UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

October 4, 2016, at 3:00 p.m.

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1. 16-24600-E-13 DPC-1 | **RICHARD FLORES** **Scott Hughes** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK 8-30-16 [23]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on August 30, 2016. By the court's calculation, 35 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

A. Robert Flores ("Debtor") failed to attend the 341 Meeting of Creditors on August 25, 2016. The Meeting has been continued to September 22, 2016, at 11:00 a.m.;

B. Debtor is delinquent $650.00 in plan payments;

C. Debtor has failed to provide the Trustee with a tax transcript or copy of his Federal Income Tax Return for the most recent pre-petition tax year for which a return was required; and

D. Debtor has failed to provide the Trustee with business documents, including:

1. Questionnaire,

2. Two years of tax returns,

3. Profit and loss statements,

4. Bank account statements,

5. Proof of business license, and

6. Proof of insurance or written statement of no such document existing.

The Trustee's objections are well-taken.

A basis for the Trustee's objection was that the Debtor did not appear at the meeting of creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. See 11 U.S.C. § 343. To attempt to confirm a plan while failing to appear and be questioned by the Trustee and any creditors who appear represents a failure to cooperate. See 11 U.S.C. § 521(a)(3). This is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

Another basis for the Trustee's objection is that the Debtor is $650.00 delinquent in plan payments, which represents one month of the $650.00 plan payment. The Plan in § 1.01 calls for payments to be received by the Trustee not later than the 25th day of each month beginning the month after the order for relief under Chapter 13. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

The Debtor has not provided either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. See 11 U.S.C. § 521(e)(2)(A); 11 U.S.C. § 1325(a)(9); Fed. R. Bankr. P. 4002(b)(3). The Debtor has failed to provide the tax transcript. That is a ground to deny confirmation. 11 U.S.C. § 1325(a)(1).

The Debtor has failed to timely provide the Trustee with business documents including: questionnaire; tax returns, profit and loss statements, bank account statements; proof of license and insurance or written statement of no such documentation exists. 11 U.S.C. § 521(e)(2)(A); Fed. R. Bankr.

P. 4002(b)(3). These documents are required seven (7) days before the date set for the first meeting, 11 U.S.C. § 521(e)(2)(A)(I). Without the Debtor submitting those required documents, the court and the Trustee are unable to determine if the plan is feasible, viable, or complies with 11 U.S.C. § 1325.

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

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

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

2.	**16-24701-E-13** **DPC-1**	**KHAMMAY/KHAMMAI PHOMMAVONGSA** **Timothy Walsh**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK** **8-30-16 [14]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors and Debtors' Attorney on August 30, 2016. By the court's calculation, 35 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

A. Khammay Phommavongsa and Khammai Phommavongsa ("Debtors") appear to be unable to make plan payments. Debtors' projected monthly disposable income listed on Schedule J is negative $160.85, and the Debtors propose plan payments of $100.00;

B. The Debtors' Plan fails the Chapter 7 liquidation analysis. Debtors' non-exempt equity totals $17,211.59 but the Debtors are proposing a 0% dividend to unsecured creditors;

C. The Plan does not appear to provide all of the Debtors' projected disposable income for the applicable commitment period. Debtors received a combined state and federal tax refund for 2015 of $5,364.00. Debtors can increase the dividend paid to creditors by turning over their tax refunds each year; and

D. The Plan is not the Debtors' best efforts:

1. Debtors earn below-median income;

2. Debtors deduct $450.00 per month for life insurance premiums but admitted no longer having any life insurance expenses at the 341 Meeting of Creditors. This expense greatly affects the budget and disposable income. Debtors' Plan should be increased to pay $289.15 per month for thirty-six (36) months, plus a turnover of the tax refunds; and

3. Debtors attached a business budget to Schedules I & J that report $95,439.50 per month in gross receipts. The Debtors stated at the 341 Meeting of Creditors that the business closed in 2013 and that the budget was erroneously attached from a previous bankruptcy filing.

DEBTORS' OPPOSITION

Debtors filed an opposition on September 21, 2016, requesting a hearing and stating that Debtors have amended the schedules to resolve the Trustee's concerns. Dckt. 19. Below is a summary of the Amended Schedules (Dckt. 18):

A. *Amended Schedule A/B:* #53 (other property) and #61 (total other property not listed): Debtors removed the prior-listed interest in "Asian Market; Inventory subject to lien of $25,000.00" with a value of $19,338.59. This reduced #63 (total of all property on Schedule A/B) to $16,973.00. (Debtors also amended Schedule C to remove the C.C.P. § 703.140(b)(6) exemption for this prior-listed asset, although Debtors failed to check this box on the Amendment Cover Sheet).

B. *Amended Schedule J*: Debtors increased their childcare and children's education costs (#8) from $500.00 to $700.00. Debtors reduced their clothing, laundry, and dry cleaning cost (#9) from $100.00 to $50.00. Debtors removed the $450.00 life insurance expense (#15a). These changes result in a new net monthly disposable income of $139.15 (#23c). Debtors did not file an Amended Plan to reflect this increase in disposable income.

C. *Amended Statement of Financial Affairs*: Debtors amended #4 to include Debtors' sources of income for the current year ($29,492.49 combined), 2015 ($59,951.00 combined), and 2014 ($449,167.00 combined).

TRUSTEE'S REPLY

The Trustee filed a Reply on September 27, 2016. Dckt. 21. The Trustee objects to confirmation on the same grounds still, described below:

A. The Trustee believes that Debtors' changes to their budget are reasonable, but he objects that the plan payment should be $139.00 per month.

B. Debtors removed listing an interest in Asian Market from Schedule B. Unless a declaration is filed by the Debtors explaining that matter to the court, the Trustee does not believe that there is sufficient evidence for the court to conclude that the liquidation analysis has been met.

C. Not all of Debtors' disposable income is in the Plan, and this concern has not been addressed by the Debtors.

D. The objection about the Plan not being Debtors' best efforts has been satisfied.

E. The Trustee's objection about the Debtors filing a business budget with $95,439.50 per month listed in gross receipts will be resolved if Debtors' file a declaration explaining why that budget was removed from the schedules.

APPLICABLE LAW REGARDING PERJURY

In signing the Schedules and Statement of Financial Affairs, each Debtor has certified under penalty of perjury that the information therein is true and correct. *See* Statement of Financial Affairs, Part 12, Dckt. 1 at 44, 51. The forms themselves make this clear, stating with respect to the Statement of Financial Affairs:

> "I [each person signing] have read the answers on this Statement of Financial Affairs and any attachments, and I declare under penalty of perjury that the answers are true and correct. I understand that making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $250,000, or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571."

Id. at 51. As clearly stated, the consequences of false statements, concealing assets, or fraud can be significant. 18 U.S.C. § 152(3) states that a crime is committed by a person who: "knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11 . . . ." According to 18 U.S.C. § 3559(a)(4), the crime is a Class D felony and is punishable by up to five years in prison, a fine of up to $250,000.00, or both.

In civil proceedings, such misrepresentations are a basis for denying or revoking a discharge. "In order to prove a violation of Section 727(a)(4)(A), the plaintiff must show that the debtor (1) made a

false oath in connection with the case; (2) related to a material fact; (3) knowingly; and (4) fraudulently. *Jones v. U.S. Trustee*, 736 F.3d 897, 900 (9th Cir. 2013) (citing *In re Retz*, 606 F.3d 1189, 1197 (9th Cir. 2010)). In the civil bankruptcy proceeding, the preponderance of evidence standard applies to the bankruptcy court's factual determination if such false statements were made by Debtor. *Grogan v. Garner*, 498 U.S. 279, 288–89 (1991).

DISCUSSION

The Trustee's objections are well-taken. The court has an independent duty to make certain that the requirements for confirmation have been met. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2011); *see also In re Dynamic Brokers, Inc.*, 293 B.R. 489, 499 (B.A.P. 9th Cir. 2003) (citing *Everett v. Perez (In re Perez)*, 30 F.3d 1209, 1213 (9th Cir. 1994)).

The Trustee opposes confirmation of the Plan on the basis that the Debtor's plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. §1325(a)(4). Trustee states that: Debtors' non-exempt equity totals $16,211.59, but the Debtors are proposing a 0% dividend to unsecured creditors. Debtors' Amended Schedule J increases Debtors' disposable income to $139.15. Even if Debtors were to amend the Plan, Debtors would fail the Chapter 7 Liquidation Analysis still.

The Debtors have not explained how, under the proposed plan and the schedules filed under penalty of perjury, that the unsecured claimants are entitled to a 0% dividend when there may be upwards of $16,211.59 in non-exempt equity and assets.

Debtors' conduct raises a more fundamental problem for them in this, and possibly any bankruptcy case under any Chapter. While Debtors now file Amended Schedules purporting to state truthfully under penalty of perjury their assets, liabilities, income, and expenses, this information is grossly different from the prior truthful statements made under penalty of perjury of their assets, liabilities, income, and expenses upon which they have sought to have the court, creditors, the Chapter 13 Trustee, and U.S. Trustee rely on as Debtors obtained all of the protections and benefits under the Bankruptcy Code.

The court reviews these grossly conflicting statements under penalty of perjury and the reasonable, credible testimony under penalty of perjury why and how such grossly false statements could have innocently been made by Debtor.

	Original Schedules Dckt. 1	**Amended Schedules Dckt. 18**
Schedules A/B		
Cash	None	None
Wells Fargo Bank Account	$73	$73
Vehicles	None	None
Household Goods	$2,200	$2,200

Clothing	$300	$300
Jewelry	$400	$400
401k	$14,000	$14,000
Interest in Asian Market, Inventory Subject to $25,000 lien	$19,338	None
Schedule C - Exempt Assets		
Household Furnishings	$2,200	$2,200
Clothing	$300	$300
Jewelry	$400	$400
Retirement 401k	$14,000	$14,000
Wells Fargo Bank Account	$73	$73
Interest in Asian Market - $19,338 Value	$2,200	None
Schedule I - Income		
Debtor 1 Employed 31 Years Automatic Bar Control	$4,128	No Amended Schedule I Filed
Debtor 2 IHSS Care Provider	$828	
Schedule J - Expenses 2 Dependents, Ages 17 and 21 Total	($3,866)	($3,566)
Rent	($1,500)	($1,500)
Home Maintenance	$0	$0
Electricity/Gas	($250)	($250)

Water, Sewer, Garbage	($160)	($160)
Cell Phones	($200)	($200)
Phone/Cable/Internet	($123)	($123)
Food and Housekeeping Supplies	($500)	($700)
Childcare/Education	$0	$0
Clothing, Laundry, Cleaning	($100)	($50)
Personal Care Products	$0	$0
Medical/Dental Expenses	$0	$0
Transportation	($200)	($200)
Entertainment	($50)	($50)
Life Insurance	($450)	$0
Vehicle Insurance	($333)	($333)

A review of these two statements under penalty of perjury raises serious questions concerning the truthfulness and good faith of Debtors. It is unreasonable that Debtors can have no Home Maintenance and Upkeep Expenses. Even in a rental, there are normal use, wear, and tear expenses incurred by the tenant (such as light bulbs, air filters, cleaning the house, and the like).

Debtors then list only $200.00 per month for transportation expenses (bus fare, gas, repairs, maintenance) for four persons. On Schedule B, Debtors twice state under penalty of perjury that Debtors do not own any vehicles, but twice state under penalty of perjury that Debtors have a ($333.00) per month vehicle insurance expense.

When questioned by the Trustee as to the validity of certain expenses, Debtors have changed them. Though originally stating under penalty of perjury that the reasonable and necessary food and housekeeping expenses were ($500.00), for Amended Schedule J (apparently to achieve the pre-determined amount Debtors want to manufacture as the Net Monthly Income) Debtors increase this expense to ($700.00), 140% of the original expense stated under penalty of perjury.

On Original Schedule J, Debtors also stated under penalty of perjury that there was also a ($450.00) per month life insurance expense. This expense disappears on Amended Schedule J, with ($200.00) of the disappeared expense shifted to the new higher food expense.

On Original Schedule A/B, Debtors state under penalty of perjury an interest in an Asian Market, and on Original Schedule C, Debtors exempt a portion of that value. On Amended Schedules A/B and C, this asset and exemption disappear.

Finally, on both Original Schedules A/B and Amended Schedule A/B, Debtors state under penalty of perjury not having any cash. It is difficult to believe that two adult debtors did not have even two nickels rubbing together in their pockets and purse. It appears that Debtors take a "I'll only tell the court what I think is significant, and not provide complete, truthful, and accurate information under penalty of perjury" approach, possibly because such information would not yield the outcome sought by Debtors, irrespective of whether that outcome is permitted under the Bankruptcy Code.

When Debtors responded to the Trustee's Opposition, Debtors failed (or refused) to provide any testimony under penalty of perjury. Instead, Debtors merely instructed their attorney to file a reply making arguments. These arguments consisted merely of stating that the Debtors had filed amended schedules. The Reply carefully avoids addressing any explanation for how Debtors could be making the original statements under penalty of perjury, which they were now stating to be false under penalty of perjury on the amended schedules.

When the Trustee pointed this out, Debtors very belatedly filed a declaration on the eve of this hearing. Filed September 29, 2016, Dckt. 24. Clearly, Debtors knew that such filing, two business days before the hearing, would prejudice the court's ability to review it.

Notwithstanding the eve-of-hearing filing, the court elected to use time on the weekend to review this additional testimony under penalty of perjury. A review of the Declaration provides the following information:

A. The Declaration is signed by both Debtors, stating that the information in this Declaration (as with the prior schedules) is true and correct.

B. On Original Schedule J, "it appears that items left over from a previous case reflected expenses that do not exist."

Debtors offer no testimony as to how and when they carefully reviewed Original Schedule J they innocently and honestly made a mistake in leaving non-existent expenses on Schedule J.

C. Debtors state that due to financial conditions, they stopped paying the life insurance (but offer no testimony as to when) and the fact that they closed the Asian Market (at some unstated time) they had to increase their food bill. But Debtors offer no reason as to why or how owning the Asian Market reduced their food expenses – unless they were stealing (taking undisclosed in kind distributions of food) from the market, which would then artificially decrease the profit of the market.

D. Later in the Declaration, Debtors state that the Asian Market was sold in 2015 but fail to provide any specific date or terms of such sale. Debtors do disclose on the Statement of Financial Affairs that the Asian Market was sold in January 2015 to an

unnamed person (disclosure of the name is required) for $40,000.00, with proceeds of $20,000.00 (no explanation is provided for where the other $20,000.00 of the $40,000.00 sales price was diverted) was paid to PG&E and an unidentified landlord.

The Statement of Financial Affairs also fails to disclose the relationship of the purchaser (in addition to failing to disclose the identity). Rather, it merely states, "Third Party." That provides no meaningful disclosure, as transferring it to anyone other than either of the two debtors is a transfer to a third-party.

Statement of Financial Affairs Question 16, Dckt. 1 at 48.

E. Debtors assert that the 2015 tax refund is "unusual" and speculate that it may be due to having sold the business. Presumably, Debtors have the information from the tax return and do not need to speculate. However, Debtors fail to provide the court with such testimony.

Declaration, Dckt. 24.

REVIEW OF PRIOR BANKRUPTCIES

Debtors, with the assistance of current counsel, have unsuccessfully prosecuted two prior Chapter 13 cases. These cases are summarized as follows:

I. Chapter 13 Case 11-42249

A. Filed.....September 14, 2011

B. Dismissed.....May 10, 2013

C. Dismissal of Case

1. The case was dismissed due to Debtors' failure to provide for a modest Employment Development Department Claim ($1,447.92). This resulted in the plan being over extended to 103 months. 11-42249; Civil Minutes, Dckt. 42.

D. Schedules

1. On Original Schedule B, Debtors list having a Retirement 401k, which had a value of exactly $14,000.00. *Id.*, Dckt. 1 at 14. This is the same amount stated under penalty of perjury five years later in this bankruptcy case. Unless the 401k investment is made in a tin can buried in the back yard, it appears inconceivable that there has been no change in this 401k account.

2. Debtors also list owning four vehicles on Schedule B. *Id.* at 15.

3. On Schedule F, Debtors stated under penalty of perjury that they had no creditors with general unsecured claims. *Id.* at 19.

4. On Schedule I,

   a. Monthly Income for Debtor 1 was stated to be $3,884 (Automatic Bar Control), and

   b. Monthly Income for Debtor 2 was stated to be $97,185 (Asian Market). *Id.* at 22.

   c. Debtors state under penalty of perjury that their two children are 17 and 21 years of age in September 2011. *Id.* (On Schedule J filed in the current case on July 19, 2016, Debtors state under penalty of perjury that their two children, five years later, are still just 17 and 21 years old.)

While Debtors and counsel may argue, "really, it's just a small typo that Debtors state under penalty of perjury that their children are 17 and 21 years of age in 2016, not a big deal . . . ," it is a big deal. If Debtors can make an error on such a simple fact (which is a critical issue in determining reasonable expenses and who are bona fide dependents), all of Debtors' statements are suspect.

   d. On the business attachment to Schedules I and J, Debtors discloses gross monthly income of $97,185.00 and expenses of ($92,250.00). Thus, Debtors report having monthly net business income of $4,934.00. *Id.* at 25.

      (1) For the expenses:
         (a) Nothing is listed for income taxes
         (b) Nothing is listed for self-employment taxes
         (c) Nothing is listed for unemployment taxes
         (d) No expense or distribution in kind for food to the Debtors, in addition to the net monthly income, is listed.

On Schedule J, no provision is made for payment of income taxes, self-employment taxes, or other taxes, which a self-employed person is required to make. *Id.* at 23–25. No explanation is provided for how and why these Debtors are exempted from the federal and state self-employment tax laws.

II. Chapter 13 Case No. 11-34967

   A. Filed.....June 15, 2011

   B. Dismissed.....September 6, 2016.

C. Dismissal of Case. 11-34967; Civil Minutes, Dckt. 21.

1. Debtors failed to provide business records to Trustee.

2. Debtors failed to provide copies of employer payment advices.

3. Debtors failed to properly deduct business expenses on Form 22C, as an over-median income debtor.

III. Chapter 7 Case No. 10-52307

A. Filed.....December 10, 2010

B. Discharge.....March 22, 2011

C. Schedules. 10-52307, Dckt. 1.

1. Schedule B lists the 401(k) retirement account having a value of exactly $14,000.00 in December 2010—the same as Debtors now state under penalty of perjury in 2016.

2. Lists interest in Asian Market, value of $19,338.00.

3. Schedule I; *Id.* at 27.

a. Debtor 1 income of $3,649 (Automatic Bar Control), and

b. Debtor 2, $95,439 income from business.

c. Debtor states under penalty of perjury that in 2010 their two children were 17 and 21 years of age (the same age as Debtors state under penalty of perjury in 2016).

