Debtor") real property and therefore of Creditor's claim.

SEPTEMBER 12, 2017 HEARING

At the hearing, the court continued the hearing on this Objection to 3:00 p.m. on September 19, 2017. Dckt. 53.

RULING

Creditor's only ground in the Objection is that the Plan relies upon a motion to value that is scheduled to be heard. Continuing the hearing on this Objection is appropriate so that the court can hear and determine the motion to value. The hearing on the Objection is continued to 3:00 p.m. on October 17, 2017.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by PNC Bank, N.A., Successor by Merger to National City Bank, Creditor with a secured claim, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Objection to Confirmation of the Plan is continued to 3:00 p.m. on October 17, 2017.

23. **17-24453-E-13** **MICHELLE QUINLIVAN** **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK**
DPC-1 **Mark Briden** **8-16-17 [33]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on August 16, 2017. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The hearing on the Objection to Confirmation of Plan is continued to 3:00 p.m. on October 17, 2017.

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

A. Michelle Quinlivan ("Debtor") failed to appear at the meeting of creditors;

B. The Plan relies on a pending motion to value; and

C. Page two of the Plan is missing.

In reverse order, first, the court notes that a full copy of the Plan was filed on August 30, 2017, resolving the Chapter 13 Trustee's ground. Dckt. 41. Second, the pending motion to value is scheduled for hearing on September 19, 2017. Dckt. 39. PNC Bank, N.A., Successor by Merger to National City Bank

("Creditor"), objected to the Plan solely on the ground that the Plan relies on a motion to value, and the court has continued the hearing on that objection.

Third, the continued meeting of creditors is scheduled to be conducted at 10:00 a.m. on September 14, 2017. Debtor has not responded to the Objection, but the filing of a complete plan suggests to the court that Debtor is attempting to prosecute this case. The court has continued a separate objection, and continuing this one for the court to hear the motion to value and for the continued meeting of creditors to be conducted is appropriate. The hearing on the Objection is continued to 3:00 p.m. on October 17, 2017.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by David Cusick ("the Chapter 13 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Objection to Confirmation of the Plan is continued to 3:00 p.m. on October 17, 2017.

24.	**13-23157-E-13 DPC-2**	**HOSSEIN BAKTVAR AND LALEH MOGHADAM** **Peter Macaluso**	**OBJECTION TO CLAIM OF JOSEPH P. THOMPSON, CLAIM NUMBER 23** **7-28-17 [59]**

Final Ruling: No appearance at the September 19, 2017 hearing is required.

David Cusick ("the Chapter 13 Trustee") having filed a Notice of Withdrawal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(I) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Objection to Claim No. 23 of creditor Joseph P. Thompson, LLC was dismissed without prejudice, and the matter is removed from the calendar.**

25. 17-21770-E-13 WILLIAM GLOVER MOTION TO CONFIRM PLAN
LBG-2 Lucas Garcia 7-27-17 [44]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on July 27, 2017. By the court's calculation, 54 days' notice was provided. 42 days' notice is required. FED. R. BANKR. P. 2002(b); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is denied.

William Glover, Jr. ("Debtor") seeks confirmation of the Amended Plan because the original Schedule I was based on paychecks prior to filing and failed to account for the need to adjust Debtor's tax withholdings. Dckt. 44. The Amended Plan has monthly plan payments of $250.00 for sixty months. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on August 30, 2017. Dckt. 51. The Chapter 13 Trustee asserts that Debtor is $250.00 delinquent in plan payments, which represents one month of the $250.00 plan payment. According to the Chapter 13 Trustee, the Plan in § 1.01 calls for payments to be received by the Chapter 13 Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Further, the Trustee asserts that there is a lack of evidence in the record to indicate that the Internal Revenue Services has consented to the provision that its claim will not be paid in full.

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

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

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

26. **14-20671-E-13** **CATHERINE TROUT** **MOTION TO AVOID LIEN OF**
RJ-3 **Richard Jare** **CITIBANK (SOUTH DAKOTA), N.A.**
8-17-17 [66]

Final Ruling: No appearance at the September 19, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, and Office of the United States Trustee on August 17, 2017. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Citibank (South Dakota) NA ("Creditor") against property of Catherine Trout ("Debtor") commonly known as 9225 Gilardi Road, Newcastle, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $6,811.62. An abstract of judgment was recorded with Placer County on July 15, 2011, that encumbers the Property.

