UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

October 2, 2018 at 3:00 p.m.

1.	**13-29907-E-13** **SS-10**	**SYAMPHAI LIEMTHONGSAMOUT** **Scott Shumaker**	**MOTION TO SELL** **9-11-18 [187]**

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.

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, creditors, and Office of the United States Trustee on September 11, 2018. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days' notice).

The Motion to Sell Property 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 Sell Property is XXXXXXXXXXXXXXXX.

The Bankruptcy Code permits Syamphai Liemthongsamout, the Chapter 13 Debtor ("Movant"), to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movant proposes to sell the real property commonly known as 3669 Reel Circle, Sacramento, California (the "Property").

The proposed purchaser of the Property is Rizwan Begg, and the alleged terms of the sale are:

A. A gross purchase price of 232,000.00 (including $210,000.00 for purchase of the Property and $22,000.00 for purchase of personal property).

B. $1,500 credit to Buyer for delay's in Closing.

Dckt. 187.

REVIEW OF THE MOTION

The Motion states the following with particularity:

1. Debtor has completed her Plan payments, has filed the certificate for the required post-petition debtor education class, and has filed the certification required under 11 U.S.C. § 1328(a).

2. In her Bankruptcy schedules, Debtor identified a partial interest in the property . Debtor's mother passed away two years ago leaving Debtor and her husband as the sole owners of the property in joint tenancy. They now seek to sell the property.

3. FN2: In Debtor's original schedules, she identified herself and her mother as joint tenants. This was partially an error. Debtor's common-law husband (Debtor was married in a Laotian ceremony in Sacramento in 1995; the marriage is not recognized in California) is and was also on title. As such, there were three joint tenants, not two. Concurrently with the filing of this Motion, Debtor is filing amended Schedules to reflect the appropriate status of title at the time of filing the herein Bankruptcy Petition. The amended schedules were previously and courtesy copies are attached as exhibits to this Motion.

4. For over 10 years, the property was occupied by Debtor's mother, Debtor's younger sister and her family; the rent they paid each month contributed to the mortgage payment and the up-keep of the house.

5. Since the passing of Debtor's mother in 2016, her sister and family no longer wanted to stay in the house and moved out of the house as of March 2018. Without the rent income, Debtor is not in a financial position to be able to continue the upkeep of the house, property tax, and home insurance.

6. Accompanying this Motion are copies of Debtor's mother's Death Certificate, as well as an Estimated Closing Statement.

7. Debtor has complied with all applicable requirements in that:

a. All payments required by the chapter 13 plan have been paid to the trustee;

b. Debtor has completed and filed the certificate for the required post-petition education

c. Debtor has filed the certifications required in 11 U.S.C. § 1328(a).

8. Debtor will realize no profit from the sale of this transaction. Debtor's mother's children, Debtor included, had pledged to their mother before her passing that if the property was no longer occupied by a family member or members, that they would sell the house and split the proceeds among her surviving children (there were, and still are, 9 siblings).

9. After distribution of the estate to Debtor's siblings, Debtor will receive nothing from the sale of the property, as she is responsible for the $46,603.86 loan to Chase which is being paid through escrow. The loan from Chase solely was for Debtor's benefit and was used to support herself and her son while Debtor was out of work for six months in 2006. As a result, Debtor will need to repay the Chase loan to the Estate, with that amount exceeding her potential split from the required settlement payoff of the Chase loan to her siblings.

10. Furthermore:

a. -the sale represents a fair value for the subject property;
b. -all creditors with liens and security interests encumbering the subject property will be paid in full before or simultaneously with the transfer of title or possession to the buyer;
c. -all costs of sale, such as escrow fees, title insurance, and broker's commissions, will be paid in full from the sale proceeds;
d. -the sale price is all cash;
e. -Debtor will not relinquish title to or possession of the subject property prior to payment in full of the purchase price;
f. and -the sale is an arm's length transaction.

11. Finally, on the date of the filing of this Motion, Debtor's Counsel's office reviewed the claims register in this case and determined that no entity has filed any claims alleging any interest in the property other than may be identified herein.

SUPPORTING DOCUMENTS

Debtor has provided her Declaration in which her testimony under penalty of perjury includes the following:

> In my Bankruptcy schedules, I identified a partial interest in the property. My mother, my common-law husband, and I were on title as joint tenants until approximately two years ago when my mother passed away. I understand that the legal effect of my mother passing is that my husband and I are now the sole owners of the property in joint tenancy.
>
> My husband, Laurent Khamthevnkhiry, and I now seek to sell the property and I understand that I need court permission to do so. For over 10 years, the property was occupied by my mother, my younger sister Sandy and her family. The rent amount they paid each month contributed to the mortgage payment and the up-keep of the house. Since the passing of my mother in 2016, my sister and her family no longer wanted to stay in the house and they moved out of the house as of March of this year.
>
> I am in no financial position to continue the mortgage payments, upkeep of the house, property tax, and home insurance on my own. The sooner escrow closes, the sooner I will be relieved of the payment obligation and other expenses associated with the property. In addition, my mother's children, myself included, had pledged to our mother before her passing that if the Reel Circle house was no longer occupied by a family member or members, we would sell the house and split the proceeds among her surviving children (there were, and still are, 9 of us).
>
> After distribution of the estate to my siblings, I will receive very little or nothing from the sale of the property, as I am responsible for the $46, 603.86 loan to Chase which is being paid through escrow. The loan from Chase was for my benefit, and was used to support myself and my son while I was out of work in for six months in 2006; therefore I will receive nothing from the net proceeds of the sale of 3669 Reel circle, because the distribution will go to my siblings (unless they agree I should receive something).
>
> Not only will I receive nothing of the net proceeds from the sale of the property, but thereafter I will have to contribute back the amount that exceeds my potential split from the required settlement payoff of the Chase loan to my siblings. I understand that because there is no will and the agreement is not in writing, the Court does not have to give weight to it. However, that was our pledge, which was made prior to my taking out the Chase loan. Although my husband is on title, he does not claim a right to any of the sale proceeds. I did not previously disclose my mother's passing to the Court because I was unaware of any obligation to do so. The property at all times had relatively little value and is the extent of my inheritance.
>
> Accompanying this Motion are true and correct copies of my mother's Death Certificate and an estimated closing statement. The buyer's name is Rizwan Begg, and it is an all-cash sale in the amount of $210,000. Prior to Mr. Begg's submitting

> an offer on the Reel Circle property, I had never heard of him nor had contact of any kind with him. Mr. Beggs is pushing very hard for a quick close, but has agreed to an extension of Escrow to allow time to get Court approval for the sale.

Dckt. 189.

The Motion also relies on the Declaration of Debtor's sister, Khonepheth Lily Liemthongsamout ("Debtor's Sister"). Dckt. 190. Debtor's Sister states she is aware and was present to hear Debtor's mother's desires to split the sale proceeds of the Property evenly between her children, and for Debtor and her common-law husband to assume the debt they took on the Property. Debtor's Sister states further that all children, none living in the Property as of March 2018, have agreed on the sale of the Property and that the proceeds of sale will be put into her account, rather than Debtor's.

Debtor's Exhibits A, B, and C (Dckt. 191) consist of a statement estimating closing costs, Debtor's mother's death certificate, and Debtor's Amended Schedules, respectively.

TRUSTEE'S RESPONSE

The Chapter 13 Trustee, Davis Cusick ("Trustee"), filed a Response to Debtor's Motion on September 14, 2018. Dckt. 193. Trustee asserts the court previously denied an order shortening time for a similar motion to sell by Debtor (Dckt. 185).

CREDITOR'S RESPONSE

J.P. Morgan Chase Bank, National Association ("Creditor") filed a Response on September 24, 2018. Dckt. 195. Creditor does not oppose Debtor's Motion to Sell as it seeks authority to sell the Property and pay the Creditor's Claim in full. Creditor requests that (if there is any dispute as to the amount of its claim) the undisputed amount of Creditor's claim be paid at the close of the sale and for the disputed amount of Creditor's Claim to be segregated in an interest bearing account, along with an additional $10,000.00 in sale proceeds pending further Order of the bankruptcy court to allow for Creditor's potential recovery of any of its reasonable attorney's fees and costs incurred to the extent that Creditor successfully establishes its right to the disputed amount due on its Claim.

ORDER DENYING MOTION TO SHORTEN TIME

Debtor filed an *Ex Parte* Application For Order Shortening Time on August 28, 2018. Dckt. 174. Debtor stated within that motion:

> Debtor is asking that this matter be specially set on shortened time because she has secured a cash buyer who has insisted on an extremely short time for closing. The closing was to be within thirteen days of entering into contract and is scheduled for September 5, 2018. Unfortunately, the buyer has steadfastly refused to agree to more time. If Debtor is not granted this *ex parte*, she will lose this buyer and the sale will not go through. The house is not a highly sought-after property and Debtor is unsure

when, or if, she will be able to secure a new buyer if this sale does not move forward. Id. Even if Debtor can convince the buyer to agree to a later sale date, this Court's next available hearing date is October 5, 2018, which will almost certainly guarantee that the sale will fall through.

The court issued an Order Denying Motion to Shorten Time on August 31, 2018. Dckt. 185. In denying that motion, the court identified several concerns with the Motion, including:

> Whether Rizwan Begg has any relationship with or to Debtor, Debtor's "husband," or other connection is not disclosed. *Id.,* 2:19-20.
>
> For over ten years, the property was occupied by Debtor's mother, Debtor's younger sister and her family. Rent was paid, which was used to pay the mortgage and upkeep. As discussed below in the Review of Schedules and Statement of Financial Affairs filed in this case, Debtor does not list there being any rental income. *Id.,* 3:1-4.
>
> For what Debtor describes as property not in a desirable area and stated to have a value of $90,000.00 on original and Amended Schedule I, the sales price is $210,000.00, and is projected to generate net sales proceeds after costs of sale and payment of secured claims of $173,498.39. *Id.,* 3:5-7.
>
> Debtor's sister no longer wants to live in the Property. Since Debtor is not receiving rent (Debtor does not explain what efforts have been made to rent the Property), Debtor is not in a financial position (without providing any information about the alleged "boyfriend" co-owner) to keep the Property. *Id.,* 3:11-14.
>
> Debtor then states, though she is one of two joint tenants, Debtor will receive nothing from the sale. Motion, p. 3:3; Dckt. 175. This is because: first, the HELOC was money obtained solely for the benefit of Debtor, and second, notwithstanding being the owner of the Property, the Property being property of the bankruptcy estate, and the Property subject to being the source for paying of Debtor's creditors whose debts she seeks to discharge without payment, Debtor "will have to contribute back the amount that exceeds her potential split from the required settlement payoff of the Chase loan to her siblings." The Motion makes no reference to the legal obligation of Debtor to "contribute" the money from her property to her siblings in lieu of paying her creditors' claims. *Id.,* 3:15-22.

Original Schedules and Statement of Financial Affairs

On the original Schedule A filed in this case Debtor listed the Property as having a value of $90,000, subject to secured claims of ($81,061), and that Debtor had a "Joint tenant" interest. Dckt. 1 at 9. It further states that "Mother" pays mortgage on the "1st DOT directly" and that Debtor and "her boyfriend" (not stated to be "husband") are the "sole obligee on 2nd DOT."

Original Schedule A also affirmatively states that "Debtor is on title with Mother."

On original Schedule B, Debtor states that she jointly owns a 2002 Lincoln Navigator "w/boyfriend." Id. at 12.

On original Schedule D, Debtor lists a HELOC obligation of $50,549 secured by the Property, for which she and her "boyfriend" are "obligees." *Id.* at 16. Debtor also lists a "First DOT" against the Property securing an obligation to "Midland Mortgage for which Debtor states she is, or has, a "Codebtor." Id. On Schedule I, Debtor states that she is single and has wage income of $3,770 a month. Id. at 23. No rental income is stated. Debtor further states that she has no dependents. Id. On the Statement of Financial Affairs, Debtor states that she has no current nor any former spouse. Id. at 31.

Dckt. 185 at 3:24-4:11.

Amended Schedules and Statement
of Financial Affairs - Filed December 31, 2013

On Amended Schedule I, Debtor shows additional monthly income of $2,300 a month as "Boyfriend income contributions." Dckt. 44 at 10. Debtor does not show any rental income. Debtor filed an Amended Schedule J on which she lists having a dependent minor child and a dependent "Boyfriend(Husband)." Id. at 11. On the Amended Statement of Financial Affairs, Question 16, Debtor again states that she has no current spouse and has not had a spouse within the prior eight years.

Dckt. 185 at 4:12.5-19.

Second Amended Schedules and Statement of Financial Affairs - Filed August 28, 2018

In conjunction with filing the current Motion to Sell, Debtor filed an Amended Schedule A, in which the Property is now stated to be $27,342. Dckt. 183 at 3. Debtor states that the gross value of the Property is $90,000, and her 1/3 interest, after costs of sale, has a value of $27,342. Debtor states that she is "on title with her boyfriend and mother." Id.