4. Schedule J (No Business Attachment), *Id.* at 28–29.

a. For Expenses, Debtors list ($93,708.00) for the business, which would result in approximately a $1,900.00 monthly net income from the business. No income or expense is shown for "in kind food taken by Debtors from business."

b. On Schedule B, Debtors list four vehicles (one listed as co-signed for father) and on Schedule J for the three other vehicles the insurance expense is ($333.00), exactly the same as stated under

penalty of perjury in 2016 with Debtors stating under penalty of perjury having no interests in any vehicles.

In reviewing Schedule G filed by Debtors in each of the prior bankruptcy cases, while saying that Debtors are making monthly lease payments for the Asian Market Property, as well as saying that a portion of the sale proceeds of the market were diverted to a landlord:

A. Case No. 10-52307

1. Debtor states under penalty of perjury that there are no executory contracts or unexpired leases. Schedule G, Dckt. 1

B. Case No. 11-34967

1. Debtor states under penalty of perjury that there are no executory contracts or unexpired leases. Schedule G, Dckt. 1

C. Case No. 11-42249

1. Debtor states under penalty of perjury that there are no executory contracts or unexpired leases. Schedule G, Dckt. 1

Even though stating under penalty of perjury that Debtors have no interests in any unexpired leases, a monthly lease expense is listed of $2,200.00.

On Schedule G in the current case, Debtors state that there are no unexpired leases. Dckt. 1 at 38. That would not be unexpected if the business were sold and the lease transferred. While having no general unsecured claims in the prior Chapter 13 cases, Debtors' Schedule F has now ballooned to seventeen pages. Dckt. 1 at 20–36. In reviewing the listed claims, Debtors now state that some of these debts were incurred in:

A. 2014.....3 Claims

B. 2013.....4 Claims

C. 2012.....7 Claims

D. 2010.....Twelve Claims

E. 2008.....Four Claims

F. 2005.....One Claim

G. 2000.....Three Claims

H. Unstated date.....Ten Claims

I. 1995.....Three Claims

J. 1994.....One Claim

Either Debtors failed to accurately list claims in the prior cases, have hidden creditors from the court and the bankruptcy from creditors, are listing false debts in this case, or choose not to read the Schedules before signing them under penalty of perjury. None of these conclusions bode well for Debtors.

At the end of the day, Debtors fail to provide credible testimony in support of confirmation. Debtors fail to provide credible testimony and schedules executed under penalty of perjury in this case. Debtors, and each of them, have demonstrated that they sign whatever is put in front of them or are willing to give inaccurate information to their attorney under penalty of perjury to mislead the court. Debtors' repeated false, inaccurate, and always-favorable-to-the-Debtors statements demonstrate that they have not filed this case in good faith. It further demonstrates that Debtors have not proposed the current plan in good faith. It further demonstrates that Debtors are not prosecuting this case in good faith.

Mere denial of confirmation of this plan does not appear to be the end of the story. The court refers this matter to the Chapter 13 Trustee and U.S. Trustee for review of the current case and statements under penalty of perjury, and each of the prior cases and statements under penalty of perjury, for consideration of further action. The bankruptcy process is not one in which parties (be they creditors or debtors) can repeatedly file petitions, documents, motions, or complaints, make repeated misrepresentations to the court, have cases and actions dismissed, and then repeatedly re-file with impunity. Just as complaints can be dismissed with prejudice, so can bankruptcy cases (which results in the debtor never being able to obtain a discharge of the debts in any subsequent case). Injunctions can be entered barring the refiling of actions, as well as future bankruptcy cases.

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

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

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

3. **16-24802-E-13** **KEVIN/BRANDEE MCCANN** **OBJECTION TO CONFIRMATION OF**
DPC-1 **David Foyil** **PLAN BY DAVID CUSICK**
9-8-16 [18]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors and Debtors' Attorney on September 8, 2016. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

A. Kevin McCann and Brandee McCann ("Debtors") failed to provide the Trustee with a tax transcript or a copy of the Federal Income Tax Return with attachments for the most recent pre-petition tax year (2015) or a written statement that no such documentation exists;

B. Debtors are $415.00 delinquent in plan payments to Trustee and have not paid anything into the Plan yet;

C. The Plan may not be the Debtors' best effort.

1. Debtors understated their income on Schedule I. Per Trustee's calculations, Debtors' average monthly gross income is $6,509.16. Per Debtors' calculations, Debtors' average monthly gross income is $4,641.67;

2. Debtors listed wage garnishments on Schedule I. At the 341 Meeting of Creditors, Debtors testified that these garnishments have ended; and

3. Debtors failed to properly complete the Means Test. Debtors are above the median income for their household size. The Census Bureau Median Family Income for a household of two people is $66,537.00. Debtors' actual annual income is $78,109.92 according to Trustee's calculations of the pay advices.

The Trustee's objections are well-taken.

The Debtors have not provided either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. *See* 11 U.S.C. § 521(e)(2)(A); 11 U.S.C. § 1325(a)(9); Fed. R. Bankr. P. 4002(b)(3). The Debtors have failed to provide the tax transcript. That is a ground to deny confirmation. 11 U.S.C. § 1325(a)(1).

Another basis for the Trustee's objection is that the Debtors are $415.00 delinquent in plan payments, which represents one month of the $415.00 plan payment. According to the Trustee, the Plan in § 1.01 calls for payments to be received by the Trustee not later than the 25th day of each month beginning the month after the order for relief under Chapter 13. The Debtors' delinquency indicates the Plan is not feasible, and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6)

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

> [i]f 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–(A) 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 (B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

The Plan proposes to pay a 0% dividend to unsecured claims, which total $22,267.88, though the Debtor's projected disposable income under 11 U.S.C. § 1325(b)(2) totals $6,509.16 (per the Trustee's calculations). Thus, the court may not approve the Plan.

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

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

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

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

4.	**12-41404-E-13** **JLB-6**	**CARRIE WILSON** **James Brunello**	**MOTION TO APPROVE LOAN MODIFICATION** **8-29-16 [80]**

Final Ruling: No appearance at the October 4, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, and Office of the United States Trustee on August 29, 2016. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

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

The Motion to Approve Loan Modification filed by Carrie Wilson ("Debtor") seeks court approval for Debtor to incur post-petition credit. Bank of America, N.A. ("Creditor"), whose claim the plan provides for in Class 4, has agreed to a loan modification that will reduce Debtor's mortgage payment from the current $2,106.23 per month to $1,492.35 per month. The current interest rate is 5.850%. The modification will provide for increases in the interest rate from 2.000% during the first five (5) years of the Plan to 3.000% during year six (6) to 3.875% during years seven (7) through twenty (20).

The Motion is supported by the Declaration of Debtor Carrie Wilson. Dckt. 82. The Declaration affirms Debtor's desire to obtain the post-petition financing and provides evidence of Debtor's ability to pay

this claim on the modified terms. Debtor states that she requested a loan modification, that Creditor offered one to her, and that Debtor has been performing under the proposed modified loan agreement while now seeking court approval. Debtor states that her income decreased in retirement, and the loan modification will be beneficial to her.

TRUSTEE'S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a statement of no opposition to the Motion to Approve Loan Modification on September 20, 2016. Dckt. 85.

DISCUSSION

This post-petition financing is consistent with the Chapter 13 Plan in this case and Debtor's ability to fund that Plan. There being no objection from the Trustee or other parties in interest, and the motion complying with the provisions of 11 U.S.C. § 364(d), the Motion to Approve the Loan Modification 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 Approve the Loan Modification filed by Carrie Wilson having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the court authorizes Carrie Wilson ("Debtor") to amend the terms of the loan with Bank of America, N.A., which is secured by the real property commonly known as 119 Toni Court, Vallejo, California, on such terms as stated in the Modification Agreement filed as Exhibit B in support of the Motion, Dckt. 83.

5. **12-21207-E-13** **JIM LEDESMA** **MOTION FOR SANCTIONS FOR VIOLATION OF THE AUTOMATIC STAY**
PGM-3 **Peter Macaluso** **8-26-16 [155]**

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on August 26, 2016. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

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

The Motion for Sanctions for Violation of the Automatic Stay is xxxxxxxxx.

The present Motion for Sanctions for Violation of the Automatic Stay provided by 11 U.S.C. § 362(a) and for damages pursuant to 11 U.S.C. § 362(k) and the inherent power of this court has been filed by Debtor Jim Ledesma ("Movant"). The Claims are asserted against Capital One, N.A. ("Respondent").

LEGAL STANDARD

A request for an order of contempt by the Debtor, United States Trustee, or another party in interest is made by motion governed by Federal Rule of Bankruptcy Procedure 9014. Fed. R. Bankr. P. 9020. A bankruptcy judge has the authority to issue a civil contempt order. *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine)*, 77 F.3d 278, 283–85 (9th Cir. 1996). The statutory basis for recovery of damages by an individual debtor is limited to willful violations of the stay, and then typically to actual damages,

including attorneys' fees; punitive damages may be awarded in "appropriate circumstances." 11 U.S.C. § 362(k)(1). The court may also award damages for violation of the automatic stay (a Congressionally created injunction) pursuant to its inherent power as a federal court. *Sternberg v. Johnston*, 595 F.3d 937, 946 (9th Cir. 2009). FN.1.

FN.1. Bankruptcy courts have jurisdiction and authority to impose sanctions, even when the bankruptcy case itself has been dismissed. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990); *Miller v. Cardinale (In re DeVille)*, 631 F.3d 539, 548–49 (9th Cir. 2004). The bankruptcy court judge also has the inherent civil contempt power to enforce compliance with its lawful judicial orders. *Price v. Lehtinen (In re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009); *see* 11 U.S.C. § 105(a). A bankruptcy judge is also empowered to regulate the practice of law in the bankruptcy court. *Peugeot v. U.S. Trustee (In re Crayton)*, 192 B.R. 970, 976 (B.A.P. 9th Cir. 1996). The authority to regulate the practice of law includes the right and power to discipline attorneys who appear before the court. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); *see In re Lehtinen*, 564 F. 3d at 1058.

Attorneys' fees may be recovered for work involved in bringing about an end to the stay violation and for pursuing an award of damages. *America's Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard)*, 803 F.3d 1095, 1101 (9th Cir. 2015). A monetary penalty may not be imposed on a creditor unless the conduct occurred after the creditor receives notice of the order for relief as provided by § 342. 11 U.S.C. § 342(g)(2).

The automatic stay imposes an affirmative duty of compliance on the nondebtor. *State of Cal. Emp't Dev. Dep't v. Taxel (In re Del Mission Ltd.)*, 98 F.2d 1147, 1151–52 (9th Cir. 1996). A party who takes an action in violation of the stay has an affirmative duty to remedy the violation. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1191–92 (9th Cir. 2003).

In addition Congress provides in 11 U.S.C. § 362(k) additional relief for violation of the automatic stay, which may be requested by an individual debtor. In asserting this claim pursuant to 11 U.S.C. § 362(a) & (k), Movant states with particularity (Fed. R. Bankr. P. 9013) the following grounds for relief:

A. "After the Debtor made the payments, Capital One did send a denial letter claiming the application was incomplete, and has kept the trial loan modification payments, and not returned, nor accounted for them in the bankruptcy case."

B. "That on 4/11/16, Capital One did send a loan modification instructing the debtor to 'Act by April 28, 2016' which the Debtor did."

C. "After making said payments, the Debtor was informed the application was 'incomplete'."

D. "Thereafter, Capital One did not honor the loan modification, nor has it accounted for, nor returned the post-petition collection of $2,767.92."

E. "On 1/22/12, the Debtor filed a Chapter 13 to reorganize his debts."

F. "On 2/29/12, Capital One did file Proof of Claim #3."

G. "Here, an actual controversy now exists between the Debtor and Capital One in that the loan modification was arbitrarily denied and Capital One remains in the possession of the post-petition trial loan modification payments."

H. "The Debtor seeks to cease of harassment by Capital One and a return of the funds paid to complete the Chapter 13 plan, the stopping of this continued unlawful conduct, which is causing, and does continue to cause harm, and separate injuries each and every day that Capital One refuses to return the funds, and as it engages in false, unfair, deceptive and unconscionable conduct to perpetrate or conceal their unlawful conduct."

I. "Here, Capital One has actual knowledge of Debtor's Chapter 13 case, the actions as described above have been done with actual knowledge of the bankruptcy, the actions as described above have been done intentionally, and the actions as described above have been done willfully in violation of 11 U.S.C. § 362."

J. "These intentional acts continue after repeated notice by Plaintiff's counsel to cease and desist, and as a proximate cause of Defendants' intentional actions in violation of the automatic stay."

K. "Here, the trial loan modification payments paid directly to lender are vital to the completion of the plan, to prevent the motion to dismiss that is now pending."

L. "Here, the Debtor has sustained emotional distress and attorney fees, as a proximate cause of Defendants' intentional actions in violation of the automatic stay."

M. "Here, the Debtor continues to sustain damages and will continue to incur attorney fees to pursue resolution of this issue, including but not limited to this motion and continued motions to modify this plan."

Movant has provided the Declaration of Debtor Jim Ledesma in support of the Motion. Dckt. 157. The Declaration affirms that Movant had been paying $2,675.00 per month to the Trustee, but when Respondent offered a trial loan modification to Movant, Movant accepted and made the payments as required by May 1, 2016; June 1, 2016; and July 1, 2016. Movant paid the difference of $1,752.36 per month to the Trustee. On August 4, 2016, Movant received a letter from Respondent that denied his loan modification because the "application was incomplete." Exhibit B, Dckt. 158.

Response by the Trustee

The Trustee filed a response on September 13, 2016. Dckt. 163. The Trustee notes that Movant's motion is based on the denial of an offered post-petition loan modification, the receipt of voluntary payments

made by Movant pursuant to the offer, and the retention of those payments without accounting for them in the bankruptcy case by Respondent. The Trustee states that the automatic stay may have been violated.

Respondent's Letters to Movant

The Trustee states that all parties, including Movant and Respondent, are bound by the terms of the confirmed Plan (Dckt. 40) according to 11 U.S.C. § 1327, and presently, no motion has been filed seeking to approve a loan modification. In Respondent's first letter (Exhibit A, Dckt. 158), the Trustee notes that the letter's purpose may have been to propose a trial loan modification, but the letter includes other language, such as:

A. "Act by April 8, 2016"

B. "Option 1: Stay in Your Home"

C. "Option 2: Leave Your Home"

The Trustee believes that such above language may be a violation of the automatic stay—in addition to ignoring the binding effect of a confirmed plan—because the letter attempts to force Movant to pay Respondent directly or surrender the property. FN.2.

FN.2. As an aside, the Trustee states that he is not aware whether Respondent sends letters like Exhibit A (Dckt. 158) to Chapter 13 debtors regularly, and the Trustee requests that Respondent's counsel advise the Trustee and the U.S. Trustee.

The Trustee notes that the actual terms of the proposed trial loan modification allow Movant to accept by either contacting Respondent by April 28, 2016, or by making the first trial period payment by April 28, 2016. The trial period requires three payments, and Respondent can revoke the offer if:

A. The first payment is not made by the due date,

B. There are liens on the property that cannot be corrected timely,

C. There are insurance issues,

D. Any trial period payment is late, or

E. Movant does not fulfill "all other terms." FN.3.

FN.3. The Trustee notes that "all other terms" are not specified in the proposal.

The Trustee states that according to the offer, if the offer is not revoked, and if Movant makes all trial period payments on time, then a loan modification would be sent by Respondent to Movant.

Regarding Exhibit B (Dckt. 158), the Trustee emphasizes that the "rejection" letter actually states that the "request for loss mitigation assistance for your Home Loan was closed because: Your application was incomplete." The Trustee notes that an incomplete application (unclear from Movant's Motion whether one was submitted) was not a basis to revoke the offer and that a trial loan modification seems to be pending still despite the request being closed. Alternatively, the Trustee believes that Movant may be able to sue Respondent for breach of contract.

Payments Under the Confirmed Plan

The Trustee notes that Movant paid $79,945.61 in total through month forty-five (45) of the Plan. After that point, monthly payments owed have been $2,675.00 for the balance of the Plan. Through month fifty-five (55), Movant has paid $103,927.69 in plan payments and is delinquent by $2,767.92, which represents Movant's reductions for the trial period payment months of May, June, and July of 2016. During those three (3) months, Movant paid $1,752.36 per month. The Trustee believes that Movant paid $922.64 to Respondent directly during those months.

The Trustee was unaware of a trial loan modification and continued to disburse payments to Respondent during the trial period months. Respondent holds a Class 1 secured claim under the confirmed Plan and receives $1,237.43 per month. The Trustee has disbursed $67,301.72 to Respondent, including $23,526.70 for pre-petition arrears and $154.04 in post-petition arrears. The Trustee's records show that mortgage payments to Respondent are current under the Plan.

The Trustee notes that Movant has not explained how accepting payments from Movant is a violation of the automatic stay.

Return of Funds

The Trustee points to the Frequently Asked Questions section of Respondent's first letter (Exhibit A, Dckt. 158) and emphasizes that Respondent is supposed to maintain a "suspense account" whose provisions appear to provide that the balance of the account will be deducted from amounts that would otherwise be added to the modified principal balance if a loan modification is approved. That implies that the funds would remain in the suspense account if a loan modification were to be denied.

Accordingly, the Trustee requests that Respondent provide the current balance of the suspense account and the balance that creditor has been paid.

Opposition to the Motion

Respondent filed an Opposition on September 21, 2016. Dckt. 166. FN.4

FN.4. Due to an e-filing system error, the Opposition and supporting documents were filed twice. The court refers to the documents submitted as Docket Nos. 166–173.

Respondent counters, opposing the Motion on the following grounds:

A. Movant's Plan was modified twice, most recently on October 30, 2015 (Dckt. 92).

B. "The Second Modified Chapter 13 Plan provides in relevant part that post-petition monthly payments on the Loan would be made in the amount of $1,752.96, when due, in accordance with the terms of the Loan. The post-petition payments would be made by the Chapter 13 trustee."

C. "Additionally, the Second Modified Chapter 13 Plan provides that Property of the estate revested in Debtor upon confirmation of the plan."

D. "On March 23, 2016, the Court entered an order confirming the Second Modified Chapter 13 plan" (Dckt. 140).

E. "Subsequently, Capital One sent the Debtor a letter, dated April 11, 2016, offering a loan modification . . . ."

F. "Pursuant to the terms of the Modification Letter, the Debtor, among other required actions, was to (I) make three trial payments in the amount of $922.64; (ii) if all of the trial payments were made, complete the Modification Agreement and any additional requirements Capital One sends to the Debtor; and (iii) obtain court approval of the terms of the Loan Modification."