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of $265,000.00 as of the date of the petition. The unavoidable consensual liens that total $105,670.00 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the amount of $175,000.00 on Schedule C.

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

ISSUANCE OF A COURT-DRAFTED ORDER

An order (not a minute order) substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Catherine Trout ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Citibank (South Dakota) NA ("Creditor"), California Superior Court for Placer County Case No. MCV0048145, recorded on July 15, 2011, Document No. 2011-0054405-00, with the Placer County Recorder, against the real property commonly known as 9225 Gilardi Road, Newcastle, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

27. 17-23580-E-13 DEBORAH MATTIUZZI MOTION TO CONFIRM PLAN
RWH-1 Ronald Holland 8-8-17 [25]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 8, 2017. By the court's calculation, 42 days' notice was provided. 42 days' notice is required. FED. R. BANKR. P. 2002(b); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is denied.

Deborah Mattiuzzi ("Debtor") seeks confirmation of the Amended Plan to classify Plum Tree Homeowners Association as a creditor with a secured claim after she learned that it was in a third position, not fourth. Dckt. 27. The Amended Plan proposes a 100% dividend to unsecured claims still and raises the plan payments from $2,577.00 for the first two months to $2,622.00 for the remaining fifty-eight months of the Plan. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on August 30, 2017. Dckt. 35. The Chapter 13 Trustee asserts that Debtor is $10.00 delinquent in plan payments, which represents less than one month of the $2,622.00 plan payment. According to the Chapter 13 Trustee, the Plan in § 1.01 calls for payments to be received by the Chapter 13 Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

The Chapter 13 Trustee asserts that the Franchise Tax Board has a claim for $1,804.76 in priority unsecured debt. Proof of Claim 1-1, filed on August 4, 2017. The Plan does not provide for all priority debt as required by 11 U.S.C. § 1322(a)(2).

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

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

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

28. **10-44687-E-13** **DARYL/JOYCE STEWART**
TJW-2 **Timothy Walsh**

MOTION TO BE APPOINTED AS SUCCESSOR TO DECEASED DEBTOR, MOTION FOR WAIVER OF 1328 CERTIFICATION REQUIREMENTS FOR ENTRY OF DISCHARGE AND/OR MOTION FOR OMNIBUS RELIEF UPON DEATH OF DEBTOR
8-30-17 [69]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on August 30, 2017. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

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

The Motion to Substitute is granted.

Joint Debtor, Joyce Stewart, seeks an order approving the motion to substitute Joint Debtor for the deceased Debtor, Daryl Stewart. This motion is being filed pursuant to Federal Rule of Bankruptcy Procedure 1016.

Debtor filed for relief under Chapter 13 on September 16, 2010. On November 1, 2010, Debtor's Chapter 13 Plan was confirmed. Dckt. 20. On May 7, 2015, Debtor Daryl Stewart passed away.

Pursuant to Federal Rule of Bankruptcy Procedure 1004.1, Joint Debtor requests authorization to be substituted in for the deceased debtor and to perform the obligations and duties of the deceased party in addition to performing her own obligations and duties. A Notice of Death was filed on August 30, 2017.

Dckt. 69. Joint Debtor is the spouse of the deceased party and is the successor's heir and lawful representative. Joint Debtor states that she will continue to prosecute this case in a timely and reasonable manner.

DISCUSSION

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

Federal Rule of Bankruptcy Procedure 7025 incorporates Federal Rule of Civil Procedure 25, which provides that "[i]f a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed." *Hawkins v. Eads*, 135 B.R. at 384.

The application of Rule 25 and Rule 7025 is discussed in COLLIER ON BANKRUPTCY, 16th Edition, § 7025.02, which states:

> Subdivision (a) of Rule 25 of the Federal Rules of Civil Procedure deals with the situation of death of one of the parties. If a party dies and the claim is not extinguished, then the court may order substitution. **A motion for substitution may be made by a party to the action or by the successors or representatives of the deceased party.** There is no time limitation for making the motion for substitution originally. Such time limitation is keyed into the period following the time when the fact of death is suggested on the record. In other words, procedurally, **a statement of the fact of death is to be served on the parties in accordance with Bankruptcy Rule 7004 and upon nonparties as provided in Bankruptcy Rule 7005** and suggested on the record. The suggestion of death may be filed only by a party or the representative of such a party. The suggestion of death should substantially conform to Form 30, contained in the Appendix of Forms to the Federal Rules of Civil Procedure.
>
> The motion for substitution must be made not later than 90 days following the service of the suggestion of death. Until the suggestion is served and filed, the 90 day period does not begin to run. In the absence of making the motion for substitution within that 90 day period, paragraph (1) of subdivision (a) requires the action to be dismissed as to the deceased party. However, the 90 day period is subject to enlargement by the court pursuant to the provisions of Bankruptcy Rule 9006(b). Bankruptcy Rule 9006(b) does not incorporate by reference Civil Rule 6(b) but rather speaks in terms of the bankruptcy rules and the bankruptcy case context. Since Rule