Dckt. 185 at 4:20.5-25.

OTHER "ERRORS" IN DEBTOR'S CASE

In Debtor's Motion to Confirm First Amended Plan filed December 31, 2013, Debtor for the first time disclosed $15,842.00 in savings for her son. Dckt. 40. Debtor explained "This money is for [Debtor's son's] future and Debtor never considered it to be her money. *Id.*

In Debtor's Motion to Confirm Second Amended Plan filed July 21, 2015, Debtor amended her plan to provide for the Class 4 claim of Midland Mortgage. Dckt. 90. Debtor had originally represented her mother was the sole obligor of this debt, and clarified in her motion to confirm " Debtor did not list herself as such because she had forgotten that she was a borrower thereon." *Id*.

DISCUSSION

It appears the court's concerns raised in its August 28, 2018 Order (Dckt. 185) were largely ignored. In fact, Debtor's Motion and her original motion filed August 28, 2018 (Dckt. 175) are identical.

The exception here is that Debtor adds information about the buyer within her Declaration (apparently ignoring the requirement of Federal Rule of Bankruptcy Procedure 9013 requiring the motion state grounds with particularity). Specifically, Debtor adds the name of the buyer and a statement that she does not know him. Debtor's Declaration, Dckt. 189 at 3:5-7.

Value of Property and Interests of Debtor to be Included in the Bankruptcy Estate

Debtor has not addressed the significant discrepancy in value stated for the Property as compared to what is now sought. The Motion states briefly that, as a rule of law, any increase in value of property after confirmation of a Plan inures to the benefit of the Debtor, not the Bankruptcy Estate. Dckt. 187 at 4:4-5. But, no assertion is made that the home more than doubled in value since the Debtor's filing. Contrary, Debtor actually represents the following to the court, stating "The house is not a highly sought-after property and Debtor is unsure when, or if, she will be able to secure a new buyer if this sale does not move forward." Dckt. 174.

Debtor also has not addressed her failure to correctly represent her financial situation during her Chapter 13 case. Debtor apparently misstated under penalty of perjury that her home was worth less than it actually was, that her common-law husband was merely her "boyfriend," that (by omission) she owns a 50 percent interest in the Property and not a 33 percent interest, that she is not receiving rental income to be put towards a Plan.

Debtor disclosed in the August 28, 2018 *Ex Parte* Motion to sell that she had acquired an even greater interest in the Property, disclosing for apparently the first time that her mother, a joint tenant, had died two years earlier. Such information significantly impacts the propriety of the then Chapter 13 Plan or the Modified Plan that was filed and confirmed in August 2017. No reference to this greater real estate interest is set forth in the Motion to Confirm the Modified plan or the Debtor's Declaration in support thereof. Dckts. 130, 132.

Income of Debtor and Funding Plan

Debtor now asserts that her "husband" is a joint tenant of the property. She previously stated under penalty of perjury that she was not married. Statement of Financial Affairs, Question 16; Dckt. 1. On the Schedules she affirmatively stated that she owed various personal property items with the "boyfriend." Schedules B, Dckt. 1 at 12.

In footnote 2 in the prior Ex Parte Motion to Sell and the current Motion to Sell, Debtor now states that she has been married, but that such marriage is not recognized in California. Dckt. 187 at 2, 175 at 2. Debtor states that the marriage was a Loatian ceremony conducted in Sacramento in 1995.

However, Debtor repeated identifies having a "common law marriage" and now that she and her "husband" own the property. Declaration, p. 2:4; Dckt. 177. If Debtor and her "husband" have elected to have a marital relationship, contractually, that financially parallels a marriage that is recognized in California (a marriage license obtained), then various assets of her husband may well be "community property" which should have been included in this bankruptcy case and estate. *See Marvin v. Marvin*, 18 Cal. 3d 660, FN.11 (1976):

> "Consequently we conclude that the mere fact that a couple have not participated in a valid marriage ceremony cannot serve as a basis for a court's inference that the couple intend to keep their earnings and property separate and independent; the parties' intention can only be ascertained by a more searching inquiry into the nature of their relationship."

In convincing the court to confirm a Chapter 13 Plan in this case, Debtor has repeatedly reported having "contributions" from her boyfriend, not income of a husband, to fund the plan. On original Schedule I Debtor listed having $3,042 in monthly income, with no contribution from any "boyfriend." Dckt. 1 at 23. Then on December 31, 2013, Debtor filed her first Amended Schedule I, stating that she had an additional $2,300.00 a month in "Boyfriend Income contribution." Dckt. 44 at 10. On Amended Schedule I Debtor did include in listing her "dependents" her "Boyfriend (Husband)." *Id.* at 11.

No income information is listed on the Amended Statement of Financial Affairs filed December 13, 2013 for her dependent "Boyfriend (Husband)." Statement of Financial Affairs Questions 1 and 2; *Id.* at 13-14.

In support of Debtor's July 2015 Motion to Modify the Chapter 13 Plan, Debtor provided new financial information. This included an additional $2,300 in "Boyfriend Income contribution." Dckt. 93 at 3. On the expense exhibit, Debtor continues to identify as a "dependent" a "Boyfriend (Husband)." *Id.* at 4.

In support of Debtor's May 2017 Motion to Modify Plan, Debtor provided new financial information. In addition to showing Debtor's gross income increasing to $4,117.00 a month, she also shows an increased "Boyfriend Income contribution" of $3,400. Dckt 133 at 3. On the expense exhibit, Debtor continues to identify as a "dependent" a "Boyfriend (Husband)." *Id.* at 4.

In looking at the expenses, it is clear that the Debtor is paying all of the expenses for the Debtor, a son, and the "Boyfriend (Husband)." Rather than the "Boyfriend (Husband)" providing all of his monthly income (which appears to be substantial in light of the increases of the "Boyfriend (Husband)" contributions when Debtor needed it to justify confirming a modification of the plan), it appears that the expenses are disproportionately placed on the Debtor (and on the Debtor's creditors holding general unsecured claims).

In this case, Debtor proposed to pay a 7 percent dividend to unsecured creditors in both her First and Second Confirmed Amended Plans. Dckts 43, 134. At best, Debtor's proposed plans did not provide all disposable income as required by 11 U.S.C. § 1325(b)(1) and should not have (but for active misrepresentations by the Debtor) passed the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). At worst, it appears the Debtor proposed a plan telling the court Debtor wanted to pay only what Debtor wanted to pay, intentionally hiding assets Debtor did not want to include (her son's savings, her husband's income, rent income, etc) and misrepresenting her financial situation to confirm a plan acceptable to Debtor. This would fail the requirements of 11 U.S.C. § 1325(a)(3).

As to the disposition of the Property and use of the proceeds, if Debtor was truly a joint tenant with her mother, the mother's interest (there apparently being no will and no severance of the joint tenancy) would have passed to Debtor by operation of law. Debtor has not explained how her transfer to her siblings of proceeds of the sale is anything other than a gift. Nor has Debtor explained what Bankruptcy Code provision provides for Debtor's sister to act as Trustee of the Estate, taking possession of the proceeds into her bank account after sale and disposing of the proceeds as she may see fit. Dckt. 190. [FN.1]

FN.1. Several times in Debtor's Chapter 13 case, it is represented that Debtor made mistakes not knowing the requirements of law. Again here, the Motion and how Debtor is proceeding to effectuate the "intent" of her deceased mother shows a misunderstanding of the requirements of law. Debtor's counsel in this case appears to be less an advocate for Debtor and more an observer, here to explain to the court "misunderstandings" after letting his client commit perjury and violate the Bankruptcy Code.

Finally, the court notes that no proposed agreement for the sale of the Property has been provided. The *Ex Parte* Application for Order Shortening Time stated "The closing was to be within thirteen days of entering into contract and is scheduled for September 5, 2018." Dckt. 174. Despite this being a cash sale, Debtor has represented there is an agreement, and has merely not provided it for the court's review. Given the vast number of "errors" within Debtor's case thus far, and the fire-sale nature of the sale with a greater than premium price, the court wonders whether the agreement was not intentionally left out.

At the hearing, Debtor and Debtor's counsel explained **XXXXXXXXXXXXX**

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

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

The Motion to Sell Property filed by Syamphai Liemthongsamout, the Chapter 13 Debtor, ("Movant") 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 Sell is **XXXXXXXXXXX**.

2. **17-26635-E-13 MMM-1** | **SALLY FIELDS** **Mohammad Mokarram** | **MOTION TO MODIFY PLAN** **8-28-18 [20]**

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 the Chapter 13 Trustee, creditors, and Office of the United States Trustee on August 28, 2018. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (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.

Sally Fields ("Debtor") seeks confirmation of the Modified Plan because she intends to surrender her vehicle, 2012 Chevy Impala (the "Vehicle"), and reclassify that claim as a Class 3. Dckts. 22, 23. Debtor is surrendering the Vehicle because it "broke down," and Debtor will now rely on public transportation. Dckt. 22. 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 14, 2018. Dckt. 25.

The Chapter 13 Trustee asserts that Debtor is $990.00 delinquent in plan payments, which represents multiple months of the $430.00 plan payment. Before the hearing, another plan payment will be due. According to the Chapter 13 Trustee, the Plan in § 2.01 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).

Additionally, the Trustee asserts that Debtor's Modified Plan does not authorize $2,031.55 in payments already disbursed by the Trustee towards CAHP Credit Union's claim (being reclassified as Class 3 after Debtor has surrendered the Vehicle).

Lastly, the Trustee argues that Debtor has failed to file Supplemental Schedules I and J supporting the proposed Modified Plan's reduction in the Plan payment from $430.00 to $200.00, which is based on higher transportation costs associated with public transportation. Trustee notes Debtor's last filed Schedules (Dckt. 1) indicate $250.00 in monthly transportation costs.

DISCUSSION

The Trustee's arguments are well taken. Debtor is $990.00 delinquent in Plan payments. Delinquency indicates that the Modified Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Also concerning the feasibility of the Modified Plan are Debtor's failure to provide for payments already made, and to provide supplemental Schedules indicating changed expenses. As to changes in expenses, Debtor has not indicated in her Declaration made under penalty of perjury that her new transportation expense will be $430.00 monthly (current transportation costs being $200 plus the reduction in plan payment of $230 equate to $430). *See* Declaration, Dckt. 22. It may be that Debtor and Debtor's counsel see the increase in expenses as obvious and not warranting further discussion. However, courts must rely on properly authenticated, admissible evidence and not arguments blowing in a winded Motion. Cause exists to deny the Motion.

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 Sally Fields ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

3.	**18-24658-E-13 DPC-1**	**WILLIAM FREEMAN AND CARLA TAVORMINA FREEMAN Carl Gustafson**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 9-5-18 [21]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on September 5, 2018. 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.

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

A. The Debtor's plan fails the Chapter 7 liquidation analysis under 11 U.S.C. § 1325(a)(4). Debtor's non-exempt property totals $68,986.28 and Debtor

proposes a 18% dividend (or $54,131.00) to unsecured creditors. The non-exempt assets include the following: 303 West J st, Benicia, California; 3950 Koval Ln, Unit 16-105, Las Vegas, Nevada; $2,500 in cash on hand, $40 in bank accounts.

B. The plan proposes to pay $6,000.00 in attorney fees, but Debtor does not operate a business. Only $4,000.00 is allowed in a non-business case under Local Rule 2016-1(c)(1). At the Meeting of Creditors held on August 30, 2018, Debtor indicated Debtor rents out a small unit included at Debtor's residence at 303 W.J st., Benicia, California. The Statement of Financial Affairs, question 27, reports Debtors formerly operated Tavormina & Associates, which ceased operations in January 2018 and home rental since November 2017.

C. The Plan fails to include all projected disposable income, as Debtors received tax refunds of $7,689.00 from the IRS and $2,895.00 from the FTB in 2017.Debtor's current means test form claims a tax expense of $4,258.00 per month, which would be $51,096 per year. Dckt. 1, 54:16. In 2017, Debtor only owed taxes of $2,736.25 monthly, totaling $32,835.00 for the year.

Trustee's objections are well-taken.

The Plan proposes to pay a 18 percent dividend to unsecured claims, which total $54,131.00 Debtor has not explained how, under the proposed plan and the schedules filed under penalty of perjury, the unsecured claimants are entitled to a 18 percent dividend when there may be upward of $68,986.28 in non-exempt equity.

Trustee asserts the Plan, providing $6,000.00 in attorney's fees, violates Local Bankruptcy Rule 2016-1(c)(1). However, a review of the Statement of Financial Affairs Form 107 filed in this case shows co-debtor William Freeman is claiming $92,480.66 in gross income, in part from operating a business. Dckt. 1. Schedule I indicates $938.06 in monthly income from rent or the operation of a business. Schedule I, Dckt. 1. Trustee has not provided evidence demonstrating Debtor is not operating a business, as Debtor states on its Schedules and Petition under penalty of perjury. To the extent Trustee recounts statements made during the Meeting of Creditors, those statements are hearsay and Trustee has not provided an exemption or exception to that rule. FED. R. EVID. 801.