G. "The Debtor made the three required trial payments."

H. "Based upon Capital One's preliminary investigation, the Debtor was required to provide additional documentation to complete the application for the loan modification, and Capital One provided these documents to the Debtor. . . . However, the Debtor did not provide all of the requisite documentation. . . . As a result, Capital One terminated the modification as incomplete and sent the Debtor a letter dated August 4, 2016, informing him that his application for the loan modification was denied because his application was incomplete."

I. "The Debtor's loan modification request was properly denied by Capital One. Because the Debtor did not provide all of the requisite documentation."

The Opposition also addresses that Trustee filed a Response. The Opposition states that Respondent "continues to investigate" the facts and legal issues raised by the Trustee.

The Opposition states that before filing opposition, Respondent's counsel contacted counsel for both the Chapter 13 Trustee and for Movant and asked them to consent to a continuance to allow Respondent time to investigate issues by the Trustee in his Response. The Opposition states that counsel for the Chapter 13 Trustee agreed, but Movant's counsel refused to agree unless and until Respondent filed an opposition.

Respondent requests a continuance to November 22, 2016, to provide additional time to investigate the issues raised in the Trustee's Response.

Reply to the Opposition

Movant filed a Reply on September 27, 2016. Dckt. 182. Movant asserts the following points in the Reply:

A. "CAPITAL ONE HAD KNOWLEDGE OF BANKRUPTCY"

1. "The Creditor, Capital One, N.A. . . . filed it's proof of claim #3, on 2/29/12, and has noticed no less than (8) eight Notice of Mortgage Payment Changes; 5/24/12, 11/28/12, 1/4/13, 5/16/13, 6/17/13, 6/1/15, 11/24/15, and 6/1/16)."

2. "Capital One has been denied a Motion for Relief from Automatic Stay on 4/8/14, docket #71."

3. "The bankruptcy docket reflects that the a Motion to Substitute Attorney from C. Anthony Hughes to Peter G. Macaluso on 8/10/15, AND GRANTED 12/15/15."

4. "On 1/22/16, Capital One filed a Request for Special notice, docket #122."

B. "Knowledge of the Bankruptcy is Non-disputed."

C. "CAPITAL ONE ACTED WILLFULLY"

1. "On 4/11/16, Capital One mailed directly to debtor, and former counsel, what is listed as Capital One's Exhibit B, which states **'ACT BY APRIL 28, 2016 . . . OPTION 1 STAY IN YOUR HOME . . . . OPTION 2 LEAVE YOUR HOME' . . . IF YOU'RE UNABLE OR UNWILLING TO PAY THE MONTHLY PAYMENTS, YOU HAVE TWO OPTIONS (A SHORT SALE OR A DEED-IN-LIEU) BUT YOU MUST CONTACT US NOW . . . REMEMBER, YOU MUST RESPOND BY APRIL 28, 2016.**"

2. "On 8/4/16, Capital One acknowledges the bankruptcy proceeding and mailed directly to debtor, and not counsel a denial letter as incomplete, as Capital One's Exhibit C states."

D. "Capital One intentionally sent these communications to debtor, did not communicate it to the debtor's counsel, nor the Trustee, and did not seek relief from the automatic stay, nor amend the Notice of Mortgage Payment Change"

E. "Capital One's actions are deemed willful."

F. "CAPITAL ONE WILLFULLY VIOLATED PLAN TERMS"

1. "Capital One received disbursement via the Trustee."

2. "Capital One received disbursement directly from the debtor."

G. "Whether Capital One believes in good faith that it had a right to the property is not relevant to whether the act was 'willful' or whether compensation must be awarded."

H. "DEBTOR HAS SUFFERED DAMAGES AS A RESULT VIOLATION"

1. "The debtor's plan was confirmed."

2. "The debtor's Trustee made payments to Capital One."

3. "The debtor made payments to Capital One."

4. "No payments have been returned either to debtor nor Trustee."

I. "Capital One is liable for violation of 11 U.S.C. 362(k)."

J. "FUNDS USED TO MAKE TRIAL PAYMENTS ARE ESTATE PROPERTY"

1. "The debtor paid said payments with funds authorized to be paid to the Trustee, and Capital One received duel payments additionally pursuant to the proof of claim filed in this case" (citations omitted).

Movant requests that the hearing be continued.

DISCUSSION

Debtor has raised an interesting, and heretofore undisclosed, conduct of a creditor in connection with a secured claim that was the subject of a confirmed Chapter 13 Plan. The first part of Debtor's Motion seeks damages for "violation" of the automatic stay for the failure to process the final loan modification. Debtor states,

> "Here, an actual controversy now exists between the Debtor and Capital One in that the loan modification was arbitrarily denied and Capital One remains in the possession of the post-petition trial loan modification payments."

Motion, p. 2:22–25; Dckt. 155.

Initially, it appears that Debtor's contention sounds in breach of contract—an offer to modify, completion of modification terms, and then Respondent breaching the contract by failing to complete the modification. If so, Debtor fails to "connect the dots" how that failure would be a violation of the automatic

stay. But Debtor hints at the more significant, and insidious, conduct upon which relief is sought, stating, "[a]nd Capital One remains in possession of the post-petition trial loan modification payments." In the next paragraph of the Motion, Debtor begins fleshing out the alleged violation:

> "The Debtor seeks to cease of harassment by Capital One and a return of the funds paid to complete the Chapter 13 plan, the stopping of this continued unlawful conduct, which is causing, and does continue to cause harm, and separate injuries each and every day that Capital One refuses to return the funds, and as it engages in false, unfair, deceptive and unconscionable conduct to perpetrate or conceal their unlawful conduct."

Id., p.2:26, 3:1-6.

The ground stated in the Motion is that Respondent, knowing that a confirmed Chapter 13 Plan was in place and Respondent's debt the subject of the Plan, acted in violation of the Plan. Further, Respondent made demand, and threatened Debtor, with either capitulating to the terms dictated by Respondent or lose the house to foreclosure. Respondent ignored the confirmed Plan, which worked to cure any default and block any foreclosure by Respondent.

The Chapter 13 Trustee punctuates the conduct of Respondent by directing the court to two of the exhibits filed by Debtor. Exhibit 1, Dckt. 158, is a letter from Respondent to Debtor dated April 11, 2016. This letter makes the following affirmative statements by Respondent:

A. "As a result of a bankruptcy proceeding, you may not be personally liable for the unpaid balance of this loan...."

In the confirmed Chapter 13 Plan, Debtor did not seek to discharge the debt, but has provided for curing any arrearage thereon. What bona fide, good faith reason might exist for this sophisticated creditor taking the step of advising a least-sophisticated consumer debtor that he or she may not be "liable" (whatever that term may mean to a least-sophisticated consumer) is unclear.

B. The property is "subject to foreclosure in accordance with the laws of the state where located..."

How the property, which is the subject of the confirmed plan that provides for curing the arrearage and all current payments being made under the plan, is "subject to foreclosure" is unclear. It appears to be a clear misstatement of California and Federal law.

C. "[t]his is not an attempt to collect a debt, but is intended for informational purposes."

By this statement, it appears that Respondent admits that the communication would appear to these consumer debtors as an attempt to collect a debt. Further, the substance of the letter, as noted below, telling the Debtor to either do the loan modification or lose the property to foreclosure is an attempt to collect the debt—either by the modification payments from Debtor or by taking the property to pay the debt.

D. "Your Home Loan is seriously delinquent. We've tried to contact you to discuss options available to you, but your time to act is running out."

Debtor is in the fifth year of the Chapter 13 Plan, nearing completion. There is no indication that the payments as required under the Plan to Respondent are delinquent. To the contrary, as confirmed by the Chapter 13 Trustee, by this loan modification demand, Respondent has doubled up on the payments, taking the plan payments from the trustee (current monthly payment and arrearage payment), pocketing more money than it is entitled to receive under the confirmed Chapter 13 Plan (as a matter of federal law).

E. Respondent tells Debtor, who is performing a confirmed Chapter 13 Plan pursuant to the applicable federal law, that Debtor has only two alternatives:

1. Stay in the home by making the trial loan modification payments. Even if made, Debtor has to submit a "Borrower Assistance Package" so that Respondent can evaluate Debtor's eligibility for the modification.

or

2. **Leave Your Home** (emphasis in original). For this only other option, Debtor is told if Debtor is unable or unwilling to make the payments demanded by Respondent, Debtor must either agree to a "Short Sale or a Deed-in-Lieu."

As is obvious, this statement demanding action and threatening foreclosure misses another obvious alternative—just continue to perform your confirmed Chapter 13 Plan, finish curing the arrearage, and keep the existing financial arrangement in place.

Respondent's Opposition ignores these letters, but merely argues that the loan modification was properly denied. It does admit that Respondent did receive the direct payments from the Debtor of the Trial Loan Modification Payments (which were in addition to the payments Respondent was receiving from the Chapter 13 Trustee under the confirmed Chapter 13 Plan which bound Respondent).

The Trustee's Response was filed and served on September 13, 2016. When Respondent filed its Opposition eight days later, it asked for a continuance to allow Respondent to investigate the "new facts" raised by the Trustee. It appears to the court that Respondent should be able to know in less than one day, and confirm for its attorneys, that it demanded the additional loan modification payment from Debtor and continued to receive, accept, and benefit from the Chapter 13 Plan payments made by the Chapter 13 Trustee. If Respondent could not address that basic "fact" in eight days, no continuance of any length would be sufficient.

Respondent does not identify any new "facts" for which further discovery is necessary or appropriate. As to the magnitude of Respondent telling Debtors in federal bankruptcy cases across the nation that their Chapter 13 Plans were of no legal force and effect, that their only two options were to start making additional payments or lose their homes, and that telling a least-sophisticated consumer debtor that they either pay or lose their homes to foreclosure is not an attempt to collect a debt may well be the subject of a separate contested matter, adversary proceeding, or 2004 examinations in this case.

Disgorgement of Payments Received From Debtor
In Excess of Plan Distributions

It is undisputed that the confirmed Second Modified Chapter 13 Plan requires that Capital One, N.A. be paid $1,752.96 per month through the Chapter 13 Trustee. Statement of Undisputed Facts, Opposition ¶ 7; Dckt. 174. In addition, Capital One, N.A. has obtained three additional payments of $922.64 each from the Debtor pursuant to the Trial Loan Modification. *Id.* ¶ ¶ 11, 12.

The Second Modified Plan actually provides for Capital One, N.A. to receive payments of $1,752.96 for the current monthly installment, plus an additional $638.93 for the arrearage cure. The Chapter 13 Trustee continued to make the $2,391.89 plan payment to Capital One, N.A. Trustee's Response, Dckt. 163; Declaration of Lori Yonkovich, Dckt. 164. The Trustee was unaware that Capital One, N.A. was also receiving an additional payment of $922.64 per month directly from the Debtor pursuant to the unauthorized Trial Loan Modification.

The effect of the undisclosed, unauthorized Trial Loan Modification implemented by Capital One, N.A. was to improperly boost the monthly payments made on the Class One Claim under the confirmed Second Modified Plan to $3,214.63, a monthly overpayment of more than 34% of the amount authorized under the confirmed Plan.

Capital One, N.A. has received unauthorized payments of $2,767.92 directly from the Debtor for payment on its pre-petition claim for which payment is provided for, and authorized to be made, only through the Chapter 13 Plan. Capital One, N.A. improperly obtained such payment and continues to improperly hold such monies in continuing violation of the automatic stay. 11 U.S.C. § 362(a)(1), (3) [until the plan is completed, the bankruptcy estate retains an interest in the property, including conversion of this case to one under Chapter 7], (4), and (6).

The court shall order Capital One, N.A. to pay $2,767.92, without interest so long as the money is timely paid, to the Chapter 13 Trustee on or before **October XX, 2016**. The Chapter 13 Trustee shall disburse the monies as otherwise provided under the Chapter 13 Plan.

ORAL ARGUMENT

At the hearing, **xxxxxxxxxxxxxxxxxxx**.

DECISION

Xxxxxxxxxxxxxxxxxxx

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

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

The Motion for Sanctions for Violation of the Automatic Stay filed by Jim Ledesma ("Movant") the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion for Sanctions for Violation of the Automatic Stay is **xxxxxxxxxxxxxxxxxxxx**.

6.	**16-24712-E-13 DPC-1**	**MITCHELL/CANDICE SITTINGER Chad Johnson**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK 9-7-16 [17]**

Final Ruling: No appearance at the October 4, 2016 hearing is required.

The Objection to Confirmation is sustained.

The Chapter 13 Trustee filed his Objection to Confirmation of Debtors' August 2, 2016 filed proposed plan (Dckt. 10) on September 7, 2016. On September 21, 2016, Debtors filed a response stating that Debtors were not proceeding with the August 2, 2016 Plan and filed an amended plan and motion to confirm. The Trustee then filed an *ex parte* motion to dismiss the Objection to Confirmation of the Chapter 13 Plan without prejudice pursuant to Fed. R. Civ. P. 41(a)(2) and Fed. R. Bankr. P. 9014 and 7041. Dckt. 35.

It appears that the Trustee has been beaten to the "dismissal punch" by the Debtors, with the filing of the amended plan and motion to confirm to work as a *de facto* dismissal of the August 2, 2016 Plan. Therefore, the court sustains the Objection and denies confirmation of the August 2, 2016 Plan, it being moot in light of the amended plan and motion to confirm.

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

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

The Objection to Confirmation of the Chapter 13 Plan filed by Trustee having been presented to the court, the Debtors having filed an amended plan and motion to confirm an amended plan, terminating Debtors' efforts to confirm the August 2, 2016 filed plan that is the subject of the Trustee's Objection, and good cause appearing,

IT IS ORDERED that the Objection to Confirmation is sustained and confirmation of the August 2, 2016 Plan denied as moot, Debtor pursuing confirmation of an amended plan.

7.	**15-28113-E-13**	**BYRON/DARLENE DADE**	**MOTION TO SELL**
	CA-1	**Michael Croddy**	**9-13-16 [38]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 13Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 13, 2016. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(2), 21 day notice.)

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

The Motion to Sell Property is granted.

The Bankruptcy Code permits the Chapter 13 Debtors Byron Dade and Darlene Dade ("Movants") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movants propose to sell the real property commonly known as 3620 Plymouth Drive, North Highlands, California ("Property").

The proposed purchasers of the Property are Noe Villa and Jessica Villa and the terms of the sale are:

A. The purchase price is $205,000.00

1. The buyer shall make an initial deposit of $2,050.00.

2. There is a First Loan in the amount of $198,850.00.

3. A balance of down payment or purchase price in the amount of $4,100.00 is to be deposited with Escrow Holder.

B. The Short Sale Addendum is a part of the sale contract and paragraph 3ii of the Short Sale Addendum shall apply, deposit to go to escrow within three days of acceptance.

C. Sale is contingent on both short sale lender approval and bankruptcy trustee approval.

D. Sale is as-is and seller will do no inspections or repairs.

E. Buyers agree to arbitration/mediation.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response to the Instant Motion to Sell on September 16, 2016. Dckt. 44. The Response indicates that the Debtors have receive approval for the purchase price of $205,000.00 from lienholder Ocwen Loan Servicing, LLC, and the Trustee does not oppose the Motion to Sell. However, a Settlement Statement was not included with the submitted exhibits and Debtors' attorney has stated the same Docket Control Number (CA-1) as the previous motion filed on February 29, 2016. FN.1.

FN.1. The moving party is reminded that the Local Rules require the use of a new Docket Control Number with each motion. Local Bankr. R. 9014-1(c). Here, the moving party failed to properly designate a Docket Control Number. Local Bankruptcy Rule 9014-1(c) states the requirements for a Docket Control Number with examples. The Court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

DISCUSSION

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

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate.

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 Byron Dade and Darlene Dade, the Chapter 13 Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Byron Dade and Darlene Dade, the Chapter 13 Debtors, are authorized to sell pursuant to 11 U.S.C. § 363(b) to Noe Villa and Jessica Villa or nominee ("Buyers"), the Property commonly known as 1620 Plymouth Drive, North Highlands, California ("Property"), on the following terms:
>
> 1. The Property shall be sold to Buyers for $205,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 41, and as further provided in this Order.
>
> 2. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.
>
> 3. The Chapter 13 Debtors be, and hereby are, authorized to execute any and all documents reasonably necessary to effectuate the sale.
>
> 4. No proceeds of the sale, including any commissions, fees, or other amounts, shall be paid directly or indirectly to the Chapter 13 Debtors. Within fourteen (14) days of the close of escrow the Chapter 13 Debtors shall provide the Chapter 13 Trustee with a copy of the Escrow Closing Statement. Any monies not disbursed to creditors holding claims secured by the property being sold or paying the fees and costs as allowed by this order, shall be disbursed to the Chapter 13 Trustee directly from escrow.

8. **16-25515-E-13** **JENNIFER MUNOZ** **MOTION TO VALUE COLLATERAL OF**
MET-1 **Mary Ellen Terranella** **ONEMAIN FINANCIAL**
9-7-16 [13]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 13 Trustee, creditor, and Office of the United States Trustee on September 7, 2016. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The Motion to Value secured claim of OneMain Financial ("Creditor") is granted, and the secured claim is determined to have a value of $1,095.00.

The Motion filed by Jennifer Munoz ("Debtor") to value the secured claim of OneMain Financial ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 1999 Nissan Maxima GLE ("Vehicle"). The Debtor seeks to value the Vehicle at a replacement value of $1,095.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

TRUSTEE'S NON-OPPOSITION

On September 19, 2016, David Cusick, Chapter 13 Trustee, filed a statement of no opposition. Dckt. 17.

DISCUSSION

The lien on the Vehicle's title secures a non-purchase money lien incurred in August 2015 to secure a debt owed to Creditor with a balance of approximately $8,247.00. The lien did not secure a purchase-money loan, and therefore, it is not subject to the 910 day requirement set forth in the hanging paragraph of 11 U.S.C. § 1325(a)(9). The Creditor's claim secured by a lien on the asset's title is under-collateralized. The Creditor's secured claim is determined to be in the amount of $1,095.00. The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Jennifer Munoz ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of OneMain Financial ("Creditor") secured by an asset described as a 1999 Nissan Maxima GLE ("Vehicle") is determined to be a secured claim in the amount of $1,095.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is $1,095.00 and is encumbered by liens securing claims that exceed the value of the asset.

9. **15-29616-E-13** **KRISTIN CRISTE** **OBJECTION TO CLAIM OF NATIONAL CREDIT SYSTEMS, INC., CLAIM NUMBER 10**
DPC-2 **Mary Ellen Terranella** **8-15-16 [61]**

Final Ruling: No appearance at the October 4, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Debtor, Debtor's Attorney, and Office of the United States Trustee on August 15, 2016. By the court's calculation, 50 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(b)(1)(A) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Objection to Proof of Claim number 10-1 of National Credit Systems, Inc. is sustained and the claim is disallowed in its entirety.