> 7025 is not one of the rules which is excepted from the provisions of Rule 9006(b), the court has discretion to enlarge the time which is set forth in Rule 25(a)(1) and which is incorporated in adversary proceedings by Bankruptcy Rule 7025. Under the terms of Rule 9006(b), a motion made after the 90 day period must be denied unless the movant can show that the failure to move within that time was the result of excusable neglect. The suggestion of the fact of death, while it begins the 90 day period running, is not a prerequisite to the filing of a motion for substitution. The motion for substitution can be made by a party or by a successor at any time before the statement of fact of death is suggested on the record. **However, the court may not act upon the motion until a suggestion of death is actually served and filed.**
>
> The **motion for substitution together with notice of the hearing is to be served on the parties in accordance with Bankruptcy Rule 7005 and upon persons not parties in accordance with Bankruptcy Rule 7004 . . . .**

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

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

Here, Joyce Stewart has provided sufficient evidence to show that administration of the Chapter 13 case is possible and in the best interest of creditors after the passing of the debtor. The Motion was filed within the ninety-day period specified in Federal Rule of Bankruptcy Procedure 1016, following the filing of the Notice of Death. Dckt. 69. Additionally, Debtor has provided a copy of Deceased Debtor's certification. Dckt. 67. Based on the evidence provided, the court determines that further administration of this Chapter 13 case is in the best interests of all parties, and that Joint Debtor, Joyce Stewart, as the spouse of the deceased party and as the successor's heir and lawful representative, may continue to administer the case on behalf of the deceased debtor, Daryl Stewart. The court grants the Motion to Substitute Party.

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

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

IT IS ORDERED that the Motion is granted, and Joyce Stewart is substituted as the successor to the deceased Debtor Daryl Stewart and is allowed to continue the administration of this Chapter 13 case pursuant to Federal Rule of Bankruptcy Procedure 1016. The court further waives the requirement for post-petition education for the deceased Debtor.

IT IS FURTHER ORDERED that the requested waiver of 11 U.S.C. § 1328 Certifications provided for the deceased Debtor Daryl Stewart is denied.

29. 15-20787-E-13 WW-2 | **KENNETH JOHNSON** | **MOTION TO MODIFY PLAN**
Mark Wolff | **8-8-17 [44]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 8, 2017. By the court's calculation, 42 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(g) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

The Motion to Confirm the Modified Plan is denied.

Kenneth Johnson ("Debtor") seeks confirmation of the Modified Plan to provide for pre-petition arrears and post-petition payments to Seterus, Inc. ("Creditor"). Dckt. 46. The Modified Plan includes Creditor in Class 1, maintains a 44% dividend to unsecured claims, and proposes the following payments:

A. $3,340.00 per month for twenty-nine months, with all missed payments through July 25, 2017, excused;

B. $4,725.00 per month for thirty-one months, beginning August 25, 2017; and

C. $3,400.00 as a lump sum to be paid on August 25, 2017, to Creditor.

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

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on September 5, 2017. Dckt. 52. The Chapter 13 Trustee asserts that Debtor is $1,265.00 delinquent in plan payments, which represents less than one month of the $4,275.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Additionally, the Chapter 13 Trustee objects to the Modified Plan providing for Creditor's pre-petition and post-petition arrears as part of the same claim. The Chapter 13 Trustee asserts that Creditor filed only one claim, which listed the pre-petition arrears. The Chapter 13 Trustee believes that the arrears should be provided for separately because only one claim has been filed.

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

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

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

30. 15-26888-E-13 MJD-1 | **PATRICK FIELD** **Matthew DeCaminada** | **MOTION FOR HARDSHIP DISCHARGE** **8-18-17 [31]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on August 18, 2017. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

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

At the hearing the court addressed with counsel for Debtor and counsel for the Chapter 13 Trustee the apparent clerical error in the Notice of Hearing stating that the parties in interest had until October 25, 2017, to file written opposition to this Motion set for hearing on September 19, 2017. Dckt. 32. The Notice also states that the Opposition, if any, must be filed at least fourteen days before the September 19, 2017 hearing. Counsel for the Debtor **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**.