Trustee lastly alleges that the Plan violates 11 U.S.C. § 1325(b)(1), which provides:

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

Debtor's plan is based on overestimated taxes and therefore does not provide all Debtor's disposable income for the applicable commitment period. Declaration, Dckt. 23 at ¶ 8.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by The Chapter 13 Trustee, David Cusick ("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.

4. **18-24364-E-13 DPC-1** **CLYDE HUGHES** **Mark Shmorgan** **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 8-28-18 [22]**

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.

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, creditors, and Office of the United States Trustee on August 28, 2018. By the court's calculation, 35 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Debtor, Creditors, the 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 XXXXXXXXX.

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

A. Debtor failed to appear at the First Meeting of Creditors held on August 23, 2018.

Debtor's Possible Lack of Competency

The Chapter 13 Trustee's Report indicates Debtor appeared, but was unable to give competent testimony. The Chapter 13 Trustee noted that Debtor appeared incoherent and that Debtor's attorney would file a Motion to seek to appoint Debtor's daughter-in-law on behalf of Debtor.

Debtor filed a Notice of Incompetency and Motion for Substitution on September 15, 2018, wherein Debtor moved to substitute Teresa Monroe in place of Debtor. Dckt. 26. That motion is set to be heard on the same day as the hearing on the present Motion.

At the hearing, **XXXXXXXXXXXXXXX**

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by The Chapter 13 Trustee, David Cusick ("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 **XXXXXXXXXXX**.

5. **18-24364-E-13 MS-2** **CLYDE HUGHES** **Mark Shmorgan** **MOTION FOR SUBSTITUTION 9-15-18 [26]**

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.

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, creditors, and Office of the United States Trustee on September 15, 2018. By the court's calculation, 17 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 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 Substitute is XXXXXXXXXXXXX.

The Debtor, Clyde Hughes ("Debtor") filed the present case on July 12, 2018. Teresa Monroe, the caretaker for Debtor ("Movant"), filed this Motion seeking an order approving the Motion for Substitution of the Debtor on the grounds Debtor is not competent. This Motion is being filed pursuant to Federal Rule of Bankruptcy Procedure 7025 and Federal Rules of Civil Procedure 25.

Movant states within her Motion that she has known Debtor since 1995, working as his caretaker only since Debtor's wife passed six years ago. Dckt. 26, ¶ 4. Movant states further she is in control of all financial instruments necessary to continue to prosecute this case.

The Motion is supported by Movant's Declaration. Dckt. 28. The Declaration states the following as to Debtor's condition:

> My patient filed this Chapter 13 case on July 12, 2018. He was actively interacting with his bankruptcy counsel and participated in the drafting of his bankruptcy schedules, statement of financial affairs, and Chapter 13 plan. Dckt. 28, ¶ 4.
>
> On August 8, 2018 he became ill and his conditioned worsened and he was forced to miss his first meeting of creditors scheduled for August 23, 2018.*Id.*, ¶ 6
>
> On August 25, 2018 debtor was hospitalized. *Id.*, ¶ 7 at p. 2:11.5.
>
> Upon leaving the hospital, debtor's overall condition worsened. He is now wheelchair bound and his progressive dementia has worsened dramatically. *Id.*, ¶ 8.
>
> Given debtor's progressive age, he will be 90 years old in November, and his mental condition worsening since his illness began, it is unlikely debtor will be able to give competent testimony in the near future. *Id*., ¶ 7 at p. 2:20-23.5.

Movant's Declaration identifies her qualifications to determine Debtor's competency as the following:

> I am the longtime caretaker of the debtor in this case. Dckt. 28, ¶ 2.
>
> I have known the debtor since 1995. I originally worked as his late wife's care taker until her passing six years ago. Thereafter, I began to look after the debtor, and as his medical conditioned declined, I moved into his residence to take care of him full time, 24 hours a day. *Id*., ¶ 8.
>
> Debtor has no immediate family and no children that can assist him. I am really all he has left. *Id*., ¶ 9.

TRUSTEE'S OBJECTION TO CONFIRMATION

The Chapter 13 Trustee, David Cusick ("Trustee") filed an Objection to Confirmation of the proposed plan on August 28, 2018. Dckt. 22. The Trustee's grounds were failure to attend the 341 Meeting of Creditors - not because Debtor failed to attend, but because he did not appear competent enough to provide testimony at the Meeting.

APPLICABLE FEDERAL LAW TO DETERMINE LEGAL COMPETENCY OF PARTY

As a basic requirement for a person to have his or her rights determined in federal court, that person must meet the basic requirements for legal competency.

MOORE'S FEDERAL PRACTICE, CIVIL § 17.21, provides a good survey of the federal competency requirement.

§ 17.21 Capacity of Individual Litigant Acting on Its Own Behalf Determined by Law of Domicile

[1] Domicile Tested at Time of Filing

The capacity of an individual engaged in litigation to enforce its own right, not acting as a representative of another, is determined by the law of the litigant's domicile...

[3] Persons Lacking Legal Capacity Must Have Adequate Representation

[a] Court May Appoint Guardian

Although persons lacking legal capacity may not sue or be sued, Rule 17(c) provides that their interests may be represented in litigation in federal courts (see also § 17.10[3][c] (guardian's and guardian *ad litem's* real party in interest status); § 17.22 (capacity of representatives of persons lacking legal capacity)). If a minor or other incompetent person has a representative appointed by law, such as a guardian, committee, conservator, or other similar fiduciary, this representative may sue or defend on behalf of the minor or incompetent person. A minor or incompetent who has no duly appointed representative may sue by a next friend or by a guardian ad litem. If a minor or incompetent is sued and is not represented in the action, the court must appoint a guardian ad litem or make some other proper order to protect the minor or incompetent. Similarly, if a party becomes incompetent during the course of the litigation, the court must appoint a guardian ad litem or make some other proper order. The language of the rule is mandatory and requires the court to appoint a guardian ad litem or make some other provision once the court determines that the individual is incompetent. However, the rule does not place an affirmative obligation on the district court to inquire *sua sponte* into the individual's capacity unless evidence showing that the individual has been adjudged incompetent or other clear evidence of incompetence is brought to the district court's attention. Bizarre behavior alone is insufficient to trigger a mandatory inquiry into a litigant's competency.

The function of the representative or guardian *ad litem* is to make decisions concerning the litigation on behalf of the minor or incompetent person, and not necessarily to represent the person as an attorney. [With limited parent child exceptions.] . . .

If a general guardian fails or refuses to sue or defend in a particular case, or if there is a conflict of interest between the minor or incompetent person and the guardian or next friend, federal courts may appoint a guardian or attorney ad litem to protect the interest of the represented party in the case.

To determine whether an individual is considered a minor or incompetent person, Rule 17(c) must be read in conjunction with Rule 17(b). Under Rule 17(b)(1), the capacity of an individual to sue or be sued is determined by the law of the individual's domicile. Once the court applies the law of the individual's domicile and determines that the

individual is underage or is otherwise incompetent, the provisions of Rule 17(c) come into play. If the minor or incompetent already has a general guardian, conservator, or like fiduciary, that representative may sue or defend on behalf of the minor or incompetent. Whether an individual or entity is the type of fiduciary that has the legal authority to represent the minor or incompetent person is also determined according to state law. If the minor or incompetent has no such representative, the court must appoint a guardian *ad litem* or make some other provision for the protection of the individual. At this stage in the process, the court is not guided by state law but rather should be guided by the protection of the individual's interests. The court is not required to follow procedures set out by state law to determine incompetency, but may follow whatever procedures are appropriate within the bounds of due process.

[b] Protective Measures Implemented at Court's Discretion

The directive that courts protect the interests of persons lacking legal capacity is not tantamount to a requirement that courts appoint a representative. Rather, when the court finds that a litigant lacks legal capacity, the court may either appoint a guardian *ad litem* "or issue another appropriate order ... to protect a minor or incompetent person who is unrepresented in an action." The necessity of a guardian is determined at the court's discretion. The court need only inquire whether the incompetent's interests are adequately protected.

Some of the authorities cited by MOORES in the section above include the following cases.

Gibbs v. Carnival Cruise Lines, 314 F.3d 125, 134-135 (3rd. Cir. 2002).

"While the New Jersey Court Rule is relevant to our inquiry and will be discussed further in the next section, we do not begin our analysis with this Court Rule. Instead, we must look to Federal Rule of Civil Procedure 17, which explains the capacity of a party to sue or be sued, and may therefore be used to determine how a person is appointed a 'legal representative' within the meaning of § 183b(c). We apply the Federal Rules instead of the New Jersey Court Rules because state rules regarding the appointment of guardians *ad litem* are procedural and therefore do not apply, in the first instance, to cases brought in federal courts. See *M.S. v. Wermers*, 557 F.2d 170, 174 n.4 (8th Cir. 1977); 6A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1571, at 511-12 (1991); see generally *Hanna v. Plumer*, 380 U.S. 460, 471-72, 14 L. Ed. 2d 8, 85 S. Ct. 1136 (1965) (federal courts apply on-point Federal Rules of Civil Procedure instead of state procedural practices).

United States v. Mandycz, 447 F.3d 951, 962 (6th Cir. 2006).

"So while the commencement of a civil case does not suspend the Due Process Clause, it does alter the fairness requirements of the Clause. Whereas due process protects incompetent criminal defendants by imposing an outright prohibition on trial, it protects incompetent civil parties by requiring the court to appoint guardians to protect their interests and by judicially ensuring that the guardians protect those interests. See Fed. R.

Civ. P. 17(c) ('The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.'); see also *Ferrelli v. River Manor Health Care Ctr.*, 323 F.3d 196, 203 (2d Cir. 2003) ('[T]he district judge should be aware that due process considerations attend an incompetency finding and the subsequent appointment of a guardian ad litem.'); *Salomon Smith Barney, Inc. v. Harvey*, 260 F.3d 1302, 1309 (11th Cir. 2001), vacated on other grounds, 537 U.S. 1085, 123 S. Ct. 718, 154 L. Ed. 2d 629 (2002)*; Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642, 652 (2d Cir. 1999); *Garrick v. Weaver*, 888 F.2d 687, 693 (10th Cir. 1989)*; Genesco, Inc. v. Cone Mills Corp.*, 604 F.2d 281, 285 (4th Cir. 1979). Independent of the court's duty to appoint a guardian to look after his interests, Mandycz of course also is entitled to the other basic protections of due process in a civil setting. See *United States v. Kairys*, 782 F.2d 1374, 1384 (7th Cir. 1986) ('[B]ecause denaturalization is civil and equitable in nature, due process [is] satisfied by a fair trial before an impartial decisionmaker. [concluding that there is no right to jury trial for denaturalization proceeding]')."

Berrios v. N.Y. City Housing Authority, 564 F.3d 130, 134 (2nd Cir. 2009).

"A minor or incompetent person normally lacks the capacity to bring suit for himself. See, e.g., N.Y. C.P.L.R. 1201 (McKinney 1997); Fed. R. Civ. P. 17(b)(1) (capacity of an individual claim owner to sue is determined by 'the law of the individual's domicile'). Rule 17(c) provides that a minor or incompetent person may be represented by a general guardian, a committee, a conservator, or a similar fiduciary, see Fed. R. Civ. P. 17(c)(1), and that

> '[a] minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem--or issue another appropriate order--to protect a minor or incompetent person who is unrepresented in an action,'

Fed. R. Civ. P. 17(c)(2) (emphasis added). Thus, as to a claim on behalf of an unrepresented minor or incompetent person, the court is not to reach the merits without appointing a suitable representative.

. . .

On remand, the district court should first determine whether Berrios is a suitable guardian *ad litem* for Travieso. If it finds that he is not suitable and that it is not clear that a substantial claim could not be asserted on Travieso's behalf, the court should appoint another person to be Travieso's guardian *ad litem*. If the court either finds that Berrios is a suitable guardian or if it appoints a suitable guardian who is a non-attorney, it should not dismiss the action without affording such guardian the opportunity to retain counsel or to seek representation from a pro bono attorney or agency. If the guardian secures an attorney or is an attorney, the court should not dismiss the complaint for failure to state a claim without giving counsel an opportunity to file an amended complaint. If the guardian is not an attorney and does not obtain counsel, and if it is not clear to the court

whether a substantial claim might be asserted on Travieso's behalf, the court should decide whether to appoint counsel, taking into "consider[ation] the fact that, without appointment of counsel, the case will not go forward at all," *Wenger*, 146 F.3d at 125. If counsel is not secured or appointed, the court may dismiss the complaint, but without prejudice."

Sam M. v. Carcieri, 608 F.3d 77, 85-86 (1st Cir. 2010).