David Cusick, the Chapter 13 Trustee ("Objector"), requests that the court disallow the claim of National Credit Systems, Inc. ("Creditor"), Proof of Claim No. 10-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $878.49. Objector asserts that the Claim has not been timely filed. *See* Fed. R. Bankr. P. 3002(c). The deadline for filing proofs of claim in this case was April 20, 2016. Notice of Bankruptcy Filing and Deadlines, Dckt. 11.

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of a proof of claim, and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

The deadline for filing a Proof of Claim in this matter was April 20, 2016. The Creditor's Proof of Claim was filed April 22, 2016. No order granting relief for an untimely filed proof of claim for Creditor has been issued by the court.

Based on the evidence before the court, the creditor's claim is disallowed in its entirety as untimely. The Objection to the Proof of Claim is sustained.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of National Credit Systems, Inc. ("Creditor") filed in this case by David Cusick, the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the objection to Proof of Claim Number 10-1 of National Credit Systems, Inc. is sustained, and the claim is disallowed in its entirety.

10. 16-24717-E-13 GEORGE ALM
DPC-1 Robert Huckaby

OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK
9-7-16 [17]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on September 7, 2016. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

A. George Alm ("Debtor") appeared at the Meeting of Creditors, but failed to provide all required business documents to the Trustee in time for analysis. The Trustee does not have sufficient information to determine if the Plan is suitable for confirmation;

B. Debtor has failed to provide the Trustee with business documents, including:

1. Inventory List for Redeemed Home Furnishings and Décor,

2. All documents requested for Taylor Creek Auctions, including:

   a. Questionnaire,

   b. Profit and Loss statements for six (6) months,

   c. Bank Statements for six (6) months, and

   d. Proof of license and insurance or written statements that no such documentation exists;

3. All documents requested for Lake Tahoe Visitors Map, including:

   a. Questionnaire,

   b. Profit and Loss statements for six (6) months,

   c. Bank Statements for six (6) months,

   d. Proof of license and insurance or written statements that no such documentation exists;

C. Debtor failed to file the business attachment with Schedule I to show the gross business income and expenses from each individual business;

D. The Plan is not the Debtor's best effort. Debtor lists a gross business income of $2,300.00 on Debtor's Means Test, a net business income of $3,500.00 on Debtor's Schedule I, and indicated at the Meeting of Creditors that $1,200.00 is from rental income. Debtor must provide the gross business income and complete Debtor's means test to satisfy the above-median income requirements.

E. Debtor may not be able to make the plan payments:

1. Debtor's Plan lists a Class 4 debt to Karen Naegeli but does not list the monthly contract installment amount on Schedule J, despite listing in Schedule D that the debt is secured for $14,000.00. Debtor stated at the Meeting of Creditors that the monthly installment amount is $400.00 when he can afford it.

2. Debtor's Plan lists a debt to Nationstar Mortgage. Debtor treats the debt as a Class 4 direct pay and indicates that Debtor has applied for a loan modification. The Trustee has not received proof of a loan modification application. The Plan does not indicate specific terms of a modification such as the amount of arrears or the monthly contract or adequate protection payment amounts. Debtor stated at the Meeting of Creditors that Debtor is

approximately $20,000.00 in arrears. Schedule J shows a $1,911.00 rent or mortgage expense.

The Trustee's objections are well-taken.

The Debtor has failed to timely provide the Trustee with business documents including: questionnaire, tax returns, profit and loss statements, bank account statements, proof of license and insurance or written statement of no such documentation exists, and attach the Debtor's business income with Schedule I. 11 U.S.C. § 521(e)(2)(A); Fed. R. Bankr. P. 4002(b)(3). Those documents are required seven (7) days before the date set for the first meeting, 11 U.S.C. § 521(e)(2)(A)(I). Without the Debtor submitting the required documents, the court and the Trustee are unable to determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325.

The Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor fails to use the gross income amount and complete the Means Test to satisfy the above-median income requirements. Further, Debtor fails to provide for the contract installment amount on Schedule J for the Class 4 debt owed to Karen Naegeli. Lastly, Debtor fails to provide information relating to the loan modification, including the amount of arrears and the monthly contract or adequate protection payment amounts. Without an accurate picture of the Debtor's financial reality, the court cannot determine whether the Plan is confirmable. Therefore, the objection is sustained.

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

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

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

11. **16-24721-E-13** **SHIRLEY SHEPARD** **OBJECTION TO CONFIRMATION OF**
DPC-1 **Scott Hughes** **PLAN BY DAVID CUSICK**
8-30-16 [20]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on August 30, 2016. By the court's calculation, 35 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

A. Shirley Shepard ("Debtor") failed to file 2013 and 2014 tax returns;

B. Debtor is delinquent $1,850.00 in plan payments;

C. Debtor has failed to provide the Trustee with business documents, including:

1. Two years of tax returns,

2. Profit and loss statements,

3. Bank account statements,

4. Proof of license and proof of insurance or written statement of no such documents existing.

D. Debtor may not be able to make the plan payments. Debtor failed to file a business budget detailing her business income and expenses.

The Trustee's objections are well-taken.

The Trustee objection to confirmation of the Plan on the basis that Debtor has failed to file all tax returns for the 2013 and 2014 tax years. 11 U.S.C. § 1308(a) provides that debtors must file, with the appropriate authorities, all tax returns for the taxable periods ending during the four-year period ending on the date of the filing of the petition. This must be done no later than the day before the First Meeting of Creditors if Debtor is required to file a tax return under applicable non-bankruptcy law. This is reason to deny confirmation. 11 U.S.C. §§ 1308(a); 1325(a)(9).

The Trustee opposes confirmation offering evidence that the Debtor is $1,850.00 delinquent in plan payments. This is strong evidence that the Debtor cannot afford the plan payments or abide by the Plan and is cause to deny confirmation. 11 U.S.C. §1325(a)(6).

The Debtor has failed to timely provide the Trustee with business documents including: tax returns, profit and loss statements, bank account statements; proof of license and insurance or written statement of no such documentation exists, and attach the Debtor's business income with Schedule I. 11 U.S.C. § 521(e)(2)(A); Fed. R. Bankr. P. 4002(b)(3). Those documents are required seven (7) days before the date set for the first meeting, 11 U.S.C. § 521(e)(2)(A)(I). Without the Debtor submitting the required documents, the court and the Trustee are unable to determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325.

The Debtor may not be able to make plan payments or comply with the plan under 11 U.S.C. § 1325(a)(6). Debtor failed to file a business budget detailing her business income and expenses. Without an accurate picture of the Debtor's financial reality, the court cannot determine whether the Plan is confirmable. Therefore, the objection is sustained.

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

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

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

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

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

12. 16-24224-E-13 JONATHAN/MARITES SUSAS
Mohammad Mokarram
OBJECTION TO CONFIRMATION OF PLAN BY LOANME, INC.
8-17-16 [19]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 17, 2016. By the court's calculation, 48 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

As an initial matter, the moving party is reminded that the Local Rules require the use of a new Docket Control Number with each initial pleading (motion, objection to confirmation, objection to claim, and the like). Local Bankr. R. 9014-1(c). Here the moving party did not use a Docket Control Number. This is not correct. The Court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny overrule the objection. Local Bankr. R. 1001-1(g), 9014-1(l).

LoanMe, Inc., a creditor holding an unsecured claim, opposes confirmation of the Plan on the basis that:

A. The Plan is not proposed in good faith.

1. The Debtors' Schedule I includes deductions for monthly retirement contributions of $1,862.00. These contributions include $1,282.00 in voluntary retirement contributions.

2. Debtors' Schedule J includes monthly expenses totaling $516.00 for repayment of two 401(k) loans with Lincoln ($109.00 per month) and Fidelity ($407.00 per month).

3. The Debtors' petition appears to have included costs associated with life insurance twice. The Debtors' Schedule I includes deductions for "Life, supp life, supp dis" in the amount of $260.20, and Debtors' Schedule J lists life insurance in the amount of $960.00. Creditor believes the costs are exorbitant.

4. The Plan proposes making continuing monthly payments of $229.60 to RC Willey Home Furnishings, a creditor holding a secured claim for furniture purchased within the past sixteen (16) months. The Debtors list the amount of these secured claims at over $12,000.00, but no identification or valuation of the specific property is listed that would provide Debtors' creditors with an opportunity to analyze this expense.

5. The Plan includes monthly payments of $166.07 for a secured claim to Wyndham Resorts for a timeshare. This monthly expense is not listed in Schedule J. Additionally, Schedule J includes a monthly expense of $89.00 for a gym membership.

6. Debtors' Schedule J indicates that Debtors pay $700.00 per month for "parent's contribution." At the Meeting of Creditors, Debtors stated that the $700.00 monthly payment is made to husband's parents, while the wife's parents currently live with Debtors.

B. The Debtor has failed to devote all projected disposable income to fund the Plan.

The Creditor's objections are well-taken.

The Creditor objects on the basis that the Plan was not proposed in good faith and the Debtors have failed to devote all projected disposable income to fund the plan.

Good faith, under 11 U.S.C. § 1325(a)(3), is determined based on an examination of the totality of the circumstances. *In re Warren,* 89 B.R. 87, 92 (B.A.P. 9th Cir. 1988) (citing *In re Goeb*, 675 F.2d 1386, 1389–90 (9th Cir. 1982)).

11 U.S.C. § 1325(b) provides the requirements of a Plan if the Trustee or an allowed unsecured claimholder objects. The court may not approve the Plan unless, as of the effective date of the Plan—

> (A) 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
>
> (B) 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
>
> (2) For purposes of this subsection, 'disposable income' means current monthly income received by the debtor...less amounts expected to be reasonably expended
>
> (A) (i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and
>
> (ii) for charitable donations...in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made.

11 U.S.C. § 1325(b).

Here, the Debtors' Schedules and Forms list disposable income for expenses and deductions that Debtors are not eligible to claim. Debtors' Schedule I lists voluntary contributions to retirement plans in the amount of $1,282.00. Debtors' Schedule J lists 401(k) loans in the amount of $516.00, a gym membership for $89.00 per month, and $700.00 per month for Debtors' "parent's contribution." That amount is apparently made to the Debtor husband's parents, while the Debtor wife's parents live with the Debtors.

Additionally, Debtors list costs associated with life insurance of $255.20 on Schedule I and of $960.00 on Schedule J. Further, the Debtors list a secured debt for a timeshare to Wyndham Resorts for $166.07 that is not included on Schedule J. These excessive costs and duplicate expenses indicate that the Plan is not the Debtors' best efforts, and all disposable income is not being put into the Plan. 11 U.S.C. §§ 1322(a)(1) & 1325(b)(1).

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

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

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

13. 16-20227-E-13 PAMELA BEARD HUGHES AMENDED MOTION TO MODIFY PLAN
MRL-1 Mikalah Liviakis 9-18-16 [38]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on August 15, 2016. By the court's calculation, 50 days' notice was provided. 35 days' notice is required.

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

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

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtor provides evidence in support of confirmation.

CREDITOR'S OPPOSITION

21st Mortgage Corporation ("Creditor") filed opposition on September 16, 2016. Dckt. 35. Creditor objects to confirmation of Debtor's Plan on the following grounds:

A. Debtor's proposed amended Chapter 13 Plan seeks to include three (3) delinquent post-petition payments owed to Creditor, totaling $2,117.64. Debtor proposes to pay installments from September 2016 forward in the amounts of $705.88 to the Trustee directly, who would then disburse the post-petition payments to Creditor. Therefore, Debtor would be required to pay $3,387.76 to the Trustee immediately to bring her Plan current. Currently, Debtor is delinquent to Creditor in the amount of $3,529.40.

B. The Motion to Modify proposes to add Debtor's post-petition arrearages to the confirmed Chapter 13 Plan, but then delay paying on them for twenty-eight (28) months, not curing the present default until the end of the Plan in January 2021. Debtor proposes to pay the post-petition arrearages at $110.00 per month.

Debtor made the first four (4) post-petition payments to Creditor (February through May of 2016). The May 2016 payment was returned for non-sufficient funds. The June 2016 payment was posted toward the May 2016 payment. No further payments have been made.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed opposition on September 19, 2016. Dckt. 40. The Trustee objections to confirmation of Debtor's Plan on the following grounds:

A. Debtor is delinquent $2,297.00 under the proposed plan. Seven payments totaling $4,223.00 have come due under the proposed Modified Plan. Debtor has paid the Trustee $1,936.00, with the last payment occurring on June 13, 2016, in the amount of $489.00.

B. There appear to be conflicting hearing dates listed on the documents filed with Debtor's proposed Modified Plan. Two dates for the hearing are listed: October 4, 2016, and October 18, 2016.

DISCUSSION

Creditor's Opposition is a long recitation of facts and arguments. Possibly Creditor believes that the law is either clear or the court should know it. That is not helpful in addressing a creditor's objection. What it appears to focus on is: (1) feasibility and (2) good faith. 11 U.S.C. § 1325(a)(6) and (3).

Creditor objects to Debtor taking three post-petition installment payments to Creditor, which came due and were not made, and curing those defaults through the modified plan. With these three post-petition defaults, Creditor states that these three post-petition payment amounts total $2,117.64. Opposition, p. 2:8–9; Dckt. 35. Repayment of this post-petition arrearage will be over months 28 through 57 of the Plan. Month 28 appears to be May 2019. Thus, beginning the "cure" is delayed for two years.

After Creditor's Opposition was filed on September 16, 2016, Debtor filed an Amended Motion to Confirm Modified Plan on September 18, 2016. Dckt. 38. Debtor repeats the contention that the defaults were caused because "I was not able to cancel several auto-draft payments that I had set up prior to the bankruptcy from my account until after I filed bankruptcy. As a result of these creditor payments I fell behind on my mortgage payment." The Motion does not allege how such transfers from the bankruptcy estate and made to creditors or third-parties in violation of the automatic stay have not been reversed. No assertion is made why the unauthorized, in violation of the automatic stay, payments made to one creditor

are allowed to stand and the Creditor filing the Opposition to the Plan is being required to fund such improper payments.

The Trustee's objection is also well-taken. First, the court notes that an Amended Motion to Confirm Modified Plan was filed on September 18, 2016 (Dckt. 38) that resolves the Trustee's observation stating the correct hearing date of October 4, 2016. The Amended Motion to Confirm Modified Plan is otherwise identical to the motion it replaces.

Second, the Trustee objections that Debtor is $2,297.00 delinquent in plan payments, which represents multiple months of the proposed $489.00 plan payment. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Neither in the Motion nor in Debtor's declaration is the identity or amount of the unauthorized, improper post-petition payments that were made to the creditor receiving the special, improper post-petition payments. Debtor does state that she has $107,913.00 in personal property, but after claiming all of her exemptions and costs of sale, nothing is left for creditors. Unfortunately, Debtor uses this as an excuse for preferring the unidentified creditor and seeking to have 21st Century Mortgage Company finance those improper payments by Debtor. FN.1.

FN.1. Debtor feigning inability to recover the improper payments is not credible. Acts taken in violation of the automatic stay are void. *Far Out Productions, Inc. v. Oskar et al.*, 247 F.3d 986, 995 (9th Cir. 2001); *Schwartz v. United States of America (In re Schwartz)*, 954 F.2d 569, 571 (9th Cir. 1992). Once the creditor learns of the bankruptcy case, the burden is on the creditor to undo the violation, and the failure to do so may result in sanctions and other relief pursuant to 11 U.S.C. § 362(k). It appears that Debtor seeks to prefer the unidentified creditor in violation of the Bankruptcy Code, ignoring her duties and obligations as a good faith Chapter 13 debtor.

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

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

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

14. 10-49028-E-13 DPC-1 | **ANGELICA MARQUEZ** **Peter Macaluso** | **MOTION TO APPROVE RECONCILIATION OF PAYMENTS ON PROOF OF CLAIMS** **9-6-16 [98]**

Final Ruling: No appearance at the October 4, 2016 hearing is required.

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

Correct Notice Provided. The Amended Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on September 6, 2016. By the court's calculation, 28 days' notice was provided. 28 days' notice is required. FN.1.

FN.1. The court notes that an Amended Proof of Service was filed on September 13, 2016 (Dckt. 102), along with a Supplement (Dckt. 103) stating that the Proof of Service has been updated to reflect that a Notice of hearing was filed with the Motion. The Notice had been served, but it was omitted from the Proof of Service. The Supplement also states that the Stipulation itself has now been filed and served.

The Motion to Approve Reconciliation of Payments on Proof of Claims has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the 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 for Approval of Reconciliation of Chapter 13 Trustee's Payments on Proof of Claim No. 5 as Amended by Proof of Claim No. 6 is granted.

David Cusick, the Chapter 13 Trustee, requests that the court approve an Accounting, the Trustee's Reconciliation of Payments for Proofs of Claim No. 5, as amended by Proof of Claim No. 6 that was filed based upon Civil Minute Order of April 26, 2016 (Dckt. 81). That Order required the Chapter 13 Trustee to file a reconciliation of payments made for the obligation upon which Proof of Claim No. 5, as amended by Proof of Claim No. 6, was based as a Class 1 Claim under the Confirmed Chapter 13 Plan, allocating the $684.51 payment to the pre-petition arrearage and stating any remaining pre-petition arrearage or overpayment of the pre-petition arrearage.

MOTION

The Trustee states that he has disbursed sixty-one (61) monthly contract installment payments to the creditor for a total of $165,714.07. That total is comprised of four (4) disbursements of $2,077.00 and fifty-seven (57) disbursements of $2,761.51.

The Trustee states that the creditor has been overpaid by $39,017.07.

On Proof of Claim No. 6, the creditor claimed an arrearage of $48,853.95, of which the Trustee has disbursed $23,303.54 with a remaining principal owed of $25,550.41. After applying the overpaid amount, the arrearage is overpaid by $13,466.66.

The Trustee seeks authorization to apply the overpayment to the ongoing payments due under the Plan because the Trustee is to continue making the ongoing payments on Proof of Claim No. 5 until the plan is completed. The balance due through August 25, 2016, is $3,149.34.

The Trustee has a balance on hand of $18,255.23 and will disburse it as follows:

A. $3,149.34 to the creditor for the ongoing payment, including August 2016,

B. $2,100.00 to the Debtor's Attorney for approved attorney fees,

C. $675.93 to unsecured claims under the Plan, which requires 1%, and

D. $12,329.96 to the Debtor.

The Trustee states that he, the creditor, and the Debtor have accepted the resolution, and a stipulation signed by the parties has been filed with this Motion.