The Motion for Hardship Discharge is granted.

Patrick Field ("Debtor") moves for the entry of a hardship discharge in this case pursuant to 11 U.S.C. § 1328(b). Debtor represents that he has been making payments under a confirmed plan since September 2015, with a total of approximately $21,000.00 paid so far. Plan payments will complete in approximately five months.

Debtor reports that his health declined suddenly, requiring hospitalization and seven surgeries since June 29, 2017. Dckt. 33. Debtor states that he was admitted to the hospital to treat flesh-eating bacteria on his arms and hands, and while in the hospital, he has contracted additional infections in his chest and left knee. *Id.* Debtor has been unemployed since April 24, 2017, and has been unable to obtain employment.

Id. After being released from the hospital, he will have to complete several weeks of physical therapy before being released to pursue disability compensation. *Id.*

CHAPTER 13 TRUSTEE'S RESPONSE

David Cusick ("the Chapter 13 Trustee") filed a Response on September 1, 2017. Dckt. 36. The Chapter 13 Trustee notes that Debtor is in month twenty-five of a sixty-month plan, with a total of $62,400.00 due. Currently, Debtor is delinquent $1,800.00.

The Chapter 13 Trustee does not oppose the Motion, and he notes that there is a significant student loan debt that does not appear to be the subject of an adversary proceeding, but it may be viable based upon Debtor's medical condition.

APPLICABLE LAW

Section 1328(b) of the Bankruptcy Code states:

> Subject to subsection (d), at any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if–
>
> > (1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;
> >
> > (2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and
> >
> > (3) modification of the plan under section 1329 of this title is not practicable.

The provisions of 11 U.S.C. § 1328(b) are written conjunctively and must all be satisfied to grant a hardship discharge. *See, e.g.*, *In re Cummins*, 266 B.R. 852, 855 (Bankr. N.D. Iowa 2001). Debtor has the burden or proving each of those elements. *Spencer v. Labarge (In re Spencer)*, 301 B.R. 730, 733 (B.A.P. 8th Cir. 2003). "Unsubstantiated and conclusory statements" about a debtor's inability to afford plan payments anymore are insufficient when considering a motion for a hardship discharge. *See, e.g.*, *In re Dark*, 87 B.R. 497, 498 (Bankr. N.D. Ohio 1988).

Some courts have looked for a catastrophic event to justify a hardship discharge, but others have relied upon the plain meaning of 11 U.S.C. § 1328(b) to determine whether a "debtor is justly accountable for the plan's failure." *In re Bandilli*, 231 B.R. 836, 840 (B.A.P. 1st Cir. 1999). Determining whether a debtor is justly accountable is fact-driven, and some considerations include:

A. Whether the debtor has presented substantial evidence that he or she had the ability and intention to perform under the plan at the time of confirmation;

B. Whether the debtor did materially perform under the plan from the date of confirmation until the date of the intervening event or events;

C. Whether the intervening event or events were reasonably foreseeable at the time of confirmation of the Chapter 13 plan;

D. Whether the intervening event or events are expected to continue in the reasonably foreseeable future;

E. Whether the debtor had control, direct or indirect, of the intervening event or events; and

F. Whether the intervening event or events constituted a sufficient and proximate cause for the failure to make the required payments.

Id.

At least one court has found that an economic hardship (i.e., lost business revenue and increased expenses) is not the kind of event "such as death or disability which prevent[s] a debtor, through no fault of his or her own, from completing payments." *In re Nelson*, 135 B.R. 304, 306 (Bankr. N.D. Ill. 1991).

Sub-section 11 U.S.C. § 1328(b)(1) "requires that the circumstances leading to the debtor's failure to make payments be beyond the debtor's control." *In re Cummins*, 266 B.R. at 855. Such aggravating circumstances need to be "truly the worst of the awfuls—something more than just the temporary loss of a job or a temporary physical disability." *In re Nelson*, 135 B.R. at 307 (citation omitted).

The second portion of 11 U.S.C. § 1328(b) requires that unsecured claims receive no less than they would have through Chapter 7 liquidation. That is called the "best interests" test that is identical to Chapter 13 plan confirmation in 11 U.S.C. § 1325(a)(4). *In re Cummins*, 266 B.R. at 856 (citations omitted). If an unsecured claim would not receive a distribution through Chapter 7, then any payment from a Chapter 13 plan satisfies that requirement. *Id.* (citing *In re Nelson*, 135 B.R. at 308).