"Rule 17(c) of the Federal Rules of Civil Procedure governs a minor or incompetent's access to federal court. It directs that a minor or incompetent may sue in federal court through a duly appointed representative which includes a general guardian, committee, conservator, or like fiduciary. Fed. R. Civ. P. 17(c)(1). If a minor lacks a general guardian or a duly appointed representative, Rule 17(c)(2) directs the court either appoint a legal guardian or Next Friend, or issue an order to protect a minor or incompetent who is unrepresented in the federal suit. Fed. R. Civ. P. 17(c)(2).

The appointment of a Next Friend or guardian *ad litem* is not mandatory. Thus, where a minor or incompetent is represented by a general guardian or a duly appointed representative, a Next Friend need not be appointed. See *Developmental Disabilities Advocacy Ctr., Inc. v. Melton*, 689 F.2d 281 (1st Cir. 1982) (declining to appoint Next Friend where plaintiffs had general guardians or duly appointed guardians who opposed the federal suit); *Garrick v. Weaver*, 888 F.2d 687, 693 (10th Cir. 1989)(holding that a minor's mother lacked authority to proceed as Next Friend in federal suit where the federal court had appointed a guardian ad litem to represent the child). However, Rule 17(c) 'gives a federal court power to authorize someone other than a lawful representative to sue on behalf of an infant or incompetent person where that representative is unable, unwilling or refuses to act or has interests which conflict with those of the infant or incompetent.' *Ad Hoc Comm. of Concerned Teachers v. Greenburgh No. 11 Union Free Sch. Dist.*, 873 F.2d 25, 29 (2d Cir. 1989); *Melton*, 689 F.2d at 285 (stating that Rule 17(c) allows federal courts to appoint a Next Friend or guardian ad litem where there is a conflict of interest between the minor and her general representative).

The minor's best interests are of paramount importance in deciding whether a Next Friend should be appointed, but the ultimate 'decision as to whether or not to appoint [a Next Friend or guardian ad litem] rests with the sound discretion of the district court and will not be disturbed unless there has been an abuse of its authority. *Melton*, 689 F.2d at 285. See also *Fernandez-Vargas v. Pfizer*, 522 F.3d 55, 66 (1st Cir. 2008)."

Garrick v. Weaver, 888 F.2d 687, (10th Cir. 1989).

"Rule 17(c) flows from the general duty of the court to protect the interests of infants and incompetents in cases before the court. See *Dacanay v. Mendoza*, 573 F.2d 1075, 1079 (9th Cir. 1978); *Noe v. True*, 507 F.2d 9, 11-12 (6th Cir. 1974). Garrick through her attorney requested the appointment of the guardian ad litem because her interests might

be adverse to her children's interests as they were each claimants to the same finite fund. When the court determines that the interests of the infant and the infant's legal representative diverge, appointment of a guardian *ad litem* is appropriate. *Noe*, 507 F.2d at 11-12. Once appointed, the guardian *ad litem* is 'a representative of the court to act for the minor in the cause, with authority to engage counsel, file suit, and to prosecute, control and direct the litigation.' *Id.* at 12. We hold that a guardian ad litem sufficiently meets the "other fiduciary" requirement of Rule 17(c) so as to deprive Garrick of standing to represent her children in the same action for which the guardian ad litem was appointed. Garrick's standing to represent her minor children in other actions remains unaffected."

Dacannay v. Mendoza, 573 F.2d 1075, 1079 (9th Cir. 1978).

"It is an ancient precept of Anglo-American jurisprudence that infant and other incompetent parties are wards of any court called upon to measure and weigh their interests. The guardian *ad litem* is but an officer of the court. *Cole v. Superior Court*, 63 Cal. 86, 89 (1883); *Serway v. Galentine*, 75 Cal. App. 2d 86, 170 P.2d 32 (1940). While the infant sues or is defended by a guardian *ad litem* or next friend, every step in the proceeding occurs under the aegis of the court. See generally Solender, Guardian *Ad Litem*: A Valuable Representative or an Illusory Safeguard, 7 Tex.Tech.L.Rev. 619 (1976); Note, Guardians *Ad Litem*, 45 Iowa L. Rev. 376 (1960)."

Robidoux v. Rosengren, 638 F.3d 1177, (9th Cir. 2011).

"District courts have a special duty, derived from Federal Rule of Civil Procedure 17(c), to safeguard the interests of litigants who are minors. Rule 17(c) provides, in relevant part, that a district court 'must appoint a guardian *ad litem*— or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.' Fed. R. Civ. P. 17(c). In the context of proposed settlements in suits involving minor plaintiffs, this special duty requires a district court to 'conduct its own inquiry to determine whether the settlement serves the best interests of the minor.' *Dacanay v. Mendoza*, 573 F.2d 1075, 1080 (9th Cir. 1978); see also *Salmeron v. United States*, 724 F.2d 1357, 1363 (9th Cir. 1983) (holding that 'a court must independently investigate and evaluate any compromise or settlement of a minor's claims to assure itself that the minor's interests are protected, even if the settlement has been recommended or negotiated by the minor's parent or guardian *ad litem*')."

Scannavino v. Florida Department of Corrections, 242 F.R.D. 622, 664, 666-667 (M.D. Fla. 2007).

"Although under Rule 17(b) a district court determining a party's capacity must use the law of that party's domicile, the court need not adopt any procedure required by state law but must only satisfy the requirements of due process. *Cohen v. Office Depot, Inc.*, 184 F.3d 1292, 1296 (11th Cir. 1999) (explaining that 'if the state law conflicts with a federal procedural rule, then the state law is procedural for *Erie/Hanna* purposes regardless of how it may be characterized for other purposes.'); *Thomas*, 916 F.2d at 1035 ('[W]e

reject the notion that in determining whether a person is competent to sue in federal court a federal judge must use the state's procedures for determining competency or capacity.'). In the absence of a clear test for determining a party's incapacity or incompetence under Florida law, 'a federal procedure better preserves the integrity and the interests of the federal courts.' *Id.* at 1035.

'It is a well-understood tenant of law that all persons are presumed to be competent' and that the 'burden of proof of incompetency rests with the party asserting it.' *Weeks v. Jones*, 52 F.3d 1559, 1569 (11th Cir. 1995). Because '[a] person may be competent to make some decisions but not others,' the test of a party's competency 'varies from one context to another.' *United States v. Charters*, 829 F.2d 479, 495 n.23 (4th Cir. 1987). In general, "to be considered competent an individual must be able to comprehend the nature of the particular conduct in question and to understand its quality and consequences." *Id.* (quoting B. FREEDMAN, COMPETENCE, MARGINAL AND OTHERWISE: CONCEPTS AND ETHICS, 4 INT'L. J. OF L. & PSYCHIATRY 53, 56 (1981)). In the context of federal civil litigation, the relevant inquiry is whether the litigant is 'mentally competent to understand the nature and effect of the litigation she has instituted.' *Bodnar v. Bodnar*, 441 F.2d 1103, 1104 (5th Cir. 1971); *Donnelly v. Parker*, 158 U.S. App. D.C. 335, 486 F.2d 402, 407 (D.C. Cir. 1973) (stating that Rule 17(c) may require an inquiry into the plaintiff's 'capacity to understand the meaning and effect of the litigation being prosecuted in her name').

. . .

The rights of an incompetent litigant in a federal civil proceeding are protected by Rule 17(c), Federal Rules of Civil Procedure, which provides that a district court 'shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.' Fed. R. Civ. P. 17(c). An incompetent litigant is 'not otherwise represented' under Rule 17(c) if she has no 'general guardian, committee, conservator, or other like fiduciary.' *Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642, 656 (2d Cir. 1999). The parties stipulated at the competency hearing that the plaintiff lacks a general guardian and is not otherwise represented within the meaning of Rule 17(c).

The decision to appoint a 'next friend' or guardian ad litem rests with the sound discretion of the district court and will be disturbed only for an abuse of discretion. *In re Kloian*, 179 Fed. Appx. 262, 265 (6th Cir. 2006) (quoting *Gardner v. Parson*, 874 F.2d 131, 140 (3d Cir. 1989)). Unlike a determination of competency, a district court's decision whether to appoint a guardian ad litem is purely procedural and wholly uninformed by state law. *Gibbs v. Carnival Cruise Lines*, 314 F.3d 125, 135-36 (3d Cir. 2002) ('A district court need not look at the state law, however, in determining what factors or procedures to use when appointing the guardian *ad litem*.'); Burke v. Smith, 252 F.3d 1260, 1264 (11th Cir. 2001) ('It is well settled that the appointment of a guardian ad litem is a procedural question controlled by Rule 17(c).').

. . .

Under Rule 17(c), a district court must appoint a guardian ad litem if it receives 'verifiable evidence from a mental health professional demonstrating that the party is being or has been treated for mental illness of the type that would render him or her legally incompetent.' *Ferrelli v. River Manor Health Care Ctr.*, 323 F.3d 196, 201 (2d Cir. 2003). An exhaustive review of the record, as well as the evidence adduced at the competency hearing (and other evidence properly before the court), commends the appointment of a guardian ad litem to protect the plaintiff's interests in this case. Indeed, failure to appoint a guardian ad litem undermines the plaintiff's interests and would default both the court's obligation under Rule 17(c) and the requirements of justice."

California provides the following guidance to a determination of legal competency (whether partial or full).

California Probate Code §§ 810 et seq.

§ 810. Legislative findings and declarations regarding legal capacity

(a) For purposes of this part, there shall exist a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions.

(b) A person who has a mental or physical disorder may still be capable of contracting, conveying, marrying, making medical decisions, executing wills or trusts, and performing other actions.

(c) A judicial determination that a person is totally without understanding, or is of unsound mind, or suffers from one or more mental deficits so substantial that, under the circumstances, the person should be deemed to lack the legal capacity to perform a specific act, should be based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of a person's mental or physical disorder.

§ 811. Unsound mind or incapacity

(a) A determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act, including, but not limited to, the incapacity to contract, to make a conveyance, to marry, to make medical decisions, to execute wills, or to execute trusts, shall be supported by evidence of a deficit in at least one of the following mental functions, subject to subdivision (b), and evidence of a correlation between the deficit or deficits and the decision or acts in question:

(1) Alertness and attention, including, but not limited to, the following:

(A) Level of arousal or consciousness.

(B) Orientation to time, place, person, and situation.

(C) Ability to attend and concentrate.

(2) Information processing, including, but not limited to, the following:

(A) Short- and long-term memory, including immediate recall.

(B) Ability to understand or communicate with others, either verbally or otherwise.

(C) Recognition of familiar objects and familiar persons.

(D) Ability to understand and appreciate quantities.

(E) Ability to reason using abstract concepts.

(F) Ability to plan, organize, and carry out actions in one's own rational self-interest.

(G) Ability to reason logically.

(3) Thought processes. Deficits in these functions may be demonstrated by the presence of the following:

(A) Severely disorganized thinking.

(B) Hallucinations.

(C) Delusions.

(D) Uncontrollable, repetitive, or intrusive thoughts.

(4) Ability to modulate mood and affect. Deficits in this ability may be demonstrated by the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, that is inappropriate in degree to the individual's circumstances.

(b) A deficit in the mental functions listed above may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.

(c) In determining whether a person suffers from a deficit in mental function so substantial that the person lacks the capacity to do a certain act, the court may take into consideration the frequency, severity, and duration of periods of impairment.

(d) The mere diagnosis of a mental or physical disorder shall not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act.

(e) This part applies only to the evidence that is presented to, and the findings that are made by, a court determining the capacity of a person to do a certain act or make a decision, including, but not limited to, making medical decisions. Nothing in this part shall affect the decision making process set forth in Section 1418.8 of the Health and Safety Code, nor increase or decrease the burdens of documentation on, or potential liability of, health care providers who, outside the judicial context, determine the capacity of patients to make a medical decision.

§ 812. Capacity to make decision

Except where otherwise provided by law, including, but not limited to, Section 813 and the statutory and decisional law of testamentary capacity, a person lacks the capacity to make a decision unless the person has the ability to communicate verbally, or by any other means, the decision, and to understand and appreciate, to the extent relevant, all of the following:

(a) The rights, duties, and responsibilities created by, or affected by the decision.

(b) The probable consequences for the decisionmaker and, where appropriate, the persons affected by the decision.

(c) The significant risks, benefits, and reasonable alternatives involved in the decision.

The Due Process in Competence Determinations Act, Prob. Code, §§ 810 to 813, 1801, 1881, 3201, and 3204, offers a wide range of potential mental deficits that may support a determination that a person is of unsound mind or lacks the capacity to make a decision or to do a certain act. *In re Marriage of Greenway*, 217 Cal. App. 4th 628, 640 (Cal. App. 4th Dist. 2013).

In California, a party is incompetent if he or she lacks the capacity to understand the nature or consequences of the proceeding, or is unable to assist counsel in the preparation of the case. *See* Cal. Prob. Code § 1801; *In re Jessica G.*, 93 Cal. App. 4th 1180, 1186 (2001); *Elder-Evins v. Casey*, 2012 U.S. Dist. LEXIS 92467 (N.D. Cal. July 3, 2012).