STIPULATION

The Stipulation was signed by all parties, each stating no objections. Dckt. 104. Creditor Nationstar Mortgage, LLC, and its attorney, signed on August 31, 2016. Debtor and Debtor's Attorney signed on August 31, 2016. The Trustee and Trustee's Attorney signed on September 2, 2016. The Stipulation provides the following terms:

A. "All parties are aware of the Court's Order of May 2, 2016, on Debtor's Objection to Notice of Mortgage Payment Change which held the ongoing payment due Creditor was $2,077.00 and continues to be $2,077.00; ordered that the additional payments made by the Trustee on the ongoing mortgage payment be applied to the pre-petition arrearage due Creditor; and required the Trustee to file a reconciliation of payments made.

B. All parties have received and had the opportunity to review the Trustee's Reconciliation of Payments, dated and filed with the Court on May 13, 2016, which

addressed the payments the Trustee made to the ongoing mortgage and the pre-petition arrearages owed by Debtor to Creditor, which conclude that an overpayment of $13,466.66 to Creditor existed, based on the 61 monthly contract installment payments to the Creditor disbursed.

C. All parties agree that 8 additional monthly contract installment payment to the Creditor have come due which at $2,077.00 per month totals $16,616.00, and are not opposed to the Trustee applying the overpayment to these ongoing payments, which will leave $3,149.34 due from the Trustee to be paid to Creditor, with the Debtor making all payments from September 1, 2016 onward.

D. All parties agree with no appeal of the prior order pending, and no pending Notice of Mortgage Payment Change, the Trustee may apply the payments as above, which after payment of $2,100.00 to approved Debtor Attorney Fees and payment to unsecured claims of $675.93 which is the 1% dividend required under the plan, may result in a refund to the Debtor of the balance on hand of $12,329.96."

DISCUSSION

The court ordered the Trustee to file the accounting of the payments made due to "overpayments" having been made by the Trustee pursuant to a Notice of Mortgage Payment Change that the court subsequently disallowed. The Debtor, the Creditor, and Trustee have reviewed the Trustee's accounting and agree to it and the payment of the monies as proposed therein. This agreement is evidenced by the written Stipulation filed in connection with this Contested Matter. Dckt. 104.

The Trustee's Reconciliation of Payments on Proof of Claim No. 5, as amended by Proof of Claim No. 6, which is stated in the Motion to Approve the Reconciliation (Dckt. 98) is approved. The payments to Creditor as set forth in the Reconciliation have been made and applied to Creditor's Claim. The Trustee shall make final payment of $3,149.34 to Creditor, with Debtor to make all payments, as they relate to the treatment of the claim in this bankruptcy case, directly to Creditor from and after September 1, 2016.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Reconciliation of Payments on Proof of Claims 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 Approve Reconciliation of Payments on Proof of Claims between the Trustee, Debtor Angelica Marquez, and Creditor Nationstar Mortgage, LLC, is granted, the Reconciliation is approved, and the

respective rights and interests of the parties are settled on the terms set forth in the executed Stipulation filed as Docket No. 104.

15. 16-25332-E-13 MET-1 | **STEPHEN/LESLEE FOURNIER** **Mary Ellen Terranella** | **MOTION TO VALUE COLLATERAL OF JPMORGAN CHASE BANK, N.A. 9-2-16 [18]**

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 13 Trustee, creditor, and the Office of the United States Trustee on September 2, 2016. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

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

The Motion to Value secured claim of JP Morgan Chase Bank, N.A., "Creditor," is granted and Creditor's secured claim is determined to have a value of $0.00.

The Motion to Value filed by Stephen Fournier and Leslee Fournier ("Debtors") to value the secured claim of JP Morgan Chase Bank, N.A. ("Creditor") is accompanied by Debtors' declaration. Debtors are the owners of the subject real property commonly known as 531 Buckeye Street, Vacaville, California ("Property"). Debtor seeks to value the Property at a fair market value of $220,000.00 as of the petition filing date. As the owners, Debtors' opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

No Proof of Claim Filed

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

CREDITOR'S OPPOSITION

Creditor filed an opposition on September 20, 2016. Dckt. 23. The court first notes that the two-page opposition has appended to it: (1) a proof of service, and (2) a twelve-page exhibit. Creditor's counsel regularly appears in this and other courts in the Eastern District of California. Counsel is well aware of Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Documents that requires the motion, opposition, each declaration, exhibits (which exhibits may be combined into one document) and certificate of service to be filed as separate documents.

Even more concerning, is that slapped as an improperly attached exhibit to the Opposition is what is stated to be a "Residential Broker Price Opinion." Creditor argues the "facts" set forth as to value from this Opinion. Unfortunately, no person is or has been willing to provide a declaration testifying to this "Opinion." Fed. R. Evid. 601, 602, 701, 702. In addition to having exempted itself from the Local Bankruptcy Rules, Creditor has also voided the Federal Rules of Evidence.

In reliance on the value stated in the unauthenticated Opinion attached as an exhibit, Creditor states there is substantial equity in the Property for Creditor. Based on the unauthenticated Opinion, Creditor argues the value of the Property, stating that the hearing (day of reckoning on the motion) should be continued.

In light of Creditor not being able to provide properly authenticated evidence in support of its arguments, the court has little belief that an unauthenticated further appraisal, for which no competent witness is able or willing to provide testimony, and a continuance would be a delay solely for the sake of delay.

DISCUSSION

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

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

> (a)(1) An **allowed claim of a creditor** secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, **is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property**, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set off is less than the amount of such allowed

> claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

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

The senior in priority first deed of trust secures a claim with a balance of approximately $351,055.00. Creditor's second deed of trust secures a claim with a balance of approximately $84,502.00. Creditor offers no credible, authenticated, personal knowledge testimony in opposition to the Motion.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Stephen Fournier and Leslee Fournier ("Debtors") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of JP Morgan Chase Bank, N.A., secured by a second in priority deed of trust recorded against the real property commonly known as 531 Buckeye Street, Vacaville, 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 $220,000.00 and is encumbered by a senior lien securing a claim in the amount of $351,055.00, which exceeds the value of the Property that is subject to Creditor's lien.

16. **16-25332-E-13** **STEPHEN/LESLEE FOURNIER** **MOTION TO VALUE COLLATERAL OF**
MET-2 **Mary Ellen Terranella** **MERIWEST CREDIT UNION**
8-28-16 [13]

Final Ruling: No appearance at the October 4, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditor, and Office of the United States Trustee on August 28, 2016. By the court's calculation, 37 days' notice was provided. 28 days' notice is required.

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

The Motion to Value secured claim of Meriwest Credit Union ("Creditor") is granted and the secured claim is determined to have a value of $24,060.00.

The Motion filed by Stephen Fournier and Leslee Fournier ("Debtors") to value the secured claim of Meriwest Credit Union ("Creditor") is accompanied by Debtors' declaration. Debtors are the owners of a 2014 Ford Escape ("Vehicle"). The Debtors seeks to value the Vehicle at a replacement value of $24,060.00 as of the petition filing date. As the owners, the Debtors' opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The lien on the Vehicle's title secures a purchase-money loan incurred in March 29, 2014, which is not more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $30,074.00. While the 910 day requirement is not met, Debtors assert that the purchase price included $3,000.00 of negative equity on a 2014 Ford Fiesta that was traded in as part of the 2014 Ford Escape purchase. Additionally, an Ford Extended Service Plan (a.k.a. Optional Service Contract) was included for $4,770.00. Debtors assert that the negative equity and the Optional Service Contract comprise 20% of the total amount financed, which amounted to $39,711.61. Debtors seek to reduce the balance of the vehicle to $24,060.00 to account for that 20% that was attributable to items not included in the purchase price of the vehicle.

DISCUSSION

While the portion of the financing secured by the new Vehicle is a purchase money security interest acquired less than 910 days prior to the filing that prevents the Movant from valuing the claim under the hanging paragraph of 11U.S.C. § 1325(a), the Movant seeks to value the portion of the financing that was for the negative equity arising from the trade-in, not the actual purchase of the Vehicle. Movant also seeks to extend current law to the Optional Service Contract. For the reasons below, this court will consider the negative equity of the trade-in, but not the service contract.

Negative Equity

The lien on the Vehicle's title secures a purchase-money loan incurred on March 29, 2014, which is less than 910 days prior to filing of the petition. 11 U.S.C. 1325(a). In the Ninth Circuit, negative equity is not considered a part of the price for the new vehicle, and thus, is not included in the purchase money security interest. *In re Penrod*, 611 F.3d 1158,1161–62 (9th Cir, 2009), *reh'g denied*, 636 F.3d 1175 (2011), *cert. denied* 132 S. CT. 108 (2011). Debtors may value that portion of the loan.

Service Contract

Service contract is a form of optional insurance in which the insurer is obligated to provide payments during a specified period for repairs required to the vehicle. Whether the service contract is included in the definition of a "purchase money security interest" is determined by state law. *Id.* California Commercial Code § 9103 "does not provide a precise definition of a purchase money security interest, but rather a string of connected definitions." *In re Penrod,* 611 F.3d at 1161; Cal. Comm. Code § 9103.

In *In re Penrod*, the Ninth Circuit Court of Appeals quoted the plain language of the California Commercial Code, stating,

> "'Purchase money collateral' means goods or software that secures a purchase money obligation." Cal. Comm. Code § 9103(a)(1). "Purchase money obligation' means an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used." Cal. Comm. Code § 9103(a)(2).

611 F.3d at 1161.

The California Commercial Code defines the term "good" to be,

> "(44) 'Goods' means all things that are movable when a security interest attaches. The term includes (I) fixtures, (ii) standing timber that is to be cut and removed under a conveyance or contract for sale, (iii) the unborn young of animals, (iv) crops grown, growing, or to be grown, even if the crops are produced on trees, vines, or bushes, and (v) manufactured homes. The term also includes a computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program if (I) the program is associated with the goods in such a

> manner that it customarily is considered part of the goods, or (ii) by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods. The term does not include a computer program embedded in goods that consist solely of the medium in which the program is embedded. The term also does not include accounts, chattel paper, commercial tort claims, deposit accounts, documents, general intangibles, instruments, investment property, letter-of-credit rights, letters of credit, money, or oil, gas, or other minerals before extraction."

Cal. Comm. Code § 9102(44). Physical "things" are included in the definition, but contracts, claims, instruments, letters of credit, and other non-physical "things" are not included.

Here, Debtors purchased a vehicle (a thing), was sold other insurance, and obtained additional credit to finance the negative equity that was in the Vehicle that the seller agreed to take as a trade-in. In addition to the credit extended for the purchase of the vehicle, the Creditor extended further credit to purchase or finance the additional Optional Service Contract.

In light of the limited evidence and analysis presented, the court determines that 80% of the claim presented by Creditor is the purchase money obligation and 20% of the claim is for non-purchase money credit provided by Creditor to re-finance the negative equity in the trade-in and finance future insurance contracts. The purchase-money portion of the claim cannot be reduced as provided in the "hanging paragraph" following 11 U.S.C. § 1325(a)(9). The remaining portion of the claim is a nonpurchase money secured claim that may be valued pursuant to 11 U.S.C. § 506(a).

Accordingly, the creditor's secured claim is determined to be in the amount of $24,060.00. *See* 11 U.S.C. § 506(a). The remaining balance is determined to be a general unsecured claim arising from the negative equity from the trade-in. The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Stephen Fournier and Leslee Fournier ("Debtors") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Meriwest Credit Union ("Creditor") secured by an asset described as 2014 Ford Escape ("Vehicle") is determined to be a secured claim in the amount of $24,060.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is $24,060.00 and is encumbered by liens securing claims that exceed the value of the asset.

17. **16-26043-E-13** **SUSAN GEDNEY** **MOTION TO EXTEND AUTOMATIC STAY**
TAG-1 **Aubrey Jacobsen** **9-19-16 [9]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on September 19, 2016. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

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

The Motion to Extend the Automatic Stay is granted.

Susan Gedney ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond thirty (30) days in this case. This is the Debtor's second bankruptcy petition pending in the past year. The Debtor's prior bankruptcy case (No. 16-21137) was dismissed on June 27, 2016, because of delinquency. *See* Order, Bankr. E.D. Cal. No. 16-21137, Dckt. 52. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor thirty (30) days after filing of the petition.

TRUSTEE'S OPPOSITION

David Cusick, Chapter 13 Trustee, filed an opposition on September 21, 2016. Dckt. 13. The Trustee asserts that Debtor has not shown a change in circumstances and that the Debtor's voluntary petition is incomplete because no schedules have been filed to date.

DEBTOR'S RESPONSE

Debtor filed a Response on September 27, 2016. Dckt. 22. Debtor asserts that the balance of schedules, the Chapter 13 Plan, and other required documents were filed on September 23, 2016. Also, Debtor claims that her circumstances have changed because she now plans to sell her residence, instead of proposing to cure the arrearages through the Plan.

DISCUSSION

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

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

1. Why was the previous plan filed?

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

Elliot-Cook, 357 B.R. at 814–15.

Here, Debtor states that the instant case was filed in good faith and provides an explanation for why the previous case was dismissed, as the arrearage amount owed on Debtor's mortgage was higher than anticipated, resulting in a plan payment that Debtor was unable to afford on her limited disability income at the time. Debtor is now able to complete a short-sale on her property. Debtor requests the court extend the automatic stay as to Carrington Mortgage Service, who holds the First Deed of Trust on Debtor's residence, for an additional four (4) months to allow for the completion of the short sale.

The Debtor has sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay. Further, Debtor filed the remaining schedules and a proposed Chapter 13 Plan on September 23, 2016. Dckt. 17 & 18.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Extend the Automatic Stay filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and the automatic stay is extended pursuant to 11 U.S.C. § 362(c)(3)(B) as to all persons and for all purposes, unless terminated by operation of law or further order of this court.

18. **15-29147-E-13** **JOHN QUIROZ**
DPC-1 **Richard Kwun**

CONTINUED AMENDED OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK
3-4-16 [83]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and creditor on March 4, 2016. By the court's calculation, 193 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

1. The Debtor failed to provide the Trustee with copies of Employer Payment Advices.

2. The Debtor failed to provide the Trustee with a tax transcript or a copy of his Federal Income Tax Return with attachments for the most recent pre-petition tax year.

3. The Debtor amended Schedules B, C, I, and J, the day before the meeting of creditors.

4. The Debtor is delinquent $100.00 in plan payments and the Trustee has not received any plan payments from the Debtor.

DECLARATION FROM TRUSTEE

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

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

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

FEBRUARY 9, 2016 HEARING

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

MARCH 1, 2016 HEARING

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

TRUSTEE'S AMENDED OBJECTION

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

A. All priority claims are not provided for as required under 11 U.S.C. § 1322(a)(2);

B. The Plan may not be Debtor's best efforts under 11 U.S.C. § 1325(b) based on the failure to commit a likely tax refund and the uncertainty of income based on commissions from new employment; and

C. Debtor may not be able to make plan payments as required under 11 U.S.C. § 1325(a)(6).

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

DEBTOR'S RESPONSE

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

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

SEPTEMBER 13, 2016 HEARING

At the hearing, the court continued the matter to October 4, 2016, at 3:00 p.m. Dckt. 116.

DEBTOR'S SUPPLEMENTAL RESPONSE

Debtor filed a supplemental response on September 21, 2016. Dckt. 117. Debtor re-asserts that the proper provision of priority claims not yet classified may be moot because Debtor and his ex-spouse have reached an agreement.

Debtor states that if an agreement is not made, Debtor has pending objections to claims by Creditor Patricia Costley. If the Trustee's objection is sustained, Debtor states that a settlement agreement with Creditor Costley may be hindered. Without a settlement, Debtor feels compelled to seek adjudication of Creditor Costley's claims in bankruptcy court.

Debtor states that settlement has been delayed because he and his ex-spouse no longer have attorneys.

Regarding taxes, Debtor expects a $1,000.00 tax return, but he states that he cannot file a 2015 tax return because there is a dispute about claiming three children.

Debtor asserts that there would be no purpose for him to file a new plan that would be exactly the same as one filed on November 24, 2015 (Dckt. 7). He re-affirms that the plan payments are a true and accurate measure of his actual disposable income because of receiving less in tax refunds than in prior years.

DISCUSSION

No supplemental Schedules or documents evidencing an agreement between Debtor and Creditor Patricia Costley have been filed. A review of the proofs of claim indicates that Creditor Patricia Costley's claim is on file still. Debtor's own Supplemental Response does not state clearly whether an agreement has been reached definitively. While Debtor mentions an agreement being made, he also mentions that an agreement may not be made or that it may be hindered.

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

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

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

The Trustee's objections are well-taken. The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained, and the Plan is not confirmed.

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

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

19. **15-27854-E-13** **DELANOYE ROBERTSON** **MOTION TO CONFIRM PLAN**
RJ-7 **Richard Jare** **8-10-16 [105]**

DEBTOR DISMISSED: 08/15/2016

Final Ruling: No appearance at the October 4, 2016 Hearing is required.

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

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

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

20. 16-24056-E-13 DPC-1 | **KEYCHA GALLON** / **C. Anthony Hughes** | **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK**
8-4-16 [17]

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

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

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

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

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

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

The court's decision is to sustain the Objection.

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

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

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

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

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

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

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

AUGUST 30, 2016 HEARING

At the hearing, the Debtor and the Trustee requested that the hearing be continued to allow the Debtor to address the Trustee's concerns and to file Supplemental Schedules I & J. The court continued the matter to October 4, 2016, at 3:00 p.m. Dckt. 30.

DEBTOR'S RESPONSE

Debtor filed a response on September 23, 2016. Dckt. 38. First, Debtor notes that the Trustee's objection for the Plan relying on a pending Motion to Value Collateral has been resolved because the court granted Debtor's Motion to Value Collateral (Dckt. 29).

Second, Debtor states that she has made the following changes to her budget to accommodate a decrease in income from no longer receiving $716.59 per month from IHSS:

A. Charitable contributions have been reduced from $500.00 to $0.00;

B. Food expenses have been reduced from $1,085.00 to $1,015.00; and

C. Personal care has been reduced from $250.00 to $100.00.

Debtor states that the $720.00 reduction will allow her to make plan payments. Debtor states that $829.00 of monthly support income will cease in year two of the Plan, and at that point, Debtor anticipates driving for Uber or for Lyft for supplemental income.

DISCUSSION

The Trustee's first basis for objecting to the Plan is overruled because the court granted Debtor's Motion to Value Collateral on August 30, 2016. Dckt. 29.

As to the Trustee's second point, the court notes that Debtor filed Supplemental Schedules I & J on September 23, 2016. Dckt. 42. The updated Schedules reflect income information that Debtor conveyed at the First Meeting of Creditors. To offset Debtor's reduction in income, she proposes to reduce expenses for charitable contributions, food, and personal care.