Finally, 11 U.S.C. § 1328(b)(3) requires that modifying the Chapter 13 plan not be practicable. Proposing a modified plan "is not 'practicable' if there is no source of income to fund the modified plan." *Id.* (citing *In re Bond*, 36 B.R. 49, 51 (Bankr. E.D.N.C. 1984)).

The Ninth Circuit has instructed that "[n]othing in the Code compels a bankruptcy court to close, rather than dismiss, a Chapter 13 case when a debtor fails to complete [a] plan." *HSBC Bank USA, N.A. v. Blendheim (In re Blendheim)*, 803 F.3d 477, 496 (9th Cir. 2015). Furthermore, "the availability of case closure does not eliminate a bankruptcy court's duty to ensure that a debtor complies with the Bankruptcy Code's 'best interests of creditors' test, 11 U.S.C. § 1325(a)(4), and the good faith requirement for confirming a Chapter 13 plan." *Id.* The Ninth Circuit found explicitly that a "bankruptcy court [had]

properly conditioned permanent lien-voidance upon the successful completion of the Chapter 13 plan payments. If the debtor fails to complete the plan as promised, the bankruptcy court should either dismiss the case or, to the extent permitted under the Code, allow the debtor convert to another chapter." *Id.*

DISCUSSION

In the Motion, Debtor pleads grounds to satisfy the three elements of 11 U.S.C. § 1328(b). First, Debtor pleads that he should not be held justly accountable for having to treat flesh-eating bacteria and subsequent hospital infections. He argues that he could not have anticipated or prevented the events.

Second, Debtor argues that the value of property actually distributed under the Plan on account of each unsecured claim is not less than what would have been distributed in Chapter 7 because there would have been no distribution in Chapter 7. In Chapter 13, $5,889.81 has been distributed to unsecured claims so far.

Third, Debtor states that modifying the Plan is not feasible because he has no income currently, does not have a promise of future income, does not have an ability to obtain gainful employment, and will be applying for disability income as his sole source of income.

Debtor has demonstrated to the court that the elements of 11 U.S.C. § 1328(b) have been met. The court does not believe that Debtor would seek out infections and operations that could jeopardize his life and career to the extent that he has required seven surgeries and hospitalization since late June 2017. While some courts have required that a debtor face a catastrophe, that is not a requirement. In this case, however, there has been a clear catastrophe in Debtor's life that prevents him from complying with and completing the Plan. The Motion is granted, and a hardship discharge under 11 U.S.C. § 1328(b) is entered for Debtor in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Hardship Discharge filed by Patrick Field ("Debtor") having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and the court shall enter a "hardship" discharge pursuant to 11 U.S.C. § 1328(b) for Patrick Field in this case based on the Plan as performed as of the September 19, 2017 hearing date on this Motion.

31. 16-22088-E-13 JAMIE CELAYA MOTION TO MODIFY PLAN
TLA-3 Thomas Amberg 8-14-17 [48]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 14, 2017. By the court's calculation, 36 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(g) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

The Motion to Confirm the Modified Plan is denied.

Jamie Celaya ("Debtor") seeks confirmation of the Modified Plan because she was involved in a car collision and wants to surrender her interest in the vehicle and because her income has adjusted slightly. Dckt. 51. The Modified Plan proposes plan payments of $5,827.00 from May 2016 through August 2017 and then payments of $217.00 for the remainder of the Plan. The Plan also lowers the dividend to unsecured claims from 8% to 4% and reclassifies the debt for Debtor's vehicle to Class 3. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on September 5, 2017. Dckt. 58. The Chapter 13 Trustee notes that Schedule J has not been updated and still shows $110.00 for vehicle insurance and $15.00 vehicle tax/registration, numbers that have not changed from prior Schedules J. The Chapter 13 Trustee also expects that Debtor will adjust her transportation expenses.

Debtor also reported that her income has changed, but the Chapter 13 Trustee wants more information to verify Debtor's current income. He requests three months of paystubs and bank statements. Without an accurate picture of Debtor's finances, the court cannot determine whether Debtor will be able to afford plan payments or comply with the Plan. 11 U.S.C. § 1325(a)(6).