Federal Rule of Civil Procedure 17 also provides that the court "must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action." FED. R. CIV. P. 17(c)(2). When a "substantial question exists regarding the mental competence of a party proceeding pro se," courts should "conduct a hearing to determine whether or not the party is competent, so that a representative may be appointed if needed." *Krain v. Smallwood*, 880 F.2d 1119, 1121 (9th Cir. 1989); *see also Allen v. Calderon*, 408 F.3d 1150, 1153 (9th Cir. 2005).

A guardian ad litem may be appointed for an incompetent adult only (1) if he or she consents to the appointment or (2) upon notice and hearing. *Jessica G.*, 93 Cal. App. 4th. at 1187–88.

California also considers the issue of "competency" in the context of the appointment of a conservator to take over the assets and affairs of a legally incompetent person. The court takes those factors into account as well as in determining this more narrow issue of legal competency in this specific federal proceeding.

Cal Prob Code § 1801

> (a) A conservator of the person may be appointed for a person who is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter, except as provided for the person as described in subdivision (b) or (c) of Section 1828.5.
>
> (b) A conservator of the estate may be appointed for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence, except as provided for that person as described in subdivision (b) or (c) of Section 1828.5. Substantial inability may not be proved solely by isolated incidents of negligence or improvidence.
>
> (c) A conservator of the person and estate may be appointed for a person described in subdivisions (a) and (b).
>
> (d) A limited conservator of the person or of the estate, or both, may be appointed for a developmentally disabled adult. A limited conservatorship may be utilized only as necessary to promote and protect the well--being of the individual, shall be designed to encourage the development of maximum self--reliance and independence of the individual, and shall be ordered only to the extent necessitated by the individual's proven mental and adaptive limitations. The conservatee of the limited conservator shall not be presumed to be incompetent and shall retain all legal and civil rights except those which by court order have been designated as legal disabilities and have been specifically granted to the limited conservator. The intent of the Legislature, as expressed in Section 4501 of the Welfare and Institutions Code, that developmentally disabled citizens of this state receive services resulting in more independent, productive, and normal lives is the underlying mandate of this division in its application to adults alleged to be developmentally disabled.
>
> (e) The standard of proof for the appointment of a conservator pursuant to this section shall be clear and convincing evidence.

§ 1872. Effect of conservatorship on legal capacity of conservatee

> (a) Except as otherwise provided in this article, the appointment of a conservator of the estate is an adjudication that the conservatee lacks the legal capacity to enter into or make any transaction that binds or obligates the conservatorship estate.

(b) Except as otherwise provided in the order of the court appointing a limited conservator, the appointment does not limit the legal capacity of the limited conservatee to enter into transactions or types of transactions.

§ 1873. Court order affecting legal capacity of conservatee

(a) In the order appointing the conservator or upon a petition filed under Section 1874, the court may, by order, authorize the conservatee, subject to Section 1876, to enter into transactions or types of transactions as may be appropriate in the circumstances of the particular conservatee and conservatorship estate. The court, by order, may modify the legal capacity a conservatee would otherwise have under Section 1872 by broadening or restricting the power of the conservatee to enter into transactions or types of transactions as may be appropriate in the circumstances of the particular conservatee and conservatorship estate.

(b) In an order made under this section, the court may include limitations or conditions on the exercise of the authority granted to the conservatee as the court determines to be appropriate including, but not limited to, the following:

(1) A requirement that for specific types of transactions or for all transactions authorized by the order, the conservatee obtain prior approval of the transaction by the court or conservator before exercising the authority granted by the order.

(2) A provision that the conservator has the right to avoid any transaction made by the conservatee pursuant to the authority of the order if the transaction is not one into which a reasonably prudent person might enter.

(c) The court, in its discretion, may provide in the order that, unless extended by subsequent order of the court, the order or specific provisions of the order terminate at a time specified in the order.

(d) An order under this section continues in effect until the earliest of the following times:

(1) The time specified in the order, if any.

(2) The time the order is modified or revoked.

(3) The time the conservatorship of the estate is terminated.

(e) An order under this section may be modified or revoked upon petition filed by the conservator, conservatee, the spouse or domestic partner of the conservatee, or any relative or friend of the conservatee, or any interested person. Notice of the hearing on

the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

DISCUSSION

On the facts presented to the court, it appears there are serious questions as to Debtor's competency to represent himself in this Chapter 13 case. However, the Motion fails to state grounds upon which the court can make such a determination. The Motion indicates Debtor has a progressively worsening dementia. Dckt. 26, ¶ 5. However, Movant also represents that Debtor was competent when filing this case and completing the requirements for his financial management course in July 2018. *Id*., 2.

Movant has identified herself as Debtor's caretaker, but it is unclear what her qualifications are with respect to determining the state of Debtor's mental capacity and whether he understands the nature of these proceedings and can effectively assists counsel in the Chapter 13 case.

No declarations have been provided by Debtor's doctors or those not responsible for his finances.

In her declaration Ms. Monroe states that "Debtor has no immediate family and no children that can assist him." Declaration ¶ 9, Dckt. 28. The way this is worded, it appears that Debtor does have immediate family and children, but whom just cannot "assist him." In reviewing the Certificate of Service for this Motion, the Motion does not appear to have been served on anyone other than the narrow group of creditors listed in this case.

At the hearing, **XXXXXXXXXXXXXXX**.

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

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

The Motion to Substitute filed by Teresa Monroe ("Movant") 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 **XXXXXXXXXX**.

6. **18-25668-E-13 MS-1** **CHARLIE/CHRISTINA BOGGS** **MOTION TO EXTEND AUTOMATIC STAY**
Mark Shmorgan **9-7-18 [8]**

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

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 the Chapter 13 Trustee, creditors, and Office of the United States Trustee on September 7, 2018, by the court's calculation, 25 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 ~~granted~~.

Charlie and Christina Boggs ("Debtor") seek to have the provisions of the automatic stay provided by 11 U.S.C. § 362(a) extended beyond thirty days in this case. This is Debtor's second bankruptcy petition pending in the past year [FN.1]. Debtor's prior bankruptcy case (No. 17-22513) was dismissed on August 17, 2018, after the Chapter 13 Trustee, Jan Johnson ("Trustee"), filed a Notice of Default and Application to Dismiss, and Debtors failed to cure their default. *See* Order, Bankr. E.D. Cal. No. 17-22513, Dckt. 75, August 17, 2018. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to Debtor thirty days after filing of the petition.

Here, Debtor states within its Motion:

> Debtors' prior case was dismissed for a myriad of reasons. First, debtors twice failed to modify their plan to move the mortgage from Class 1 to Class 4 after successfully completing a home loan modification. Debtors,

> likewise had two death in the family which threw their budget into a tailspin. Now that the home is modified, the budget is under control, debtors believe they will not fall behind on their plan payments again. Thus these changes in circumstance are sufficient to rebut the presumption of bad faith.

Dckt. 8.

APPLICABLE LAW

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.

DISCUSSION

(Mis)Statement by Debtor Regarding Recent Bankruptcy Cases

The court notes that Debtor filed another bankruptcy case July 15, 2011. Bankr. E.D. Cal. No. 11-37392. In that case, Debtor completed the Confirmed Chapter 13 Plan and received a discharge on February

13, 2017. *See* Order, Bankr. E.D. Cal. No. 11-37392, Dckt. 97, February 13, 2017. Debtor filed its second case (No. 17-22513) only two months after receiving a discharge in its first case (No. 11-37392).

While Debtor successfully carrying out a Chapter 13 case seems to demonstrate good faith, the court is concerned that Debtor and Debtor's counsel did not find it relevant to mention the first case within its Motion or supporting pleadings. Within Debtor's Declaration, Debtor states "This is our second attempt at Chapter 13 in the past two years." Declaration, Dckt. 10, ¶ 5. This statement could be read as Debtor affirmatively misrepresenting to the court that Debtor did not have three cases filed/pending within the past two years. That would constitute perjury.

The court is presented with another issue now brought to light given that the Debtor appears to have continually been in a bankruptcy case since 2011. While purportedly filing to "reorganize" and having the financial "problems" restructured in the first bankruptcy case, Debtor has needed to immediately dive back into Chapter 13 bankruptcy protection.

In the first bankruptcy case, Debtor used the Chapter 13 Plan to obtain a lien strip for a junior lien and discharged $90,000 of unsecured claims by paying a 0.00% dividend. 11-37392; Plan, Dckt. 5.

No explanation is provided for the need of Debtor to be in ten years of Chapter 13.

At the hearing, Debtor and Debtor's counsel explained **XXXXXXXXXXXXXX**.

Ruling

~~Debtors have sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay. Since the dismissal, Debtors have secured a mortgage modification and have gained control of their budget. Declaration, Dckt. 10. Debtor has also filed a proposed plan in this case. Dckt. 2.~~

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

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

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

~~The Motion to Extend the Automatic Stay filed by Charlie and Christina Boggs ("Debtors") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

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

7.	**18-24173-E-13** **CAS-1**	**FERRIC/STACY COLLONS** **Peter Macaluso**	**OBJECTION TO CONFIRMATION OF PLAN BY CAPITAL ONE AUTO FINANCE** **8-20-18 [21]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtors, Debtors' Attorney, the Chapter 13 Trustee, and Office of the United States Trustee on August 20, 2018. By the court's calculation, 43 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Debtor, Creditors, the 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.

Capitol One Auto Finance, a division of Capital One, N.A. ("Creditor") holding a secured claim opposes confirmation of the Plan. The court notes two additional pending Objections to Confirmation of this same Plan by additional parties. The bases for this Objection are that:

A. The Plan fails to pay the full replacement value of the Collateral. In a Chapter 13 proceedings, a Debtor may confirm a Plan over a creditor's objection only if the Plan provides the creditor the full value, as of the effective date of the Plan, of the allowed amount of the secured claim. 11 U.S.C. § 1325(a)(5)(B). The allowed amount of the secured claim is determined based on the replacement value a retail merchant would charge for a Collateral of a similar age and condition. 11 U.S.C. § 506(b). The

estimated replacement value a retail merchant would charge for the Collateral is $15,618.00. A copy of the vehicle valuation is included as Exhibit "C" filed in conjunction with this objection. To the extent that the Plan does not pay the full value of the Collateral pursuant to 11 U.S.C. § 506(b), Creditor objects to the confirmation of the Plan.

B. The Plan fails to pay the applicable prime plus interest rate. In addition, the Debtor must pay the present value of the secured claim by paying the creditor a discount rate of interest as measured by the formula rate expressed by the United States Supreme Court in Till v. SCS Credit Corp., 541 U.S. 465 (2004). See, also Drive Fin. Servs., L.P. v. Jordan, 521 F.3d 343 (5th Cir. 2008) (applying prime plus rate to vehicle lender's claim). The current prime rate of interest is 5.000%. To the extent that the Plan proposes to pay less than the prime interest rate plus 1.000%, Creditor objects to the confirmation of the Plan.

Value of Creditor's Collateral

11 U.S.C. § 1322(a) is the section of the Bankruptcy Code that specifies the mandatory provisions of a plan. It requires only that a debtor adequately fund a plan with future earnings or other future income that is paid over to the Chapter 13 Trustee (11 U.S.C. § 1322(a)(1)), provide for payment in full of priority claims (11 U.S.C. § 1322(a)(2) & (4)), and provide the same treatment for each claim in a particular class (11 U.S.C. § 1322(a)(3)). Nothing in § 1322(a) compels a debtor to propose a plan that provides for a secured claim, however.

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

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

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

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

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

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

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

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

Creditor has not provided any declaration or other evidence authenticating exhibits it is using for its valuation. Creditor has filed Proof of Claim No. 2 asserting a secured claim in the amount of $14,068.87 for which a 2015 Chrysler Town and Country is identified as the collateral. The Plan provides for a secured claim in the amount of $14,048.30, the amount that Debtor listed on Schedule D.

The Debtor must pay the secured claim in the amount stated in the Proof of Claim or in an order valuing the secured claim, if any. Chapter 13 Plan ¶ 3.02, Dckt. 13. The $20.00 amount is sufficiently *de minimis* that it does not render the Plan not confirmable.

Interest Rate

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 2015 Chrysler Town and Country. 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. Despite Creditor not identifying the risk factors common to every bankruptcy case, much less this particular case, the court fixes the interest rate as the prime rate in effect at the commencement of the case, 5.00%, plus a 1.06% risk adjustment, for a 6.06% interest rate. The objection to confirmation of the Plan on this basis is sustained. *See* 11 U.S.C. § 1325(a)(5)(B)(ii). [FN.1.]

FN.1. At 6.06% Creditor will actually be "enjoying" the original contract rate for this obligation. See Attachment 1 to Proof of Claim No. 2.

The court notes that it has tentatively sustained other objections to the confirmation of the proposed plan set to be heard the same day as the hearing on this Objection.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by Capital One Auto Finance ("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 sustained, and the proposed Chapter 13 Plan is not confirmed.