Debtor appears to have heeded this court's observation that a more cynical judge would be suspicious of $500.00 per month allocated to charitable contributions when the Debtor herself is seeking approval of a complex Plan and claims four minor dependents. The court does not take issue with the reduction of charitable contributions to $0.00.

For food expenses, Debtor proposes reducing the cost of per person meals—assuming three (3) meals per day for five (5) people for thirty (30) days—from $2.41 to $2.26. Debtor has not provided an explanation for either estimated amount. Neither amount seems reasonable to the court, especially without convincing, sound evidence.

Also, Debtor proposes to reduce personal care expenses by $150.00 per month for the duration of the Plan. Again, no explanation is provided for this reduction, and the court is wary of such an arbitrary reduction.

Absent explanation from the Debtor as to how she proposes to achieve the decrease in expenses, the court does not believe the Debtor's projection is in good faith, especially because it appears to have been made in response to the Trustee's Objection to Plan Confirmation. This is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(3).

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

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

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

21. 16-24957-E-13 KAREN HART — MOTION FOR VIOLATION OF 11 U.S.C. 362(A) AND (K)
PGM-1 Peter Macaluso — 8-25-16 [19]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on August 26, 2016. By the court's calculation, 39 days' notice was provided. 28 days' notice is required.

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

The Motion for Violation of the Automatic Stay is granted.

The present Motion for Violation of the Automatic Stay provided by 11 U.S.C. § 362(a), (k), and the inherent power of this court has been filed by Debtor Karen Hart ("Movant"). The Claims are asserted against Ford Motor Credit Company, LLC ("Respondent"). It is alleged that Respondent violated the automatic stay by failing to turn over a 2007 Ford Expedition ("Vehicle") to the Debtor after the commencement of this bankruptcy case.

LEGAL STANDARD

A request for an order of contempt by the Debtor, United States Trustee, or another party in interest is made by motion governed by Federal Rule of Bankruptcy Procedure 9014. Fed. R. Bankr. P. 9020. A bankruptcy judge has the authority to issue a civil contempt order. *Caldwell v. Unified Capital Corp. (In*

re Rainbow Magazine), 77 F.3d 278, 283–85 (9th Cir. 1996). The statutory basis for recovery of damages by an individual debtor is limited to willful violations of the stay, and then typically to actual damages, including attorneys' fees; punitive damages may be awarded in "appropriate circumstances." 11 U.S.C. § 362(k)(1). The court may also award damages for violation of the automatic stay (a Congressionally created injunction) pursuant to its inherent power as a federal court. *Sternberg v. Johnston*, 595 F.3d 937, 946 (9th Cir. 2009). FN.1

FN.1. Bankruptcy courts have jurisdiction and the authority to impose sanctions, even when the bankruptcy case itself has been dismissed. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990); *Miller v. Cardinale (In re DeVille)*, 631 F.3d 539, 548–49 (9th Cir. 2004). The bankruptcy court judge also has the inherent civil contempt power to enforce compliance with its lawful judicial orders. *Price v. Lehtinen (In re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009); *see* 11 U.S.C. § 105(a). A bankruptcy judge is also empowered to regulate the practice of law in the bankruptcy court. *Peugeot v. U.S. Trustee (In re Crayton)*, 192 B.R. 970, 976 (B.A.P. 9th Cir. 1996). The authority to regulate the practice of law includes the right and power to discipline attorneys who appear before the court. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); *see In re Lehtinen*, 564 F.3d at 1058.

The automatic stay imposes an affirmative duty of compliance on the nondebtor. *State of Cal. Emp't Dev. Dep't v. Taxel (In re Del Mission Ltd.)*, 98 F.2d 1147, 1151–52 (9th Cir. 1996). A party that takes an action in violation of the stay has an affirmative duty to remedy the violation. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1191–92 (9th Cir. 2003).

REVIEW OF MOTION AND OPPOSITION

Grounds Asserted in the Motion

In asserting this claim pursuant to 11 U.S.C. § 362(k), Movant states with particularity (Fed. R. Bankr. P. 9013) the following grounds and relief:

A. "That pre-petition, Ford did assign the repossession of the Vehicle to (ADESA) Brasher's for repossession, which was accomplished."

B. "Thereafter, on 7/28/16, the Debtor filed a Chapter 13 to reorganize her debts."

C. "Brasher's remains in possession of the Vehicle at issue."

D. "On 8/18/16, Ford did file Proof of Claim #2."

E. "That the employees of Debtor's Counsel have spoken to Ford's representatives on; 7/30/16, 7/30/16, 8/1/16, 8/2/16, 8/2/16, 8/2/16, 8/3/16, 8/3/16, as to return of the vehicle."

F. "The Ford Employees acknowledged that the bankruptcy has been filed, and that they are aware of who counsel for Debtor is, and claimed that they had released the hold to

Brasher's Auto Auction . . . and that Brasher's was authorized to release the vehicle upon the Debtor contacting Brasher's directly."

G. "On 8/24/16, Counsel for the Debtor, Peter G. Macaluso . . . spoke to both Ford and Brasher's representatives in several phone calls back and forth."

H. "In the discussion with Ford's representative Gina, the vehicle was ready for pickup from Brasher's, and that a release had been sent."

I. "In the discussion with Brasher's representative Karina Hernandez, she stated that the Debtor needed to contact Ford directly."

J. "Macaluso then spoke to Ford, and was told by a supervisor 'Kay' that the Vehicle was ready for pickup from Brasher's, and that a release had been sent."

K. "Macaluso then spoke to Robert Miller of Brasher's, who sent Counsel the confirming email that 'Per our conversation this afternoon we have yet to receive a release from Ford on your client's vehicle. To be able to redeem the vehicle we need to receive a notice to release your client's vehicle directly from Ford.'"

L. "Here, an actual controversy now exists between the Debtor and Ford in that the vehicle remains in the possession of Ford, who has yet to release the vehicle at issue."

M. "The Debtor seeks to cease of harassment by Ford, the stopping of this continued unlawful conduct, which is causing, and does continue to cause harm, and separate injuries each and every day that Ford refuses to return the vehicle, and as Ford engages in false, unfair, deceptive and unconscionable conduct to perpetrate or conceal their unlawful conduct."

N. "Here, Ford has actual knowledge of Debtor's Chapter 13 case, the actions as described above have been done with actual knowledge of the bankruptcy, the actions as described above have been done intentionally, and the actions as described above have been done willfully in violation of 11 U.S.C. § 362."

O. "These intentional acts continue after repeated notice by Debtor's counsel to cease and desist, and as a proximate cause of Ford's intentional actions in violation of the automatic stay."

P. "Here, the car is vital to the plan confirmation, and the Debtor's ability to make a living and pay her creditors, including Ford."

Q. "Here, the Debtor has sustained emotional distress and attorney fees, as a proximate cause of Ford's intentional actions in violation of the automatic stay."

R. "Here, the Debtor continues to sustained damages each day the vehicle is not returned, and will continue to incur attorney fees to enforce the terms of the automatic stay, and the Chapter 13 Plan, including but not limited to this lawsuit and continued motions to confirm a plan."

Movant has attached Respondent's Proof of Claim (Exhibit 1, Dckt. 21). Also, Movant has attached an e-mail from Robert Miller of ADESA Brasher's sent to Movant's counsel dated August 24, 2016, and stating that Brasher's had not received a release from Respondent yet and would not be able to proceed until receiving such a release. Exhibit B, Dckt. 23.

Opposition to the Motion

Respondent filed an Opposition on September 20, 2016. Dckt. 29. Respondent counters, opposing the motion on the following grounds:

A. "On July 20, 2016, FMCC repossessed the Vehicle pre-petition."

B. "On July 28, 2016, Debtor initiated the instant chapter 13 bankruptcy case and filed the balance of the bankruptcy schedules and chapter 13 plan on August 11, 2016."

C. "On August 3, 2016, after learning of the bankruptcy filing, FMCC emailed the Authorization to Release Vehicle to Adesa Brashers (Sacramento) . . . (where the Vehicle was being held) authorizing the release of the Vehicle to the Debtor, a true and correct copy of the Authorization to Release Vehicle and the accompanying e-mail is attached hereto as Exhibit 'B' to the List of Exhibits and the Declaration of Tina Gritte, filed herewith. Debtor's counsel's office was advised that the release was sent and the Debtor could contact Brashers to pick up the Vehicle."

D. "On August 24, 2016, Debtor's counsel, Pete Macaluso, left a voice mail message at the offices of Cooksey Toolen Gage Duffy & Woog, to discuss FMCC's retention of the Vehicle."

E. "On August 26, 2016, arrangements were made to have the Vehicle delivered to the Debtor by 4:00 p.m. that same day."

F. "On Monday, August 29, 2016, counsel for FMCC confirmed with Debtor's counsel's office that the Debtor did, in fact, receive delivery of the Vehicle on August 26, 2016."

G. "Debtor's Motion asks the Court to find that Ford is in violation of 11 U.S.C. § 362(a) because it refused to 'return, make available, and/or release' the Vehicle. In fact, Ford did 'make available and release[d]' the Vehicle as of August 3, 2016 *more than three weeks prior to the filing of Debtor's Motion*."

H. "[O]n August 3, 2016, Debtor's attorney's office was advised, during a phone call initiated by Debtor's attorney's office, that the release was sent to auction and that the auction would require a $15 police release."

I. "The Vehicle was released and made available to Debtor within a reasonable amount of time after being notified of the bankruptcy filing."

J. "FMCC was not notified that the Debtor did not receive the Vehicle until August 24, 2016 when Debtor's counsel, Pete Macaluso . . . contacted them regarding the release."

K. "On August 24, 2026, Macaluso was again advised that the Vehicle was ready for pickup at Brashers and that the release had been sent."

L. "Macaluso, however, relied on an August 24, 2016 email from Robert Miller of Brashers that stated no release had been received."

M. "On or about August 25, 2016, Cooksey Toolen Gage Duffy & Woog . . . became actively involved and discussed the matter with Macaluso on August 25."

N. "On August 26, 2016, FMCC contacted Brashers and received confirmation from 'Monique' that the Authorization to Release Vehicle was received on August 3, 2016, but for unknown reasons was not acknowledged until August 26, 2016."

O. "At the request of FMCC, Robert Miller also searched through Brashers' files and discovered the release."

P. "On August 26, 2016, Mr. Miller emailed Macaluso and explained the oversight . . . ."

Q. "Even though the Vehicle was made available to the Debtor since August 3, FMCC arranged to have the Vehicle delivered to the Debtor before the end of the business day on August 26, 2016."

R. "It is not clear why the Debtor did not retrieve the Vehicle when first notified of the Vehicle's release."

S. "Debtor, via Debtor's counsel, was advised that the Vehicle was available for pick up as early as August 3, but no action was taken until August 24. In fact, Debtor initiated a phone call to Ford on August 9, 2016. In that phone call, Debtor requested a copy of her contract, the contract date, and the balance due. The Debtor did not mention that the Vehicle was not available for pick up or that she did not yet have possession of the Vehicle."

T. "FMCC asserts that the Debtor has a duty to mitigate damages. *See Eskanos & Adler v. Roman (In re Roman)*, 283 B.R. 1, 12 (9th Cir. BAP 2002)."

U. "Here, the Debtor failed to mitigate her damages by refusing to pick up the Vehicle."

V. "An alternate theory is that there were no damages to mitigate. The Debtor's bankruptcy schedules indicate Debtor is also in possession of a 2008 BMW 528xi . . . . Since the Debtor filed as an individual and the Schedules do not indicate a non-filing spouse, and the Debtor's Schedules include three dependents of non-driving age, the 2008 BMW 528xi may be an extra vehicle resulting in no damage to the Debtor."

Respondent has provided supporting declarations and documentation, including two exhibits of particular note:

A. Exhibit B (Dckt. 33) is an Authorization to Release Vehicle sent from Respondent to Adesa Brashers (Sacramento) dated August 3, 2016, and concerning releasing the 2007 Ford Expedition to Movant.

B. Exhibit C (Dckt. 33) is an e-mail sent from Robert Miller of ADESA Brashers to Movant's counsel dated August 26, 2016, and stating:

1. "We searched through our files and it shows the auction did receive the release from Ford. We regret that when the customer called we had overlooked that information."

Reply to Opposition

Movant filed a Reply on September 27, 2016. Dckt. 39. Movant restates some of the facts mentioned in the Motion and, additionally, acknowledges that "Ford released the subject vehicle." Movant argues that while Ford contends that it directed the release of the vehicle, Ford's agent, Brashers, refused to release the vehicle, stating that Ford did not authorize the release.

The Reply asserts that Respondent hired Brashers to repossess the vehicle pre-petition and any and all actions taken or not taken should therefore be attributable to Respondent. Movant asserts that regardless of the alleged oversight by Brashers, Respondent failed to immediately release the vehicle until after the instant Motion was filed.

Movant argues that Respondent's actions were willful violations because Respondent "failed to insure that it's 'e-mail' was acknowledged and followed through."

Movant asserts that Respondent's actions caused Movant to pay Respondent's claim as a Class 2 claim, caused Movant to rent a replacement vehicle to get to and from work, and caused necessity for a modified plan. Movant requests compensatory damages.

DISCUSSION

In general, actions taken in violation of the stay will be void, or at least voidable, even where there was no actual notice of the existence of the stay. Violation of the stay is punishable as contempt of court. Particularly if the violation is willful, the court may punish the violator for contempt and take other appropriate steps to negate the impact of the improper action. In addition, if the debtor is an individual who has been injured by a willful violation of the stay, a court may award damages under section 362(k). A party that has received notice of the bankruptcy case, even if only oral notice, can be sanctioned for violation of the stay. If there are doubts about the veracity of the notice, it is incumbent upon the party receiving notice to determine for itself, before acting, whether a case has been filed. 3 COLLIER ON BANKRUPTCY ¶ 362.02 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.).

To establish an actionable violation of the automatic stay, the debtor must establish that: (1) the creditor knew of the existence of the stay; (2) the creditor's actions were willful; and (3) the creditor's actions violated the stay. "Willful" violations do not require a specific intent to violate the automatic stay, only a general intent to take the actions which had the effect of violating the automatic stay. 2 NORTON BANKRUPTCY LAW AND PRACTICE §43:57 (William L. Norton, Jr. & William L. Norton III eds. 3d ed.).

Any act to obtain possession of property of the estate or from the estate is expressly enjoined under Code § 362(a)(3). The phrase "property of the estate" is given broad meaning under Code § 541 and embraces all legal or equitable interests in property of the debtor as of the date of the filing of the petition, regardless of who has title or possession, or whether the property is transferable, leviable, or jointly owned. 2 NORTON BANKRUPTCY LAW AND PRACTICE §43:7 (William L. Norton, Jr. & William L. Norton III eds. 3d ed.).

That expansive definition for "property of the estate" will turn on the bankruptcy court's interpretation of state law. Examples arise in the automobile repossession and real-estate foreclosure contexts. The determinative factor in most of these decisions is whether the creditor has divested the debtor of its equitable right of redemption and otherwise complied with applicable nonbankruptcy law. In circumstances where the creditor has failed to divest the debtor of both its legal and equitable property rights prior to the debtor's filing, courts generally have held that the creditor has an affirmative duty to turn over the subject property and that a creditor's failure to do so is subject to sanctions. 2 NORTON BANKRUPTCY LAW AND PRACTICE §43:7 (William L. Norton, Jr. & William L. Norton III eds. 3d ed.).

Once the creditor becomes aware of the filing of the bankruptcy petition and therefore the automatic stay, any intentional act that results in a violation of the stay is willful. 3 COLLIER ON BANKRUPTCY ¶ 362.12[3] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). No specific intent to violate the stay or malice is required. *In re Johnson*, 501 F.3d 1163 (10th Cir. 2007); *Brown v. Chestnut (In re Chestnut)*, 422 F.3d 298 (5th Cir. 2005); *Fleet Mortgage Group, Inc. v. Kaneb*, 196 F.3d 265 (1st Cir. 1999); *In re Lansdale Family Restaurants, Inc.*, 977 F.2d 826, 829 (3d Cir. 1992) (act done intentionally with knowledge that bankruptcy petition has been filed is willful violation of stay).

In *America's Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard)*, the Court of Appeals for the Ninth Circuit overruled *Sternberg v. Johnston* partially and held that a debtor may recover attorney's

fees under section 362(k) that have been incurred in prosecuting an action for damages under the Code, in addition to recovering fees incurred to end the stay violation. 803 F.3d 1095, 1101 (9th Cir. 2015).

In *In re Perry*, the court opined that a creditor retaining a motor vehicle that it had lawfully repossessed pre-petition for nearly thirty (30) days after receiving notice of the vehicle owner's bankruptcy filing, without moving for relief from the automatic stay, probably violated the stay. 540 B.R. 710 (Bankr. C.D. Cal. 2015).

Courts have held that continued possession of a repossessed vehicle belonging to the debtor is an act to exercise control over property of the estate, and a creditor who refuses to return the vehicle violates the stay. *In re Stephens*, 495 B.R. 608 (Bankr. N.D. Ga. 2013); *see also In re Weber*, 719 F.3d 72 (2d Cir. 2013) (creditor failure to promptly return repossessed vehicle upon learning of debtor's Chapter 13 filing constitutes willful violation of stay).

In the matter at hand, Respondent and Brashers knew of Movant's bankruptcy case, and whether through a simple mix-up or a more nefarious deed, they did not promptly return Movant's vehicle. From August 3, 2016, Ford Motor Credit Company and it's agent Brashers knew of this bankruptcy case. Further, Ford Motor Credit Company knew of its obligation to turn over the vehicle to Debtor and cure the violation of the automatic stay. Notwithstanding this knowledge of the bankruptcy case pending, it was not until August 26, 2016, that Ford Motor Credit Company's agent that was holding the vehicle did turn over the vehicle to Debtor. The court computes that the violation of the automatic stay continued for twenty-three (23) days. During this time, Debtor was put to the test, and expense, of having Debtor's counsel having to repeatedly communicate with Ford Motor Credit Company and it's agent, Brashers, to no avail. Such "confusion" and delay could well have resulted in a pro se debtor or one represented by an inexperience counsel to give up in frustration.

Ford Motor Credit Company's response demonstrates a lack of knowledge, or appreciation, of the automatic stay and its responsibilities for violations of the automatic stay. It is argued that on August 3, 2016, Ford Motor Credit Company sent an authorization to release the Vehicle to it's agent, Brashers. However, Ford Motor Credit Company admits in the Opposition that it was not until August 26, 2016, that it's agent, Brashers, "acknowledged" the authorization to release the vehicle.