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

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

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

32. **17-24488-E-13** **JANELLE GILMORE** **OBJECTION TO CONFIRMATION OF**
DPC-1 **Peter Macaluso** **PLAN BY DAVID P. CUSICK**
8-24-17 [31]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on August 24, 2017. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

A. Tax returns have not been provided or filed, and

B. The Plan relies upon a pending motion to value.

The Chapter 13 Trustee's objections are well-taken. Janelle Gilmore ("Debtor") admitted at the Meeting of Creditors that the federal income tax return for the 2016 tax year has not been filed still. Filing of the return is required. 11 U.S.C. § 1308. Failure to file a tax return is grounds to deny confirmation. 11 U.S.C. § 1325(a)(1).

A review of Debtor's Plan shows that it relies on the court valuing the secured claim of First Investors Servicing Corporation. That motion was heard at the September 12, 2017 hearing and was granted

at a higher value than sought by Debtor. With the claim being valued higher, the Plan is not feasible. 11 U.S.C. § 1325(a)(6).

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

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

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

33. **17-24488-E-13** **JANELLE GILMORE** **OBJECTION TO CONFIRMATION OF PLAN BY FIRST INVESTORS SERVICING CORPORATION**
JHW-1 **Peter Macaluso** **8-24-17 [35]**

ATTENDANCE AT HEARING REQUIRED FOR JENNIFER WANG, COUNSEL FOR OBJECTING CREDITOR TELEPHONIC APPEARANCE PERMITTED

THE COURT SHALL SCHEDULE FURTHER BRIEFING AND A CONTINUED HEARING ON THE ISSUE OF WHETHER INCLUDING A REQUEST TO DISMISS A THE BANKRUPTCY CASE MAY PROPERLY BE STATED ONLY IN THE PRAYER OF AN OBJECTION TO CONFIRMATION AND THE BASIS FOR JOINING A REQUEST TO DISMISS A BANKRUPTCY CASE WITH AN OBJECTION TO CONFIRMATION

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on August 24, 2017. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained. The hearing on the request for the court to dismiss this case is continued to 3:00 p.m on xxxxxxxx, 2017. First Investors Servicing Corporation shall file and serve on or before **xxxxxxxxxxx, 2017**, Supplemental Pleadings addressing: (1) the basis under the Federal Rules of Bankruptcy Procedure for joining a prayer for relief to dismiss this case as part of Objection to Confirmation and (2) the basis for a party requesting that relief in the prayer and how such a request in the prayer complies with the Federal Rules of Bankruptcy Procedure, including Rules 9013 and 9014. Appearance of Jennifer H. Wang, Esq., counsel for First Investors Servicing Corporation at the continued hearing is required—No Telephonic Appearance Permitted.

First Investors Servicing Corporation ("Creditor") holding a secured claim opposes confirmation of the Plan on the basis that:

A. The Plan's valuation of collateral should be different, and

B. The proposed interest rate falls outside of the proper formula and *Till* guidelines.

First, the court notes that Creditor opposes a valuation presented by Janelle Gilmore ("Debtor") in the Plan and in a motion to value. Creditor has stated that it will file a separate opposition to that motion, and in fact, it did file an opposition on the same day that it filed this Objection. This Objection is not the proper place for Creditor to argue about valuation. Creditor has attempted to bring its dispute of valuation into the court's consideration of whether to confirm the Plan in violation of Local Bankruptcy Rule 9004(a) and the Revised Guidelines for the Preparation of Documents in Appendix II of the Local Rules. The court does not consider Creditor's asserted objection based upon a disputed valuation.

The court does consider the objection based upon use of an incorrect interest rate, though. Creditor objects to the confirmation of the Plan on the basis that the Plan calls for adjusting the interest rate on its loan with Debtor to 4.00%. Creditor's claim is secured by a 2011 Toyota Camry. Creditor argues that this interest rate is outside the limits authorized by the Supreme Court in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004). In *Till*, a plurality of the Court supported the "formula approach" for fixing post-petition interest rates. *Id.* Courts in this district have interpreted *Till* to require the use of the formula approach. *See In re Cachu*, 321 B.R. 716 (Bankr. E.D. Cal. 2005); *see also Bank of Montreal v. Official Comm. of Unsecured Creditors (In re American Homepatient, Inc.)*, 420 F.3d 559, 566 (6th Cir. 2005) (*Till* treated as a decision of the Court). Even before *Till*, the Ninth Circuit had a preference for the formula approach. *See Cachu*, 321 B.R. at 719 (citing *In re Fowler*, 903 F.2d 694 (9th Cir. 1990)).