8. **18-24173-E-13 CCR-1** **FERRIC/STACY COLLONS** **Peter Macaluso** **OBJECTION TO CONFIRMATION OF PLAN BY RANCHO MURIETA AIRPORT, INC.** **8-30-18 [34]**

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 Debtors, Debtors' Attorney, Chapter 13 Trustee, and Office of the United States Trustee on August 30, 2018. 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. At the hearing ----------.

The Objection to Confirmation of Plan is sustained.

Rancho Murieta Airport, Inc. ("Creditor") holding a secured claim opposes confirmation of the Plan. The court notes two additional pending Objections to Confirmation of this same Plan by additional parties. The bases of this Objection are that:

A. Creditor objects to the proposed assumption of the rental agreements in the proposed plan. In Section 4 of the proposed Plan, Debtors seek to assume the Rental Agreements under 11 U.S.C. Section 365(b)(1), which are month to month agreements that are substantially in default. Debtors also seek to cure the prepetition default by making a de minimis monthly payment of $37.00 over five years. Finally, the amount of the proposed monthly direct payment is incorrect. The current monthly payment for all three units is

> $525.00. Based upon the substantial failure to make the monthly rental payments both prepetition and postpetition, Debtors fail to meet the requirements of Section 365(b)(1) to be able to assume the Rental Agreements and RMA objects to the proposed assumption on this basis.
>
> B. The Plan is facially not feasible because Debtors have not made any postpetition payments to Creditor.
>
> C. The Plan's proposed five-year cure of the prepetition arrears on this Creditor's claims indicates that this Plan has not been proposed in good faith as to this Creditor. Debtors have proposed a plan that inequitably tries to extend the cure payments to well beyond the potential duration of the Rental Agreements. Moreover, the Agreements were entered into only 5 months prior to the bankruptcy filing and were shortly thereafter defaulted on by the Debtors. Debtors cannot afford these storage units and their proposed assumption of the defaulted contracts is not a good faith attempt to resolve this matter.
>
> Creditor's objections are well-taken.

Creditor asserts that Debtor has not commenced payments under the proposed plan. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

11 U.S.C. § 365 permits assumption of an executory contract or unexpired lease only where defaults are cured or there is adequate assurance that they will be promptly cured, and where there is adequate assurance of future performance under the contract or lease. 11 U.S.C. § 365(b)(1)(A) and (C). Here, Debtor proposes to cure the defaults under the lease over a period of five years. Furthermore, Debtor has not commenced postpetition payments. Debtor has not demonstrated adequate assurance of prompt cure or future performance of the lease. If Debtor cannot assume the lease agreement with Creditor the proposed plan is not feasible. 11 U.S.C. § 1325(a)(6).

The court is not persuaded that Debtor's plan, deficient in many respects, has been filed in bad faith as argued by Creditor.

The court notes that it has tentatively sustained other objections to the confirmation of the proposed plan set to be heard the same day as the hearing on this Objection.

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

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

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

The Objection to the Chapter 13 Plan filed by Rancho Murieta Airport ("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 sustained, and the proposed Chapter 13 Plan is not confirmed.

9. **18-24173-E-13 DPC-1** **FERRIC/STACY COLLONS** **Peter Macaluso** **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 8-28-18 [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 Debtors and Debtors' Attorney on August 28, 2018. By the court's calculation, 35 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Debtor, Creditors, the 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 Chapter 13 Trustee, David Cusick ("Trustee"), opposes confirmation of the Plan. The court notes two additional pending Objections to Confirmation of this same Plan by Creditors. Trustee premises his Objection on the basis that:

A. Debtor cannot make the Plan payments (which increase from $810.00 for 24 months to $2,340.00 for the remaining 36 months). Debtor's plan

depends on a worker's compensation and disability claim, about which Debtor has not provided any evidence as to the likely time period for the claim to be resolved.

B. Debtor's plan relies on the valuation of secured claims held by Capital One and Wells Fargo Bank N.A. for $11,000.00 and $20,000.00 respectively. However, no motions to value have been filed.

Trustee's objections are 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 not properly supported Debtor's expectation of being capable of nearly tripling their plan payments in month 25 through the end of the Plan. Without an accurate picture of Debtors' financial reality, the court cannot determine whether the Plan is confirmable.

Furthermore, Debtors' Plan relies on the court valuing the secured claims of Capital One Auto Finance and Wells Fargo Bank N.A. Though Debtors have filed a Motion to Value Collateral regarding the Capital One Auto Finance claim, they have failed to file a Motion to Value the Secured Claim of Wells Fargo Bank N.A. Without the court valuing both claims, the Plan is not feasible. 11 U.S.C. § 1325(a)(6).

The court notes that it has tentatively sustained other objections to the confirmation of the proposed plan set to be heard the same day as the hearing on this Objection.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee, David Cusick ("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. 14-25474-E-13 LBG-5 — LEE SCIOCCHETTI — Lucas Garcia — CONTINUED MOTION TO COMPEL — 8-7-18 [95]

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 and creditors on August 7, 2018. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

The Motion to Compel Abandonment 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 Compel Abandonment is granted.

After notice and a hearing, the court may order a trustee to abandon property of the Estate that is burdensome to the Estate or is of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

The Motion filed by Lee Alan Sciocchetti ("Debtor") requests the court to order David Cusick ("the Chapter 13 Trustee") to abandon $11,260.00 in funds (the "Property") achieved from the sale of a portion of Debtor's interest in property commonly known as 7986 Hwy 20, Smartsville, California (the "Land"). The sale granted Caltrans a portion of the land for an easement of access.

Debtor has provided a Declaration to support this Motion. Dckt. 98. Debtor states he claimed an exemption totaling $56,000.00 on the Land. *Id.*, ¶ 3. Debtor owns the Land jointly with other owners, and does not believe there are any liens. *Id.*, ¶ 5. Debtor intends to use the Property towards improvements and repairs on the Land. *Id.*, ¶8.

TRUSTEE'S OPPOSITION

Trustee filed an opposition on August 13, 2018. Dckt. 100. Trustee states Trustee's counsel rejected Debtor's *ex parte* stipulation for the use of the Property "because of the reinvestment issue on July 24, 2018." Trustee also opposes the Motion because Debtor has not explained what improvements are intended, particularly where the Land is described on Schedule A as "Bare Land Property Except for an Unpermitted Attached Yeart."

AUGUST 28, 2018 HEARING

At the August 28, hearing the court continued the hearing on the Motion to October 2, 2018, allowing Debtor to supplement the Motion with details as to what improvements are sought to be made on the Land.

SUPPLEMENTAL DECLARATION

On September 13, 2018, Debtor filed a Supplemental Declaration identifying specific improvements Debtor intends to make to the Land. Dckt. 103. The Declaration states the improvements are:

> a. Installation of well: $4,000 for estimate for drilling a well (if good on first drill attempt) bid by Beymer Well and Pump at $21 per foot. Then 400 feet of trenching and pipeline. I intend to rent equipment and do this myself to save funds. I will also be installing a pump and attending structures myself. Estimated cost for trench, pipes, pump, and accessories $3000.00.
>
> i. Install water system on property $7000.00 approximate total.
>
> ii. Completion will be in stages and some items (like pump) may need to be funded before they can be completed.
>
> b. Installation of Air Conditioning: Estimates have been given between $3000-$4000. Deposits possibly required when contract signed and remainder upon completion.
>
> c. Both the AC and Well installation have not achieved dates of performance or completion as still at the bid portion of the process. Before I can accept a bid, I need to know that I can fund the project using these funds held by the trustee.

DISCUSSION

At issue is $11,260.00 in proceeds from the sale of real property in which Debtor asserted an exemption pursuant to California Code of Civil Procedure § 704.730.

The abandonment provisions of 11 U.S.C. § 554(b) are premised on there being a bankruptcy estate holding property and the debtor or some other person entitled to such property, with the value to the estate being minimal or burdensome. See COLLIER ON BANKRUPTCY, SIXTEENTH EDITION, ¶ 554.02.

In the case now before the court, Debtor confirmed his Plan on November 11, 2014. The Plan (Dckt. 5) required $300 monthly payments from the Debtor and provided for distributions of $285.00 for the claim secured by a camper, a 19% dividend to creditors holding general unsecured claims, $10,707.00 in Debtor's attorney's fees, and the Chapter 13 Trustee fees. Pursuant to Joint Ex Parte Motion the Plan was

amended to increase the Plan payments to $325.00 for the last forty-one months of the Plan. Order, Dckt. 94. The Plan does not provide for Debtor to sell his interest in the undeveloped property.

On March 27, 2018, Debtor filed a Motion to Approve the sale of his interest in an easement over the Property to be purchased by California Department of Transportation. Dckt. 80. The Motion recites Debtor having claimed the homestead exemption in the property from which the easement interest was to be sold. The Motion was granted. Civil Minutes, Dckt. 87; Order, Dckt. 90.

Review of Homestead Exemption

Debtor has asserted the standard homestead exemption from enforcement of judgments under California law (not the special bankruptcy opt-out exemption). This, as debtors have learned, is a "conditional" exemption, which requires that if the property in which the exemption is sold, then the exemption goes to the proceeds, but only for a period of six months.

> "§ 704.720. Exemption from sale; Exemption of sale proceeds or indemnification
>
> (b) If a homestead is sold under this division or is damaged or destroyed or is acquired for public use, **the proceeds of sale** or of insurance or other indemnification for damage or destruction of the homestead or the **proceeds received as compensation for a homestead acquired for public use** are exempt in the amount of the homestead exemption provided in Section 704.730. The proceeds **are exempt for a period of six months after the time the proceeds are actually received by the judgment debtor**, except that, if a homestead exemption is applied to other property of the judgment debtor or the judgment debtor's spouse during that period, the proceeds thereafter are not exempt."

Cal. C.C.P. § 704.720(b). Additionally, the homestead exemption is lost if the debtor claims an exemption in other property.

Proceeds at Issue

The property is not being abandoned from the bankruptcy estate, but the Debtor seeks to use the money, taking potentially non-exempt assets from creditors. Debtor's Plan provides that the property of the Debtor, which includes the property in which the homestead exemption is claimed, revested in the Debtor on confirmation. Plan ¶ 5.01, Dckt. 5. However, if the case is converted to one under Chapter 7, the Property in which the exemption is claimed, and the proceeds at issue, are property of the Chapter 7 bankruptcy estate. 11 U.S.C. § 348(f).

In substance, the issue presented is not that property should be "abandoned" from the bankruptcy estate, but whether there have been post-confirmation changes (here, the loss of an exemption) upon which the Chapter 13 Trustee or creditors could seek modification of the chapter 13 Plan pursuant to 11 U.S.C. § 1329.

As Debtor notes, the exemption was claimed and not objected to by the Chapter 13 Trustee or other party in interest. Upon Debtor completing his plan, obtaining his discharge, and proceeding with his fresh start, he can sell his homestead property, do whatever he wants with it, and his creditors in this case (and Chapter 13 Trustee) would have nothing to think about it.

But, Debtor in this Chapter 13 case does not have a discharge and his non-exempt assets can be called upon to pay his creditors. The court issued its order on May 1, 2018, approving the sale of the property by the Debtor which has generated the proceeds at issue. Debtor is still within the six month window to use the homestead exemption proceeds for his homestead exemption property. But the clock is ticking.

Debtor's Supplemental Declaration specifies the improvements Debtor will make with the Property. Debtor having demonstrated that the monies sought to be used are exempt assets, the Motion is granted and Debtor is authorized to use the $11,260.00 in funds (the "Property") achieved from the sale of a portion of Debtor's interest in property commonly known as 7986 Hwy 20, Smartsville, California.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Compel Abandonment filed by Lee Alan Sciocchetti ("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 Compel Abandonment is granted, and the Property identified as $11,260.00 in funds (the "Property") achieved from the sale of a portion of Debtor's interest in property commonly known as 7986 Hwy 20, Smartsville, California is abandoned by David Cusick ("the Chapter 13 Trustee") to Lee Alan Sciocchetti by this order, with no further act of the Chapter 13 Trustee required.

11. **18-25596-E-13 NF-1** | **KASEY/LISA MURRAY** **Nikki Farris** | **MOTION TO EXTEND AUTOMATIC STAY** **9-7-18 [8]**

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

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, creditors, and Office of the United States Trustee on September 7, 2018, and Amended Notice provided September 17, 2018. By the court's calculation, 25 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 granted.

Kasey Alan Murray and Lisa Krystya Murray ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(a) extended beyond thirty days in this case. This is Debtor's second bankruptcy petition pending in the past year. Debtor's prior bankruptcy case (No. 17-24055) was dismissed without discharge on July 20, 2018, after Debtor became delinquent in plan payments in the amount of $2,29386 and failed to become current as of the date of the July 17, 2018 hearing. *See* Order, Bankr. E.D. Cal. No. 17-24055, Dckt. 48, July 11, 2018. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to Debtor thirty days after filing of the petition.