Ford Motor Credit Company provides the following witnesses and testimony:

I. Attorney Sheryl K. Ith, Attorney with Cooksey, Toolen, Gage, Duffy & Wood, counsel for Ford Motor Credit Company, LLC in this Contested Matter. Ms. Ith's testimony under penalty of perjury includes the following:

   A. On August 25, 2016, Ms. Ith reviewed the Motion for Violation of the Automatic Stay [the Motion now before the court] and spoke to Debtor's counsel that day, advising him that she would contact Ford Motor Credit Company. Declaration ("Dec.") ¶ 2, Dckt. 32.

   B. On August 26, 2016, Ms. Ith communicated with Tina Gritte and Michael Delmonico of Ford Motor Credit Company regarding the Motion. Dec. ¶ 4, *Id.*

C. Ford instructed ("send the Authorization for Release of Vehicle") to Brashers on August 3, 2016. Dec. ¶ 5, *Id.*

Interestingly, Ms. Ith shows no basis for any personal knowledge of such an "Authorization" having been sent on August 3, 2016, though she says under penalty of perjury that all of her testimony is based on her personal knowledge. This puts in doubt Ms. Ith's other "personal knowledge" testimony under penalty of perjury.

D. Ms. Ith confirms that Brashers did not process the release of the Debtor's vehicle until August 26, 2016. Dec. ¶ 6, *Id.*

E. Ms. Ith describes a contentious conversation with Debtor's counsel on August 26, 2016, in which Debtor's counsel stated that Robert Miller at Brashers told him no authorization had been received. Ms. Ith states that Debtor's counsel terminated the call before Ms. Ith could advise him that she had confirmed that as of August 26, 2016, authorization had been given and received. Dec. ¶ 8, *Id.*

F. Ms. Ith states that it is her opinion that Ford Motor Credit Company did all that was necessary by purporting to have sent the release on August 3, 2016, and then taking action twenty-three days later on August 26, 2016. Dec. ¶ 11, *Id.*

II. Michael Delmonico, Attorney Liaison Manager at Ford Motor Credit Company. Mr. Delmonico's testimony under penalty of perjury includes the following:

A. He spoke with Sheryl Ith on August 26, 2016. Dec. ¶ 3, Dckt. 31.

B. He states, without any foundation, that "we had already confirmed with Brashers that the Authorization for Release was received by Brashers on August 3, 2016,..." Dec. ¶ 4, *Id.*

At this juncture, Mr. Delmonico appears to be making a perceived "incantation" that will extricate Ford Motor Credit Company by blaming its agent for the failure to act. Mr. Delmonico does not provide any testimony as to how he had personal knowledge of such "Authorization" having been given, nor does he cite to any business records upon which such testimony would be based.

C. Mr. Delmonico then offers his opinion testimony, under penalty of perjury, that "Ford took all necessary and reasonable actions to comply with 11 U.S.C. § 362." Dec. ¶ 5, *Id.*

This testimony speaks volumes and undercuts the credibility of Mr. Delmonico's and other testimony provided by Ford Motor Credit Company. While Mr. Delmonico can provide his personal knowledge testimony (Fed. R. Evid. 601 and 602), there is no basis shown for him having the legal training and expertise to opine as to the duties and obligation under 11 U.S.C. § 362. The fact that he would sign

such a declaration demonstrates a willingness to sign whatever is put in front of him, "so long as my employer wins!"

III. Tina Gritte, Bankruptcy Specialist for Ford Motor Credit Company. Ms. Gritte's testimony under penalty of perjury includes the following:

A. Ms. Gritte personally sent the authorization to release the vehicle to Debtor on August 3, 2016. Dec. ¶ 3, Dckt. 30.

B. The authorization was sent to Adesa Brashers via email (sacramentofordc16@brashers.com). The authorization is filed as Exhibit B. *Id.*

C. Ms. Gritte states that she also "called the auction to verify its receipt." *Id.*

Ms. Gritte does not state when that call was made, to whom she spoke, or the response.

D. That it was not until August 24, 2016, that Debtor's counsel contacted Ford Motor Credit Company and was then advised that the authorization had been sent on August 3, 2016. Dec. ¶ 5, *Id.*

E. Ms. Gritte states that on August 26, 2016, she spoke with a person named Monique at Brashers who confirmed that the email was received on August 3, 2016. Dec. ¶ 6.

No testimony is provided by "Monique" or any other person at Brashers accepting responsibility for not turning over the vehicle for Ford Motor Credit Company. Neither is any testimony provided that Brashers turned over the vehicle until after the present Motion was filed.

F. Ms. Gritte states that on August 29, 2016, she "confirmed" with an unidentified person at Brashers that the vehicle had been turned over to Debtor on August 26, 2016.

Again, no testimony is provided by anyone with personal knowledge, but instead, Ms. Gritte purports to testify as to what she heard someone say to her, and thereby concludes that Ford Motor Creditor is in the clear.

Ford Motor Credit Company, LLC's evidence and testimony demonstrates that it knew as of August 3, 2016 that its agent, Brashers, was in possession of the vehicle in violation of the automatic stay. Further, that Ford Motor Credit Company, LLC had the control of the vehicle and the authority to give directions to Brashers, its agent.

The evidence presented further shows that notwithstanding the automatic stay being the third-rail of Bankruptcy Code violations, when in knowing violation of the automatic stay, Ford Motor Credit Company, LLC's attempts to correct the violation consisted of sending one email, with no follow-up. While the email was provided by Tina Gritte to show that the Authorization was sent on August 3, 2016, it also says that Ford Motor Credit Company, LLC was to receive an acknowledgment from Brashers. Exhibit B, Dckt. 33. The record is devoid of any such acknowledgment having been received and any reasonable

conduct by Ford Motor Credit Company, LLC to make sure that the continuing violation of the automatic stay was being promptly addressed. Rather, the record demonstrates that no action was taken by Ford Motor Credit Company, LLC and that it now seeks to blame its agent, Brashers, (though blaming the agent appears to be an admission of the violation) or the Debtor for not making Ford Motor Credit Company, LLC follow up with its agent sooner.

The evidence presented by Ford Motor Credit Company, LLC further demonstrates that no action was taken by Ford Motor Credit Company, LLC until it was served with the present Motion and engaged the services of Ms. Ith's law firm. Only after this Motion was served did Ford Motor Credit Company, LLC contact its agent, having ignored never receiving an acknowledgment from its agent, Brashers.

As note above, the credibility of witnesses presented by Ford Motor Credit Company, LLC is suspect. Some layperson readily signs declarations for which he has no personal knowledge or in which he expresses legal opinions and conclusions for which he shows no knowledge or ability. In other declarations legal opinions are given as "testimony," as well as testimony for which there is no demonstrated personal knowledge.

One of Ford Motor Credit Company, LLC's arguments is that it is its agent's fault and responsibility for the continuing violation of the automatic stay. Ford Motor Credit Company, LLC also has shown that it controlled the continued improper detention of the vehicle in that it had the power to "authorize" the release of the vehicle, and that after it was served with the Motion and instructed its agent, Brashers, the vehicle was immediately released by Brashers.

The court determines that Ford Motor Credit Company, LLC violated the automatic stay, and continued in knowing violation of the automatic stay for twenty-three days. The violation of the stay continued until Debtor filed the present Motion. The filing of this Motion was necessary to remedy the violation of the automatic stay.

Damages and Attorneys' Fees

In the Motion, Debtor seeks to have the vehicle turned over (which has been accomplished after Ford Motor Credit Company, LLC was served with the Motion and engaged counsel), costs and attorneys' fees, and damages. The first relief sought has been obtained in response to the Motion prior to the hearing and rendered moot as for further injunctive sanction relief.

As for "damages," no evidence of damages has been provided by Debtor. It is alleged in the Motion that "Debtor continues to sustain damages each day the vehicle is not returned," but the court has no idea (or evidence of) what the damages could be in this Contested Matter.

It is further alleged that "Debtor has sustained emotional distress." While the court has some leeway in determining emotional distress damages, even in the absence of expert testimony FN.2., there is no evidence relating to such damages. Given the relatively short time period, most likely the "emotional distress" was minor and most related to annoyance that the Debtor's rights were being given short shrift by Ford Motor Credit Company, LLC.

FN.2. *Dawson v. Wash. Mut. Bank (In re Dawson)*, 390 F.2d 1139, 1148 (9th Cir. 2004).

Finally, Debtor seeks to recover the legal fees and expenses in addressing this continuing violation of the automatic stay. The evidence shows that the Motion was necessary, with Ford Motor Credit Company, LLC taking action to make sure that its continuing violation was remedied only after being served with the Motion. The record is devoid of any action taken by Ford Motor Credit Company, LLC sending one email, not getting any acknowledgment, and then blaming its agent, Brashers, as the defense.

Attorneys fees are awarded pursuant to "post-judgment" motion pursuant to Federal Rule of Civil Procedure 54(d). Fed. R. Bankr. P. 9014, 7054. Debtor shall file a motion for attorney's fees and costs for this contested matter on or before October 18, 2016.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Damages for Violation of the Automatic Stay by Debtor Karen Hart ("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 granted, and the court finds that Ford Motor Credit Company, LLC has willfully violated the automatic stay provisions of 11 U.S.C. § 362(a) during the period from August 3, 2016, to August 26, 2016, by the continuing detention and failing to turn over a 2007 Ford Expedition.
>
> **IT IS FURTHER ORDERED** that the 2007 Ford Expedition having been turned over by Ford Motor Credit, LLC to the Debtor after the filing of the Motion and prior to the hearing, no further relief for possession of the vehicle is granted.
>
> **IT IS FURTHER ORDERED** that no monetary damages are awarded for Movant against Ford Motor Credit Company, LLC.
>
> **IT IS FURTHER ORDERED** that the Movant shall file and serve on or before October 18, 2016, a cost bill and motion for attorney's fees, if any, incurred in connection with and which were necessary to rectify the violation of the automatic stay and to prosecute an action for damages pursuant to 11 U.S.C. § 362(k), or for which there is a legal or contractual right to fees. The allowed costs and attorney's fees, if any, shall be enforced as part of the monetary award under this order against Ford Motor Credit Company, LLC.
>
> This Order constitutes a judgment (Fed. R. Civ. P. 54(a) and Fed. R. Bankr. P. 7054, 9014) and may be enforced pursuant to the Federal Rules of Civil Procedure

and Federal Rule of Bankruptcy Procedure (including Fed. R. Civ. P. 69 and Fed. R. Bankr. P. 7069, 9014).

22.	**16-24661-E-13** **DPC-1**	**RONNETTE ROGERS RUNNINGS** **Dale Orthner**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK** **8-30-16 [27]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on August 30, 2016. By the court's calculation, 35 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

A. The Debtor is delinquent $1,586.00 in plan payments to the Trustee, and the next scheduled payment of $1,586.00 is due on September 20, 2016. The Debtor has paid $0.00 into the Plan to date.

B. The Debtor cannot afford to make the payments or comply with the Plan. Debtor's Plan relies on the Motion to Value Collateral of RC Willey, which is set for hearing on September 20, 2016.

The Debtor's Motion to Value Collateral of RC Willey was granted. Dckt. 36. The Trustee's opposition regarding that motion is not reason to deny confirmation.

C. The Debtor proposed to pay creditor RC Willey a monthly dividend of $9.44 in Class 2 of the Plan. While monthly disbursement payments must be no less than $15.00 per month unless the Court specifically orders it, the Trustee has no objection to a monthly dividend of less than $15.00 if the Plan provides that the Trustee shall not disburse to the creditor unless accrued payments total $15.00 or more, unless paying off the claim.

D. The Trustee is unable to determine whether the Debtor can make payments under the Plan or comply with the Plan. The Trustee is unable to determine the feasibility of the Plan. Debtor's Schedule I indicates at least a portion of Debtor's income ($2,000.00) is from a contribution from her fiancé, Randy Ellis. Debtor has failed to provide a declaration by the contributor to prove these contributions are likely to occur.

The Trustee's remaining objections are well-taken.

The Trustee objects to confirmation on the basis that the Debtor is $1,586.00 delinquent in plan payments. This is strong evidence that the Debtor cannot afford the plan payments or abide by the Plan and is cause to deny confirmation. 11 U.S.C. §1325(a)(6).

The Debtor's Schedule I lists under other monthly income "Regular monthly assistance from Randy Ellis"in the amount of $2,000.00. After Trustee's Opposition, Debtor filed a Declaration of Randy Ellis Regarding Continuing Support. Dckt. 32. The Ellis Declaration states that Randy Ellis is a longtime friend of Debtor and has contributed approximately $2,000.00 per month to Debtor for at least the last three years and intends to continue to contribute $2,000.00 per month to Debtor for at least the duration of her Chapter 13 Plan.

The Declaration states that helping Debtor complete her Plan is and will be of significant, albeit intangible, benefit to Declarant. However, nothing in this declaration indicates that Randy Ellis will be able to continue to make these contributions throughout the duration of the five-year Plan. At a minimum, given the qualified commitment in the declaration by Mr. Ellis, any order confirming the Plan must also include an express mandatory injunction ordering Mr. Ellis to make the monthly assistance of $2,000.00 to the Chapter 13 Trustee for each month of the Plan, when payment must be made until further order of the court. Without this, it is impossible for the court and other interested parties to determine the feasibility of the proposed plan and is cause to deny confirmation. 11 U.S.C. § 1325(a)(6).

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

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

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

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

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

23. **11-34363-E-13** **SAMUEL/ROMA STOUT** **MOTION TO SELL**
SS-3 **Scott Shumaker** **9-13-16 [70]**

Final Ruling: No appearance at the October 4, 2016 hearing is required.

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

24. 13-29563-E-13 CAH-8 | **JAVIER/JEANNE RODRIGUEZ** | **C. Anthony Hughes** | **MOTION TO MODIFY PLAN AND/OR MOTION REQUEST FOR FINAL PAYOFF 8-18-16 [119]**

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 18, 2016. By the court's calculation, 47 days' notice was provided. 35 days' notice is required.

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

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

Javier Rodriguez and Jeanne Rodriguez ("Debtors") filed the instant Motion to Confirm First Modified Chapter 13 August 18, 2016. Dckt 119. The Debtors state that they were victims of identity theft prior to bankruptcy. As a result, ten of the twelve claims timely filed by creditors were either withdrawn or disallowed in their entirety. The Debtors request that the court and the Trustee approve and allow an early payoff and completion of their Chapter 13 case. Debtors request a final balance payoff as of October 25, 2016.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition to the Debtors' Motion to Confirm First Modified Chapter 13 Plan on September 16, 2016. Dckt 123. The Trustee objects on the following basis:

A. No Modified Plan was filed concurrently with the Motion.

B. A motion is not required to end a 100% plan by paying off the balance early and does not modify the Plan.

DEBTORS' RESPONSE

Debtors filed a Response to Trustee's Opposition on September 27, 2016. Dckt. 126. The Response states that the Modified Plan was not filed concurrently with the initial motion on August 18, 2016, due to an administrative error. The Modified Plan was, however, served on all parties. The Modified Plan was filed on September 27, 2016, to correct this deficiency. Dckt. 128. The Response also states that this Motion to request an early payoff is to provide notice to all interested parties, specifically Debtors' creditors who filed claims that were objected to and disallowed.

DISCUSSION

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

The Trustee's Objections are well-taken. As stated in Section 1.03. Duration of payments. "The monthly plan payments will continue for 60 months *unless all allowed unsecured claims are paid in full within a shorter period of time*" (emphasis added). Here, all unsecured claims have been paid in full or disallowed, giving effect to this language in Section 1.03.

The Debtors' Response manifests the intent to "belts and suspenders" address the relatively unique circumstances of this case. The existing confirmed plan provides for a 100% dividend for creditors holding general unsecured claims. In objecting to and obtaining the voluntary withdrawal of claims, Debtors have been able to reduce the unsecured claim pool sufficiently that the Plan will pay off early.

In substance, Debtors state that the October 2016 Plan payment should be the last one necessary to fully fund the Plan. The Chapter 13 Trustee can confirm for the Debtors whether the Trustee concurs, and if not, what additional amounts need to be paid to fulfill the Debtors' obligations under the confirmed plan.

While possibly paying off the general unsecured claims, it is not clear to the court how the plan can be completed when the Class 1 Secured Claim treatment provides for curing a $67,000.00 arrearage on the secured claim of JPMorgan Chase Bank, N.A. Proposed Modified Plan, Dckt. 128. With a monthly cure payment of $1,116.67, curing the arrearage would take sixty months.

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

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

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

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

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

25. 16-24265-E-13 RWH-3 | **RICHARD AMUNDSEN** / **Ronald Holland** | **MOTION TO CONFIRM PLAN** / **8-17-16 [35]**

Final Ruling: No appearance at the October 4, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on August 17, 2016. By the court's calculation, 48 days' notice was provided. 42 days' notice is required.

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

The Motion to Confirm the Amended Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Debtors have provided evidence in support of confirmation. No opposition to the Motion has been filed by creditors. David Cusick, the Chapter 13 Trustee, filed a statement of non-opposition on August 22, 2016. The Amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

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

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

IT IS ORDERED that the Motion is granted, Debtor's Chapter 13 Plan filed on August 12, 2016 (Dckt. 32), is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

26. 14-32371-E-13 JAMES/MONA STILES MOTION TO MODIFY PLAN
SDH-1 Scott Hughes 8-16-16 [28]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 16, 2016. By the court's calculation, 49 days' notice was provided. 35 days' notice is required.

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

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

James Stiles and Mona Stiles ("Debtors") filed the instant Motion to Confirm First Modified Chapter 13 Plan on August 16, 2016. Dckt 28.

OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the Instant Motion September 19, 2016. Dckt. 40. The Trustee opposes confirmation on the following grounds:

A. The Debtors' Plan in not the Debtors' best effort or may not have been proposed in good faith. The Debtors' Confirmed Plan called for payments of $1,375.00 per month for sixty (60) months to pay unsecured creditors no less than 100%. The Trustee moved to dismiss as the case would take seventy-nine (79) months to complete due to unsecured claims filed being $12,203.17 greater than scheduled. The Debtors filed the First Modified Plan to resolve the Trustee's Motion.

The proposed plan payments are $25,783.00 total paid as of August 11, 2016, with monthly payments of $1,295.00 commencing August 25, 2016. The dividend to be paid to unsecured creditors is reduced to 0%. Debtors' Schedule J reflects the ability to pay $1,357.00, which would leave $2,542.00 available for unsecured creditors.

B. The Debtors' proposed Plan will not complete within sixty (60) months. Debtors are adding a post-petition mortgage supplemental claim to Class 1 for $650.00 with a monthly dividend of $10.83, which is less than the normal $15.00 minimum payment required under Federal Rule of Bankruptcy Procedure 3010. The claim will take sixty (60) months to pay at the rate of $10.83, as Debtors have already completed twenty (20) months of the Plan, brining the total term of the proposed Modified Plan to eighty (80) months.