The court agrees with the court in *Cachu* that the correct valuation of the interest rate is the prime rate in effect at the commencement of this case plus a risk adjustment. Because the creditor has only identified risk factors common to every bankruptcy case, the court fixes the interest rate as the prime rate in effect at the commencement of the case, 4.25%, plus a 1.25% risk adjustment, for a 5.50% interest rate. The objection to confirmation of the Plan on this basis is sustained. *See* 11 U.S.C. § 1325(a)(5)(B)(ii).

IMPROPER REQUEST FOR DISMISSAL

In the prayer, Creditor asks for "immediate dismissal" of this case. Creditor does not provide the court with any argument or legal authority for including such a request in the Objection. The Objection before the court is to confirmation of a Chapter 13 Plan, not a motion to dismiss. This request for relief by order of the court fails on several grounds. As Creditor knows, relief in the form of an order must be sought by motion (or "application" when specially authorized) from the court. FED. R. BANKR. P. 9013. Federal Rule of Bankruptcy Procedure 1017(f) requires that a request for dismissal of a Chapter 13 case "shall be on motion filed and served as required by Rule 9013." An "order" is not requested by burying it in one line of a prayer.

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

RULING

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 First Investors Servicing Corporation ("Creditor") holding a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan will be sustained, which order shall be entered at the conclusion of the continued hearing provided for below.
>
> **IT IS FURTHER ORDERED** that the hearing on the Objection is continued to 3:00 p.m. on **xxxxxxxxxxx, 2017**, to address the issues raised in connection with the request in the prayer to dismiss this bankruptcy case.
>
> **IT IS FURTHER ORDERED** that First Investors Servicing Corporation shall file and serve on or before **xxxxxxxxxxx, 2017**, Supplemental Pleadings addressing: (1) how joining a request for relief in the prayer to dismiss this case with the Objection to Confirmation is permitted under the Federal Rules of Bankruptcy

Procedure, and (2) the basis for a party requesting that relief in the prayer and how such a request in the prayer complies with the Federal Rules of Bankruptcy Procedure, including Rules 9013 and 9014.

IT IS FURTHER ORDERED that Jennifer H. Wang, Esq., counsel for First Investors Servicing Corporation shall appear at the continued hearing in person—No Telephonic Appearance Permitted.

34. 17-25489-E-13 MS-1 | **FRED KENDLE** **Mark Shmorgon** | **MOTION TO AVOID LIEN OF WELLS FARGO BANK, N.A.** **8-22-17 [8]**

Final Ruling: No appearance at the September 19, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditor, and Office of the United States Trustee on August 22, 2017. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Wells Fargo Bank, N.A. ("Creditor") against property of Fred Kendle ("Debtor") commonly known as 6259 Silverton Way, Carmichael, California ("Property").

CHAPTER 13 TRUSTEE'S NON-OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed a Non-Opposition on September 5, 2017. Dckt. 20.

DISCUSSION

A judgment was entered against Debtor in favor of Creditor in the amount of $22,727.36. An abstract of judgment was recorded with Sacramento County on July 9, 2014, that encumbers the Property.

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of $242,800.00 as of the date of the petition. The unavoidable consensual liens that total $71,583.62 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the amount of $175,000.00 on Schedule C.

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

ISSUANCE OF A COURT-DRAFTED ORDER

An order (not a minute order) substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Wells Fargo Bank, N.A., California Superior Court for Sacramento County Case No. 34-2011-00099142, recorded on July 9, 2014, Book 20140709 and Page 1453, with the Sacramento County Recorder, against the real property commonly known as 6259 Silverton Way, Carmichael, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

35. 17-22292-E-13 KRISTIN JOHANSON JACKSON MOTION TO MODIFY PLAN
TLA-3 Thomas Amberg 8-14-17 [40]

Final Ruling: No appearance at the September 19, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 14, 2017. By the court's calculation, 36 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(g) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

The Motion to Confirm the Modified Plan is granted.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. Kristin Jackson ("Debtor") has filed evidence in support of confirmation. David Cusick ("the Chapter 13 Trustee") filed a Non-Opposition on September 5, 2017. Dckt. 50. The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

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

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

IT IS ORDERED that the Motion is granted, and Debtor's Modified Chapter 13 Plan filed on August 14, 2017, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to David Cusick ("the Chapter 13 Trustee") for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

36. 16-27697-E-13 PGM-3 | **BRIAN OKAMOTO** Peter Macaluso | **MOTION TO MODIFY PLAN** 8-15-17 [66]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on August 15, 2017. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(g) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

The Motion to Confirm the Modified Plan is xxxxxxxxxxxxxx.