Debtor states in Debtor's Declaration (Dckt. 10) that the instant case was filed in good faith and explains that during the pendency of the first case, Co-Debtor Kasey Murray's vehicle was broken into and all of his work tools were stolen. He was thus put out of work for a time and Debtor fell behind on their

payments. Co-Debtor Lisa Murray was unable to make up the difference in income because she was coming off maternity leave. However, Lisa Murray is now back to work full time.

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.

The prior case was dismissed due to failure to make payments under the Plan. Debtor explained that the delinquency was caused by sudden unanticipated hardships, including the loss of Co-Debtor Kasey Murray's work tools and Co-Debtor Lisa Murray being on maternity leave. Debtor explained further that Lisa Murray is now working full time. Debtor has sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay.

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

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

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

The Motion to Extend the Automatic Stay filed by Kasey Alan Murray and Lisa Krystyna Murray ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

12. 18-24479-E-13 DPC-1 — VLADIMIR TISKIY, Pro Se — OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK, 9-5-18 [24]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor (*pro se*) on September 5, 2018. 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.

The Chapter 13 Trustee, David Cusick ("Trustee"), opposes confirmation of the Plan. The instant Objection is made on the basis that:

A. Debtor has failed to appear at the First Meeting of Creditors held on August 30, 2018. The Meeting was continued to October 18, 2018.

B. Debtor is delinquent $125.00 in plan payments, with another $125.00 payment becoming due before this hearing date. $0.00 has been paid into the Plan to date.

C. Debtor has not provided the Trustee with a Federal Income Tax Return or tax transcript, which was due on August 23, 2018.

D. Debtor has not provided the Trustee with required business documents, including the Questionnaire, 2 years of tax returns, 6 months of profit and loss statements, 6 months of bank statements, proof of license and insurance, or written statements that no such documents exist.

E. Debtor has not provided the Trustee with the Class 1 Checklist and Authorization to Release Information forms.

F. Debtor has not completed his Statement of Financial Affairs and his Schedules appear to contain conflicting information that indicate he is unable to make the plan payments. Debtor's Schedule J indicates his net income is negative $2,430.00 where the Plan calls for $125.00 payments for 60 months. Debtor lists SPS and Rashmore as creditors with Class 1 claims, but the arrearage dividends for those claims are listed as $0.00. Finally, Debtor has not completed the Statement of Financial Affairs, answering only Question #4.

Trustee's objections are well-taken.

Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. Attempting to confirm a plan while failing to appear and be questioned by the Chapter 13 Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

Debtor is $125.00 delinquent in plan payments, which represents one month of the $125.00 plan payment. Before the hearing, another plan payment will be due. According to the Chapter 13 Trustee, the Plan in § 2.01 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 additional feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

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

Debtor has failed to timely provide the Chapter 13 Trustee with business documents including:

A. Questionnaire,
B. Two years of tax returns,
C. Six months of profit and loss statements,
D. Six months of bank account statements, and
E. Proof of license and insurance or written statement that no such documentation exists.

11 U.S.C. §§ 521(e)(2)(A)(i), 704(a)(3), 1106(a)(3), 1302(b)(1), 1302(c); FED. R. BANKR. P. 4002(b)(2) & (3). Debtor is required to submit those documents and cooperate with the Chapter 13 Trustee. 11 U.S.C. § 521(a)(3). Without Debtor submitting all required documents, the court and the Chapter 13 Trustee are unable to determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325.

Local Bankruptcy Rule 3015-1(b)(6) requires Debtor provide Trustee the Class 1 Checklist and Authorization to Release Information forms. Debtor has not done so.

Debtor's Schedules, Statement of Financial Affairs, and proposed plan are not completed in a way as to provide the court with an accurate picture of Debtor's financial reality. Without this, the court cannot determine whether the Plan is confirmable. 11 U.S.C. § 1325(a)(6).

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by The Chapter 13 Trustee, David Cusick ("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.

FINAL RULINGS

13.	**18-24482-E-13** **SCC-1**	**AGNES DINOROG** **Mohammad Mokarram**	**OBJECTION TO CONFIRMATION OF PLAN BY SANTA CLARA COUNTY, DEPARTMENT OF CHILD SUPPORT SERVICES** **9-6-18 [15]**

Final Ruling: No appearance at the October 2, 2018, hearing is required.

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

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 September 6, 2018. 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. .

The Objection to Confirmation of Plan is overruled as moot.

Santa Clara County, Department of Child Support Services ("Creditor") filed an Objection to Confirmation of the Plan on September 6, 2018. Dckt. 15.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Subsequent to the filing of this Objection to Confirmation, Agnes Beltran Dinorog ("Debtor") filed an Amended Plan and corresponding Motion to Confirm on September 17, 2018. Dckts. 20, 21. Filing a new plan is a de facto withdrawal of the pending plan. The Objection to Confirmation of the Plan is overruled as moot, 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 Motion to Confirm the Amended Chapter 13 Plan filed by Agnes Beltran Dinorog ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection to Confirmation of the Plan is overruled as moot, the plan not being prosecuted by Debtor.

14. **18-24490-E-13 TGM-1** | **DONNA BROUSSARD** **Aubrey Jacobsen** | **OBJECTION TO CONFIRMATION OF PLAN BY HSBC BANK USA, N.A. 8-23-18 [25]**

Final Ruling: No appearance at the October 2, 2018, hearing is required.

The Objection to Confirmation is dismissed without prejudice.

HSBC Bank USA, National Association as Trustee for Deutsche Alt-A Securities, Inc., Mortgage Pass-Through Certificates Series 2006-AR3 ("Creditor") having filed a "Withdrawal of Objection," which the court construes to be an *Ex Parte* Motion to Dismiss the pending Objection on September 27, 2018, Dckt. 44; no prejudice to the responding party appearing by the dismissal of the Objection; Creditor having the right to request dismissal of the objection pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041; and the dismissal being consistent with the opposition filed by Donna Marie Broussard ("Debtor"); the Ex Parte Motion is granted **and the Objection is dismissed without prejudice.**

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Confirmation filed by HSBC Bank, USA, N.A., as 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 is dismissed without prejudice.

15. **16-22850-E-13** **JENNIFER SABINE** **MOTION TO MODIFY PLAN**
TLA-3 **Thomas Amberg** **8-28-18 [58]**

Final Ruling: No appearance at the October 2, 2018, hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors,, and Office of the United States Trustee on August 28, 2018. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (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.

DISCUSSION

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. Jennifer Lynne Sabine ("Debtor") has filed evidence in support of confirmation. David Cusick ("the Chapter 13 Trustee") filed a Response indicating non-opposition on September 14, 2018. Dckt. 66. 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 Jennifer Lynne Sabine ("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 28, 2018, 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.

16. 16-22850-E-13 DPC-2 — JENNIFER SABINE — Thomas Amberg — CONTINUED MOTION TO DISMISS CASE — 8-3-18 [52]

Final Ruling: No appearance at the October 2, 2018 Hearing is required.

- - - - - - - - - - -

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 August 3, 2018. By the court's calculation, 33 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 denied without prejudice.

David Cusick ("the Chapter 13 Trustee") seeks dismissal of the case on the basis that Jennifer Lynne Sabine("Debtor") is $1,700.00 delinquent in plan payments, which represents multiple months of the $575.00 plan payment. Before the hearing, another plan payment will be due. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

DEBTOR'S RESPONSE

Debtor filed a Response on August 6, 2018. Dckt. 56. Debtor indicates she will file an Amended or Modified Plan to cure delinquency in payments.

SEPTEMBER 5, 2018 HEARING

While the Debtor did not provide a declaration or other evidence supporting its Response, the court noted that a Modified Plan and Motion to Confirm Modified Plan have been filed. Dckt. 58, 62.

In light of Debtor moving to confirm a plan, the court continued the hearing on this Motion to October 2, 2018. Dckt. 65.

DISCUSSION

The Trustee filed a statement of nonopposition to Debtor's Motion to Confirm Modified Plan on September 14, 2018 stating that Debtor had become current under the proposed Plan and that the Plan computed mathematically. Dckt. 66. Furthermore, the court has tentatively granted the Motion to Modify Plan (Dckt. 58) set to be heard alongside this Motion.

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 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 Motion to Dismiss is denied without prejudice.

17. **18-21867-E-13 MOH-1** **AMY WOODS** **Michael Hays** **CONTINUED MOTION TO CONFIRM PLAN** **7-6-18 [24]**

Final Ruling: No appearance at the October 2, 2018 Hearing is required.

- - - - - - - - - - -

Local Rule 9014-1(f)(1) Motion—No 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 6, 2018. By the court's calculation, 46 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is granted.

Amy Woods ("Debtor") seeks confirmation of the Amended Plan subsequent to losing employment. Dckt. 24. The Amended Plan provides for Monthly Plan payments of $529.00 from April 2018 to May 2018, and $465.00 from June 2018 and thereafter. Dckt. 28. 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 July 30, 2018. Dckt. 30. Trustee asserts as follows:

1. Debtor cannot make Plan payments. At the Meeting of Creditors May 10, 2018, Debtor advised Trustee she was laid off from work and is currently unemployed. Dckt. 17. Debtor has failed to file Amended Schedules I and J illustrating her ability to make Plan payments of $465.00. In Debtor's Declaration (Dckt. 26 at 2:8), she provides that she anticipates becoming employed at a much lower income, but that her two adult sons (one indicated as unemployed on Debtor's Schedule J) will assist her in making

payments. One of Debtor's sons provides a declaration indicating he is employed ful-time, but there is no factual detail as to his financial ability.

2. Debtor may have a potential lawsuit against her former employer for wrongful termination. At the Meeting of Creditors, Debtor explained she was fired and may have a claim. This court previously held the Debtor must disclose any such claims and include them in a confirmable Plan. Dckt. 22 at 3.

SUPPLEMENTAL DECLARATION OF DEBTOR

Debtor filed a Declaration August 11, 2018. Dckt. 42. Debtor states that she is uncertain whether she has legal claims, but will report them if she files suit. *Id.* at ¶ 2. Debtor states further she will notify the Trustee once she has obtained new employment. *Id.* at ¶ 3.

Failure to Afford Plan Payment

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor has affirmed that she remains unemployed. Dckt. 42. While Debtor may have indicated before her sons can assist her with payments, specific financial information supporting feasibility of that plan has not been provided. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

Undisclosed Assets

A Chapter 13 debtor has a statutory duty to disclose all assets or potential assets to the bankruptcy court, pursuant to 11 U.S.C.§§ 521(1) and 541(a)(7). *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1274–75 (11th Cir. 2010) (holding that a post-petition lawsuit is property of the bankruptcy estate that debtor had a duty to disclose). The duty to disclose does not end once the forms are submitted to the bankruptcy court; rather the debtor must amend financial statements if circumstances change. *Id.* A pending lawsuit seeking monetary compensation qualifies as an asset, and such asset is property of the bankruptcy estate. *Id.*

While Debtor is uncertain whether she has claims and states she will notify the Trustee "if" she files a claim, Debtor's perception of and decision to undertake her claims is simply not relevant. Debtor has a duty to disclose all *potential* assets. 11 U.S.C.§§ 521(1) and 541(a)(7). As stated by this court already (Dckt. 22.), it appears the Estate has claims for wrongful termination which must be administered by Debtor.

AUGUST 21, 2018 HEARING

At the August 21, 2018, hearing, the court continued the hearing on the Motion to October 2, 2018 at 3:00 p.m. to allow Debtor to address the above issues, with it being likely that the Trustee's opposition will be resolved.

TRUSTEE'S AMENDED RESPONSE

Trustee filed an Amended Response on September 12, 2018 indicating Trustee no longer opposes confirmation of the plan.

DISCUSSION

The above issues having been addressed, the Amended Plan complies with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Amended Chapter 13 Plan filed by Amy Woods ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Debtor's Amended Chapter 13 Plan filed on July 6, 2018, 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.

18. **18-24499-E-13 CDR-1** **AVINASH SINGH** **David Johnston** **OBJECTION TO CONFIRMATION OF PLAN BY CALIFORNIA DEPARTMENT OF TAX AND FEE ADMINISTRATION 8-29-18 [43]**

CASE DISMISSED: 9/10/2018

Final Ruling: No appearance at the October 2, 2018 hearing is required.

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

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

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

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

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

19. **18-24499-E-13 DPC-2** **AVINASH SINGH** **David Johnston** **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 8-28-18 [39]**

CASE DISMISSED: 9/10/2018

Final Ruling: No appearance at the October 2, 2018 hearing is required.

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

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

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

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

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

20. 18-22116-E-13 SS-1 HORACE HODGES Scott Shumaker MOTION TO CONFIRM PLAN 8-9-18 [30]

Final Ruling: No appearance at the October 2, 2018 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 the Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 9, 2018. By the court's calculation, 54 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); 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. Horace Hodges ("Debtor") has provided evidence in support of confirmation. Dckts. 32, 33. The Chapter 13 Trustee, David Cusick ("the Chapter 13 Trustee"), filed a statement of non-opposition on August 28, 2018. Dckt. 38.