DEBTORS' RESPONSE

Debtors filed a Response to Trustee's Opposition September 20, 2016. Dckt. 43. The Response indicates that:

A. Debtors agree that the payments should remain $1,357.00 through month 60 of the Plan;

B. The supplemental mortgage claim of $650.00 should be paid at not less than $15.00 per month; and

C. Class 7 general unsecured creditors should not receive less than a total of $2,542.00 for their allowed claims.

The Debtors request for the order confirming plan to modify the plan with those terms.

TRUSTEE'S REPLY

The Trustee filed a Reply on September 27, 2016. Dckt. 45. The Trustee states that Debtors' Response resolves the Trustee's objection if the language in the order confirming the Plan reflects Debtors' modified language from their Response.

DISCUSSION

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

The Trustee objects on the basis that the Plan did not provide for the submission of all of Debtors' future income into the Plan and because of the $10.83 monthly payment for the post-petition mortgage claim causes the plan to exceed sixty (60) months. At the hearing, the Debtors amended the Plan to provide as follows:

A. Section 1.01 is amended to change the monthly plan payment from $1,295.00 to $1,357.00;

B. Section 2.08 is amended to change the arrearage dividend of "CALIBER SUPP MORTGAGE CLAIM" from $10.83 to $15.00; and

C. Section 2.15 is amended to reflect that unsecured creditors will receive not less than $2,542.00 for their allowed claims.

Therefore, the objection is overruled. Debtors' correction for the order confirming changes the plan payments to Class 7 unsecured creditors and the Class 1 supplemental mortgage claim as well as the dividend to unsecured creditors.

The modified Plan as amended complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed. The amendment will be stated in the order confirming the Plan.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtors' Chapter 13 Plan filed on August 16, 2016, as amended at the hearing to provide:
>
> A. Section 1.01 is amended to change the monthly plan payment from $1,295.00 to $1,357.00;

B. Section 2.08 is amended to change the arrearage dividend of "CALIBER SUPP MORTGAGE CLAIM" from $10.83 to $15.00; and

C. Section 2.15 is amended to reflect that unsecured creditors will receive not less than $2,542.00 for their allowed claims,

with said amendments to be stated in the order confirming, is confirmed. Counsel for the Debtors shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

27. 16-25089-E-13 DPC-1 | **MARK/JENNIFER GALISATUS** **Daniel Davis** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK** **9-7-16 [23]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors and Debtors' Attorney on September 7, 2016. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

A. The Plan will not complete within sixty (60) months due to the Proof of Claim filed by the Internal Revenue Service ("IRS"). Claim No. 1. Debtors' Plan schedules the secured IRS debt in Class 2 at $10,481.00 and 0% interest and the Class 5 priority portion at $77,048.70.

(1) The IRS's Proof of Claim asserts a secured portion of $52,401.00 at a 4% (variable) interest rate, a priority portion of $53,274.02, and a general unsecured portion of $12,997.59. Based on the Trustee's

calculation, the Plan will take sixty-six (66) months to pay the claims (including the 4% interest to the IRS). In order to complete the Plan in sixty (60) months paying 4% interest to the secured claim, the plan payments would have to increase by $260.00 per month to $3,350.00 per month.

B. The First Meeting of Creditors was held on September 1, 2016. The Debtor's did appear, but all required business documents were not provided to the Trustee in time for analysis, including: the most recent State Board of Equalization Sales Tax Return; and liability and workers compensation Insurance Declarations.

C. Debtor has failed to file an attachment to Schedule I showing the gross business income and expenses from each individual business as required by the form.

The Trustee's objections are well-taken.

The Trustee objects on the basis that the Debtors are in material default under the terms of the confirmed Plan, the Plan now requiring sixty-six (66) months to complete when accounting for the Proof of Claim filed by the IRS. Court Claim No. 1. This is in excess of the sixty (60) month statutory maximum imposed by 11 U.S.C. §1322(d) and thus, reason to deny confirmation.

The Debtors have failed to timely provide the Trustee with business documents including: the most recent State Board of Equalization Sales Tax Return; liability and workers compensation Insurance Declarations, and an attachment to Schedule I showing the gross business income and expenses from each individual business. 11 U.S.C. § 521(e)(2)(A); Fed. R. Bankr. P. 4002(b)(3). Without the Debtor submitting the required documents, the court and the Trustee are unable to determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325.

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

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

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

28. 13-30998-E-13 RALPH SETTEMBRINO MOTION TO MODIFY PLAN
MET-6 Mary Ellen Terranella 8-28-16 [125]

Final Ruling: No appearance at the October 4, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 28, 2016. By the court's calculation, 37 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is granted.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtors have filed evidence in support of confirmation. No opposition to the Motion was filed by creditors. David Cusick, the Chapter 13 Trustee, filed a statement of non-opposition on September 20, 2016. Dckt. 137. The modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329, and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on August 28, 2016, is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the

Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

29. 16-21099-E-13 MAC-3 | **KWAJHALIEN DORN-DAVIS** | **Marc Carpenter** | **MOTION TO CONFIRM PLAN** | **8-24-16 [43]**

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 24, 2016. By the court's calculation, 41 days' notice was provided. 35 days' notice is required.

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

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

Kwajhalien Dorn-Davis filed the instant Motion to Confirm First Amended Plan on August 24, 2016. Dckt. 43.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition to the Debtor's Motion to Confirm First Amended Plan on September 20, 2016. Dckt. 50. The Trustee objects on the basis that the Debtor may not be able to make the payments under the Plan or comply with the Plan. Debtor's Motion to Confirm advises the Trustee, creditors, and the court that she is in the trial period of a loan modification where her ongoing payment will decrease.

Debtor indicates that her First Deed and Note is an adjustable loan, which caused her ongoing mortgage payment to increase post-petition. No additional information regarding the loan modification has been provided and a Motion to Approve Loan Modification has not yet been filed with the court.

The Trustee states that Debtor's Plan is feasible and completes timely, but the Trustee is concerned about the Debtor being able to afford plan payments if the loan modification is denied.

DISCUSSION

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

The Trustee's objection is well taken. The court finds that the Plan relies on a loan modification that has yet to be approved by the court. The court's review of the docket reveals that no Motion to Approve Loan Modification has been filed in the instant case to date. The Debtor's Declaration and Debtor's Exhibit A indicate that Debtor has been approved for a trial loan modification that began on September 1, 2016. However, Debtor will not receive a loan modification agreement unless the Debtor has made all of their trial period payments on time, with the last payment being due November 1, 2016. Unfortunately, no such modification has been approved. This is cause to deny confirmation.

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

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

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

30. 13-20939-E-13 TIMOTHY/TAMARA MENEBROKER
Peter Macaluso

STATUS CONFERENCE RE: VOLUNTARY PETITION
1-24-13 [1]

Debtors' Atty: Peter G. Macaluso

Notes:
Set by court order dated 9/22/16 [Dckt 76]. To be heard in conjunction with hearing on *pro se* request to dismiss Chapter 13 case.

31. 13-20939-E-13 TIMOTHY/TAMARA MENEBROKER
Peter Macaluso

MOTION TO DISMISS CASE
9-19-16 [75]

Tentative Ruling: The Motion to Dismiss Case was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

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

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

Local Rule 9014-1(f)(3) Motion.

Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 13 Trustee, and Office of the United States Trustee on September 24, 2016. By the court's calculation, 10 days' notice was provided.

The Motion to Dismiss Case was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Motion to Dismiss Case is denied.

This Motion to Dismiss the Chapter 13 Bankruptcy case of Timothy Menebroker and Tamara Menebroker ("Debtors") has been filed by Co-Debtor Tamara Menebroker ("Movant"). Movant seeks dismissal of the Chapter 13 bankruptcy case pursuant to 11 U.S.C. § 1307(b) and Federal Rule of Bankruptcy Procedure 1016 and states that her request is being made in good faith.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on September 26, 2016. Dckt. 78. The Trustee makes the following points:

A. The Trustee is not sure who prepared the request. While submitted by Debtors, the Motion contains various citations to legal authority and appears in a format that does not match that used by Debtors' Counsel of Record.

B. The request sought by Debtors requires a hearing because Co-Debtor Tamara Menebroker does not have the authority of the joint debtor to dismiss the case yet.

C. The Debtors may still modify the Plan, but must clarify the status of the decedent joint debtor. The Trustee needs to know how $37,406.87 was spent that was received by Co-Debtor Tamara Menebroker after the joint debtor passed away.

D. Co-Debtor Tamara Menebroker declared that she no longer has any of the proceeds received after the death of the joint debtor, but she did not estimate what amounts were spent on expenses other than $6,688.00 in taxes. She cited to expenses for:

1. Funeral expenses,

2. Cell phones from T-Mobile,

3. Car repairs,

4. Veterinarian bill,

5. An increase in food expenses because of eating out, and

6. Supporting a twenty-one year old daughter at Sacramento State and a twenty-five year old son looking for work.

Where she proposed a modified plan with a payment reduced by $534.00 per month, presumably she has spent some of the proceeds on the plan payments that were at $1,333.00. If she has the same accounts with Safe Credit Union, she can produce statements to show how the remaining $28,048.87 in proceeds were spent.

E. Co-Debtor Tamara Menebroker is current under the last modified plan that was proposed but denied confirmation (Dckt. 54). Under the confirmed Plan, she is delinquent $3,201.00. Attorney's fees paid to the prior attorney were $4,000.00 with $1,450.00 paid prior to filing the petition and $2,550.00 paid through the Plan. Trustee has disbursed $2,550.00 in attorney's fees. The Plan is currently in month forty-four (44), and the Trustee has paid a total of $51,851.00 to date.

DISCUSSION

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and

the estate.'" *Nelson v. Meyer (In re Nelson),* 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

> [O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause....

11 U.S.C. § 1307(c). The court engages in a "totality-of circumstances" test, weighing facts on a case by case basis in determining whether cause exists, and if so, whether conversion or dismissal is proper. *In re Love*, 957 F.2d 1350 (7th Cir. 1992). Bad faith is one of the enumerated "for cause" grounds under 11 U.S.C. § 1307. *Nady v. DeFrantz (In re DeFrantz)*, 454 B.R. 108, 113 FN.4, (B.A.P. 9th Cir. 2011) (citing *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1224 (9th Cir. 1999)).

The court is unsure if this is a *pro se* filing, in that it is on standard law firm pleading paper, cites to legal cases, cites to specific Bankruptcy Code provisions, and cites to specific Bankruptcy Rules. It is signed by Tamara Menebroker, one of the two Debtors who filed this case. On Schedule I, Debtor Tamara Menebroker states that she is an Associate Information Systems Analyst, employed by the State of California for 23 years (as of the 2013 filing of this case). Dckt. 1 at 37. There is nothing to indicate that Ms. Menebroker is an attorney or has had legal training. No Certificate of Service has been filed for this *Pro Se* Request to Dismiss the Chapter 13 case. As of the 2013 filing, Ms. Menebroker stated under penalty of perjury that she had $5,624.56 in monthly gross income, and her husband had monthly gross income of $3,799.98. *Id.* A review of Schedule J, which was relied upon in determining the projected disposable income in this case, lists monthly expenses of $5,180.04. *Id.* at 39. These expenses include, for the two Debtors:

A. Food.....$875

B. Clothing.....$200

C. Personal Care Products.....$75

D. Medical and Dental.....$175

1. On Schedule I, Debtor Tamara Menebroker lists having insurance deductions of $522 and $35 a month.

E. Transportation Expense.....$750

F. Auto Installment Payments.....$328.71

1. This appears to be for a 2006 Kia Sportage provided for in Class 4 of the Plan.

Grounds Stated In *Pro Se* Request For Dismissal

In the request, Debtor states that in light of her husband's recent death and the court denying her motion to modify the plan, this surviving Debtor cannot reasonably afford the plan payments. Therefore, this surviving Debtor is seeking closure and moving on with her life by dismissing this case and then filing a new Chapter 7 case.

Denial of Prior Motion to Modify

The court throughly reviewed the grounds for denying the motion to confirm the modified plan. Civil Minutes, Dckt. 72. The denial related to some very basic matters, which could easily be remedied by Debtor. First, the surviving Debtor has not obtained an order substituting her in as the representative for the interests of her late husband in this case.

The court denied without prejudice the surviving Debtor's motion to be appointed as the representative due to incomplete information being provided. Civil Minutes, Dckt. 66. In seeking the authorization, Debtor made only general reference to having spent $37,406.87 of death benefit monies received following the death of her co-debtor spouse. The Debtor did not provide any testimony as to the use of these monies, but merely had her attorney file a response in which he argued that Debtor received $37,406.87 and is spending the money. Debtor's Response, Dckt. 59.

If the Debtor does not have an actual ability to pay, then she can seek to modify the plan. But she must be truthful and honest, fulling disclosing all assets and income.

Economically Inconsistent Contentions

On the one hand, Debtor argues that she cannot make the payments under the current plan, having lost the income of her late husband. But on the other hand, Debtor does not appear to consider the substantially decreased expenses. Under the Plan, Debtor is paying for two cars and a motorcycle. A question arises why Debtor is paying for three vehicles for one Debtor. It may be that Debtor is paying for her adult children's vehicles, an expense which can be reduced, as well as not having to pay for the vehicle used by the late co-Debtor.

It appears that Debtor's food, personal care, clothing, and transportation expenses can be reduced significantly. It is unlikely that one person has a $750.00 ($9,000.00 a year, exclusive of vehicle insurance, registration, and installment payment) a month reasonable transportation expense. If the Debtor cuts this transportation expense in half and reduced her food and clothing expenses by $250.00 a month, there would be an additional $600.00 a month Debtor could provide to continue in her plan. Then, if the Debtor stops paying for the motorcycle and one of the two cars, there is reduction of $700.00 a month in vehicle payments though the plan.

There is only one group of debts (other than the motorcycle and second car payments) provided for by the Plan – the nondischargeable tax debts totaling just over $20,000.00. Through the Plan, Debtor is able to pay these back over five years with no further interest or penalty. This is a significant economic benefit to the Debtor.

It could also appear that the *pro se* request to dismiss the case is one in which the Debtor is attempting to hide from the court and divert from the estate some or all of the $37,000.00 received on the death of her husband. Debtor affirmatively states in her *pro se* request that she intends to file a Chapter 7 case so she can get a fresh start - which begets the question why she doesn't just seek to convert this case? A cynical person might conclude that it is because a Chapter 7 trustee in this case would know about the $37,000.00 in benefits and it might be discovered (or disclosed) in a subsequent case.

Cause does not exist to dismiss this case pursuant to 11 U.S.C. § 1307(b). The Motion is denied. Though the court could convert the case at this time, it appears that the Debtor should be given additional time to seek counsel (new counsel if appropriate) of her options and benefits of the current case (even if some family members may have to pay money back into the estate).

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

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

32. **13-30624-E-13** **NAOMI BROWN** **MOTION TO INCUR DEBT O.S.T.**
PGM-3 **Peter Macaluso** **9-23-16 [44]**

Tentative Ruling: The Motion to Incur Debt was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

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

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

Local Rule 9014-1(f)(3) Motion.

Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, and Office of the United States Trustee on September 23, 2016. By the court's calculation, 11 days' notice was provided. 7 day's notice was required by the court. Dckt. 49.

The Motion to Incur Debt was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Motion to Incur Debt is granted.

The Motion seeks permission to purchase real property commonly known as 8478 Belcastel Way, Fair Oaks, California, which the total purchase price is $440,311.00, with monthly payments of $3,038.38.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on September 28, 2016. Dckt. 50. The Trustee states that Naomi Brown ("Debtor") does not state clearly that the reason for the increase in purchase price was for the options added to the purchase.

The Trustee does not oppose the transaction.

DISCUSSION

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. There being no opposition from any party in interest and the terms being reasonable, the Motion is granted. The Debtor is paying a 100% plan payment, which means that the creditors holding unsecured claims are not being treated unfairly. The interest rate on the loan is 4.25%, which does not appear to be unreasonable.

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 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 Naomi Brown ("Debtor") is authorized to incur debt pursuant to the terms of the agreement, Exhibit B, Dckt. 47.

33. 16-26070-E-13 PGM-1 | **STEPHANIE RUSCIGNO** Peter Macaluso | **MOTION TO IMPOSE AUTOMATIC STAY O.S.T. 9-26-16 [15]**

Tentative Ruling: The Motion to Impose Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

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

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

Local Rule 9014-1(f)(3) Motion.

Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 26, 2016. By the court's calculation, 8 days' notice was provided. 8 days' notice was required by the court. Dckt. 21.

The Motion to Impose Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Motion to Impose Automatic Stay is granted.

Debtor seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(a) imposed in this case. This is Debtor's third bankruptcy petition pending in the past year with the two prior cases having been dismissed. Debtor's prior bankruptcy cases (Nos. 16-20570 and 16-25568) were dismissed on August 18, 2016, and September 12, 2016, respectively. Therefore, pursuant to 11 U.S.C. § 362(c)(4)(A)(i), the provisions of the automatic stay did not go into effect in this case.

Upon motion of a party in interest and after notice and hearing, the court may order the provisions imposed if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(4)(B). The subsequently filed case is presumed to be filed in bad faith if the Debtor failed to file documents without

offering a "substantial excuse." *Id.* at § 362(c)(4)(D)(i)(II). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* at § 362(c)(4)(D). Mere inadvertence or negligence is not a "substantial excuse," unless caused by the negligence of the debtor's attorney. *Id.* at § 362(c)(4)(D)(i)(II).

Here, Debtor's prior cases were dismissed when she did not take further action to confirm a plan (No. 16-20570) and when the Debtor did not timely file documents (No. 16-25568).

Debtor argues that good cause exists for imposing the automatic stay as to all creditors because she has rebutted the presumption of bad faith. Debtor's petition was accompanied by all statements, schedules, and a Chapter 13 plan that Debtor believes is confirmable. Debtor states that she filed the instant case to cure pre-petition arrears on her primary residence. Debtor proposes to make monthly plan payments of $1,390.00.

The court finds that Debtor has provided convincing evidence to rebut the presumption of bad faith. Debtor has timely filed all documents in this case and has demonstrated her ability to make the ongoing plan payments. The Motion is granted, and the automatic stay is imposed as to all creditors the day the court's order is entered. *See* 11 U.S.C. § 362(d)(4)(c).

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

> Finding of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Impose the Automatic Stay filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Impose Automatic Stay provided by 11 U.S.C. § 362(a) is granted, and the automatic stay is imposed as to all persons and for all purposes until the stay is terminated by operation of law or further order of this court.