Brian Okamoto ("Debtor") seeks confirmation of the Modified Plan because he stopped making payments in July and August 2017 to assist his sick son make rent payments. Dckt. 69. The Modified Plan proposes payments of $2,440.00 for two months, $2,720.00 for three months, and $2,875.00 for the remainder of the Plan. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Objection, which the court treats as an Opposition, on September 5, 2017. Dckt. 77. The Chapter 13 Trustee asserts that Debtor is $2,440.00 delinquent in plan payments, which represents one month of the $2,440.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Additionally, the Chapter 13 Trustee notes that the modified plan changes the dividend to Class 1. The confirmed plan provided $395.00 for thirteen months, followed by $830.00 for forty-seven months. The Modified Plan proposes $395.00 for five months, followed by $964.00 for forty-seven months. So far, the Chapter 13 Trustee has disbursed $126.27 in mortgage arrears, and those funds have not been accounted for by Debtor.

DEBTOR'S REPLY

Debtor filed a Reply on September 11, 2017. Dckt. 81. Debtor states that $2,440.00 was paid on September 5, 2017, bringing Debtor current on plan payments. Also, Debtor proposes an amendment to the order confirming to indicate that $126.27 has been disbursed to Selene Financial against mortgage arrears.

RULING

At the hearing, the Chapter 13 Trustee confirmed that Debtor ~~is current with plan payments~~. The Modified Plan, as amended to reflect that the Chapter 13 Trustee has disbursed $126.27 to Selene Financial for its mortgage arrears, complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Modified Chapter 13 Plan filed by Brian Okamoto ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the~~ Motion is granted, and Debtor's Modified Chapter 13 Plan filed on August 15, 2017, as amended to reflect that David Cusick ("the Chapter 13 Trustee") has disbursed $126.27 to Selene Financial for its mortgage arrears,~~ is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

37. **15-28400-E-13** **HEATHER URBAN** **CONTINUED STATUS CONFERENCE**
LBG-2 **Lucas Garcia** **RE: MOTION TO MODIFY PLAN**
4-13-17 [45]

Debtor's Atty: Lucas B. Garcia

The Status Conference is xxxxxxxxxxxxxxxxxxxxxx.

Notes:
Evidentiary hearing set for 9/7/17 taken off calendar pursuant to stipulation of the Parties

Order approving stipulation and setting status conference filed 9/7/17 [Dckt 65], status conference to be conducted if the court has hot issued an order on the Motion to Confirm and entered an order confirming the plan.

SEPTEMBER 19, 2017 STATUS CONFERENCE

xxxxxxxxxxxxxxxxxxxxxx

38.	**17-24282-E-13** **DPC-1**	**KENNETH/JENNIFER MOREFIELD** **Douglas Jacobs**	**CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **8-16-17 [17]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on August 16, 2017. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is overruled.

David Cusick ("the Chapter 13 Trustee") opposes confirmation of the Plan on the basis that Kenneth Morefield and Jennifer Morefield ("Debtor") did not disclose their prior business on their Schedules or Statement of Financial Affairs.

DEBTOR'S RESPONSE

Debtor filed a Response on August 22, 2017. Dckt. 21. Debtor states that the omission was an oversight and that an amendment has been filed to properly list the closed business in the Statement of Financial Affairs. Debtor's Declaration states that she is no longer working as a message therapist or deriving any income as one. Dckt. 22.

SEPTEMBER 12, 2017 HEARING

At the hearing, the court continued this matter to 3:00 p.m. on September 19, 2017, to allow Debtor time to file an amended Statement of Financial Affairs that accounts for an oversight of an undisclosed prior business.

DISCUSSION

The Chapter 13 Trustee reports that Debtor failed to disclose a prior business on the petition. An amended Statement of Financial Affairs has been filed, and it accounts for the prior massage business that is listed as closed as of June 10, 2017. Dckt. 24.

With the Chapter 13 Trustee's ground for objecting being cured, the Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by David Cusick ("the Chapter 13 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is overruled, and Kenneth Morefield and Jennifer Morefield's ("Debtor") Chapter 13 Plan filed on June 29, 2017, is confirmed. Counsel for Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.