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 Horace Hodges ("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 9, 2018, is confirmed. Debtor's Counsel shall

prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee, 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.

21. 18-24423-E-13 SS-2 | **PAUL ULBRICH** | **Scott Shumaker** | **MOTION TO CONFIRM PLAN** | **8-13-18 [23]**

Final Ruling: No appearance at the October 2, 2018 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 the Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 13, 2018. By the court's calculation, 50 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); 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. Paul Ulbrich ("Debtor") has provided evidence in support of confirmation. Dckts. 25, 26. David Cusick ("the Chapter 13 Trustee") filed a statement of non-opposition on September 12, 2018. Dckt. 31.

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 Paul Ulbrich ("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 13, 2018, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee, 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.

22. **18-23825-E-13 PGM-1** **DARLENE CHIAPUZIO-WONG** **Peter Macaluso** **MOTION TO VALUE COLLATERAL OF LUIS GARCIA SAMANO** **8-27-18 [26]**

CASE DISMISSED: 09/10/2018

Final Ruling: No appearance at the October 2, 2018, hearing is required.

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

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

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

The Motion To Value Collateral having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

23. **18-23825-E-13 PGM-2** **DARLENE CHIAPUZIO-WONG** **Peter Macaluso** **MOTION TO VALUE COLLATERAL OF BPE LAW GROUP** **8-27-18 [32]**

CASE DISMISSED: 09/10/2018

Final Ruling: No appearance at the October 2, 2018, hearing is required.

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

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

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

24. **18-24434-E-13 DPC-1** **LINDA OLIVER** **Julius Cherry** **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 8-28-18 [16]**

Final Ruling: No appearance at the October 2, 2018, hearing is 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 28, 2018. By the court's calculation, 35 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Debtor, Creditors, the 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 October 16, 2018 at 3:00 p.m.

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

A. Debtor failed to appear at the First Meeting of Creditors scheduled for August 23, 2018. Debtor is required to attend the meeting under 11 U.S.C. § 343. Debtor's counsel emailed Trustee August 16, 2018, advising Trustee that Debtor missed the meeting due to surgery. The Meeting was continued to September 13, 2018.

B. Debtor would be unable to afford payments or comply with the proposed Plan. Debtor's proposed plan relies on a motion to value collateral being filed for Travis Credit Union, listed in the proposed plan as a Class 2B claim.

TRUSTEE'S STATUS REPORT

Trustee filed a Status Report on September 19, 2018. Dckt. 30. Trustee states that Debtor attended the continued Meeting of Creditors. Trustee states further that Debtor has filed a Motion to Value Collateral, set for hearing October 16, 2018.

Trustee requests the court continue the hearing on this Motion to be heard alongside Debtor's Motion to Value.

DISCUSSION

Trustee's sole remaining grounds for objecting to the confirmation of the proposed plan is the plan's dependence on a Motion to Value set to be heard October 16, 2018, at 3:00 p.m. The hearing on this Motion is continued so the two matters can be heard alongside each other.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee, David Cusick ("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 continued to October 16, 2018 at 3:00 p.m.

25.	**17-25136-E-13 SJD-1**	**JOHN MCFARLIN AND SAMANTHA ROBBINS Susan Turner**	**MOTION TO CONFIRM AMENDED PLAN 8-16-18 [22]**

Final Ruling: No appearance at the October 2, 2018 hearing is required.

The Motion to Confirm Amended Plan is dismissed without prejudice.

John McFarlin and Samantha Robbins ("Debtors") having filed a Reply "withdrawing their amended Chapter 13 plan" and requesting the court remove the Motion from the calendar, which the court construes to be an Ex Parte Motion to Dismiss the pending Motion on September 24, 2018, Dckt. 31; no prejudice to the responding party appearing by the dismissal of the Motion; Debtors having the right to request dismissal of the motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041; and the dismissal being consistent with the opposition filed by David Cusick ("the Chapter 13 Trustee"); the Ex Parte Motion is granted, Debtors' Motion is dismissed without prejudice, and the court removes this Motion from the calendar.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm Amended Plan filed by James McFarlin and Samantha Robbins ("Debtors") having been presented to the court, Debtors having requested that the Motion itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, Dckt. 31, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Confirm Amended Plan is dismissed without prejudice.

26. **18-24438-E-13** **JAMES CASEY** **OBJECTION TO CONFIRMATION OF**
DPC-1 **Paul Bains** **PLAN BY DAVID P. CUSICK**
9-5-18 [21]

Final Ruling: No appearance at the October 2, 2018 hearing is required.

The Objection to Confirmation is dismissed without prejudice.

David Cusick ("the Chapter 13 Trustee") having filed a Notice of Dismissal, which the court construes to be an Ex Parte Motion to Dismiss the pending Objection on September 21, 2018, Dckt. 27; no prejudice to the responding party appearing by the dismissal of the Objection; the Chapter 13 Trustee having the right to request dismissal of the objection pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041; and the dismissal being consistent with the opposition filed by James Casey ("Debtor"); the *Ex Parte* Motion is granted, the Chapter 13 Trustee's Objection is dismissed without prejudice, the court removes this Objection from the calendar, and the Chapter 13 Plan filed on July 16, 2018, 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.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Confirmation filed by the Chapter 13 Trustee having been presented to the court, the Trustee having filed an Ex Parte Motion to dismiss the present Objection, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation is dismissed. Counsel for the Debtor shall prepare and forward to the Chapter 13 Trustee a proposed order confirming the Plan, which upon approval by the Trustee shall be lodged with the court.

27. **18-21367-E-13** **SUSAN SULTANA** **MOTION TO INCUR DEBT**
ALF-3 **Ashley Amerio** **8-28-18 [33]**

Final Ruling: No appearance at the October 2, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on August 28, 2018. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

The Motion to Incur Debt 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 Incur Debt is granted.

Susan Marie Sultana ("Debtor") seeks permission to lease a 2019 Jeep Cherokee, with a total lease price of $11,783.16 and monthly lease payments of $327.31 to Antioch Chrysler Jeep over 3 years.

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response to the Motion on September 14, 2018. Dckt. 38. Trustee asserts Debtor is current under the Confirmed Plan and the Motion is sought to replace the Debtor's current lease set to expire October 2018, which called for nearly identical payments. Trustee notes additionally that Debtor fails to cite legal authority within the Motion.

DISCUSSION

Failure to cite legal authority

Trustee's argument regarding failure to cite legal authority is well-taken. Nowhere within the Motion does Debtor state legal authority for the relief it is requesting. The Supreme Court requires that the motion itself state with particularity the grounds upon which the relief is requested. FED. R. BANKR. P. 9013. A simple statement as to the basis for relief requested would have sufficed here.

Given the entirety of the Motion and the grounds stated within, the court is not here confused about how Debtor is intending to proceed. However, Debtor's counsel is reminded that failure to state the grounds with particularity is grounds to deny the Motion.

Merits of the Motion

A motion to incur debt is governed by Federal Rule of Bankruptcy Procedure 4001(c). *In re Gonzales*, No. 08-00719, 2009 WL 1939850, at *1 (Bankr. N.D. Iowa July 6, 2009). Rule 4001(c) requires that the motion list or summarize all material provisions of the proposed credit agreement, "including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions." FED. R. BANKR. P. 4001(c)(1)(B). Moreover, a copy of the agreement must be provided to the court. *Id.* at 4001(c)(1)(A). The court must know the details of the collateral as well as the financing agreement to adequately review post-confirmation financing agreements. *In re Clemons*, 358 B.R. 714, 716 (Bankr. W.D. Ky. 2007).

The court finds that the proposed credit, based on the unique facts and circumstances of this case, is reasonable. Debtor's current lease is set to expire October 2018, and this replacement lease agreement proposes nearly identical monthly payments. Furthermore, Debtor is current on Plan payments. There being no opposition from any party in interest and the terms being reasonable, the Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Incur Debt filed by Susan Marie Sultana ("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 Susan Marie Sultana is authorized to incur debt pursuant to the terms of the agreement, Exhibit A, Dckt. 36.

28. **18-24350-E-13 PSB-1** **ELVIRA/JOSE LOPEZ** **Paul Bains** **MOTION TO VALUE COLLATERAL OF REAL TIME RESOLUTIONS, INC. 8-31-18 [16]**

Final Ruling: No appearance at the October 2, 2018 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, creditors, and Office of the United States Trustee on August 31, 2018. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

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

The Motion to Value Collateral and Secured Claim of Real Time Resolutions, Inc. ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $0.00.

The Motion to Value filed by Elvira Ochoa Lopez and Jose Fierros Lopez ("Debtor") to value the secured claim of Real Time Resolutions, Inc. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 2009 Promenade Drive, Woodland, California ("Property"). Debtor seeks to value the Property at a fair market value of $600,000.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Non-Opposition on September 14, 2018. Dckt. 22. Trustee notes that Creditor has not filed a proof of claim and the bar date is September 20, 2018.

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

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

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

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

PROOF OF CLAIM FILED

Creditor filed a proof of claim on September 19, 2018. Proof of Claim, No. 11. Creditor asserts it has a secured claim for 129,723.88.

DISCUSSION

THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF THE CWMBS INC., CHL MORTGAGE PASS-THROUGH TRUST 2006-OA5, MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2006-OA5[FN.1] holds a first deed of trust securing a claim with a balance of approximately $840,500.44. Proof of Claim, No. 12. Creditor's second deed of trust secures a claim with a balance of approximately $64,211.34. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's secured claim is determined to be in the amount of $0.00, the value of the collateral, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

FN.1. The Motion references the first deed of trust of "Shellpoint Mortgage Servicing." The Proof of Claim filed indicates Shellpoint is merely the servicer on this debt.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value Collateral and Secured Claim filed by Elvira Ochoa Lopez and Jose Fierros Lopez ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of Real Time Resolution, Inc. ("Creditor") secured by a second in priority deed of trust recorded against the real property commonly known as 2009 Promenade Drive, Woodland, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $600,000.00 and is encumbered by a senior lien securing a claim in the amount of $840,500.44, which exceeds the value of the Property that is subject to Creditor's lien.

29. **18-24350-E-13 DPC-1** **ELVIRA/JOSE LOPEZ** **Paul Bains** **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 8-28-18 [12]**

Final Ruling: No appearance at the October 2, 2018 Hearing is required.

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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 28, 2018. By the court's calculation, 35 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Debtor, Creditors, the 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 overruled.

The Chapter 13 Trustee, David Cusick ("Trustee"), opposes confirmation of the Plan on the basis that Debtor cannot afford to make the payments or comply with the Plan given the Plan's reliance on a Motion to Value Collateral not yet filed for Real Time Resolutions, Inc. (listed as a Class 2C claim).

DEBTOR'S RESPONSE

Debtor filed a response to Trustee's Objection on September 2, 2018. Dckt. 20. Debtor states that a Motion to Value Collateral of Real Time Resolutions, Inc. has been filed (Dckt. 16) and is set to be heard the same date as the hearing on this Motion.

DISCUSSION

Debtor's response is well-taken. Debtor has filed its Motion to Value Collateral for Real Time Resolutions and is set to be heard on October 2, 2018. Dckt. 16. The Court's tentative ruling is to grant that motion. Trustee's sole grounds for opposition having been resolved, 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 The Chapter 13 Trustee, David Cusick ("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 Elvira Ochoa Lopez and Jose Fierros Lopez ("Debtor") Chapter 13 Plan filed on July 22, 2018, is confirmed. Counsel for Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

30. 18-23462-E-13 MAC-1 — SHARON JACKSON — Marc Caraska — MOTION TO CONFIRM PLAN — 8-22-18 [53]

Final Ruling: No appearance at the October 2, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors and Office of the United States Trustee on August 22, 2018. By the court's calculation, 41 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); 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. Sharon Ann Jackson ("Debtor") has provided evidence in support of confirmation. *See* Dckts. 55, 56. David Cusick ("the

Chapter 13 Trustee") filed a Non-Opposition on September 7, 2018. Dckt. 65. 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 Sharon Ann 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 Amended Chapter 13 Plan filed on August 22, 2018, 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.

31. **18-23464-E-13** **CYNTHIA PAYSINGER** **MOTION TO CONFIRM PLAN**
PGM-3 **Peter Macaluso** **8-27-18 [64]**

Final Ruling: No appearance at the October 2, 2018 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 and Office of the United States Trustee on August 27, 2018. By the court's calculation, 36 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); 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. Cynthia J. Paysinger ("Debtor") has provided evidence in support of confirmation. *See* Dckts. 66, 67. David Cusick ("the Chapter 13 Trustee") filed a Non-Opposition on September 12, 2018. Dckt. 77. 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 Cynthia J. Paysinger ("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 27, 2018, 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.