UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

October 18, 2016, at 3:00 p.m.

1.	**13-30919-E-13**	**BUN AUYEUNG AND SOO TSE** **Peter Macaluso**	**ORDER TO APPEAR ON MOTION FOR OMNIBUS RELIEF (L.B.R. 1016-1)** **10-12-16 [268]**

APPEARANCE OF (1) SOO HAN TSE, THE DEBTOR;

(2) THE DEBTOR'S CHILD RECEIVING COMPENSATION FOR PROVIDING CARE TO DEBTOR; AND

(3) BANKRUPTCY COUNSEL FOR DEBTOR

REQUIRED FOR THE OCTOBER 18, 2016 HEARING

NO TELEPHONIC APPEARANCES PERMITTED

BACKGROUND

After the October 12, 2016 hearing on the Chapter 13 Trustee's Motion to dismiss this Chapter 13 case for the lack of prosecution (no proposed plan having been filed and prosecuted since the 2014 denial of confirmation), the court determined that it would issue an Order to Appear for Debtor Soo Han Tse, Debtor's child, and Counsel Peter Macaluso.

Debtor's counsel advised the court at the October 12, 2016 hearing that one of the Debtor's children is being paid to care for Debtor and is living in the property with the Debtor. The property has a significant equity that Debtor could use to pay her basic needs. Debtor does not have regular income to fund a Chapter 13 Plan and is funding the Plan with a gift from a child. July 22, 2014 Civil Minutes, Dckt. 198.

In light of the lack of prosecution, the court's prior determination that Debtor is not eligible to be a Chapter 13 debtor, and the court having a concern whether the Debtor can fulfill her role to independently make decisions both for herself and as the representative of the late co-debtor's interests, and good cause appearing, the court ordered Debtor Soo Han Tse, Debtor's child who is provided care services

and is receiving compensation for doing such from any source, and Debtor's counsel Peter Macaluso to appear at 3:00 p.m. on October 18, 2016.

DISCUSSION

At the hearing, xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

2.	**13-30919-E-13** **PGM-6**	**BUN AUYEUNG AND SOO TSE** **Peter Macaluso**	**MOTION TO SUBSTITUTE SOO HAN TSE FOR BUN AUYEUNG TO COMPLETE ADMINISTRATION OF CASE AND/OR MOTION FOR EXEMPTION FROM FINANCIAL MANAGEMENT COURSE, ETC.** **9-12-16 [259]**

No Tentative Ruling: The Motion for appointment of a personal representative for the deceased debtor and continued administration of this Chapter 13 case has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen (14) days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion).

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—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 September 12, 2016. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Motion to Substitute has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen (14) days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving

party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Substitute is xxxxxxxxxxxxxxxxx.

Joint Debtor, Soo Han Tse, seeks an order approving the motion to substitute the Joint Debtor for the deceased Debtor, Bun Auyeung. This motion is being filed pursuant to Federal Rule of Bankruptcy Procedure 1004.1.

The Debtor filed for relief under Chapter 13 on August 19, 2013. On July 28, 2014, the Debtor's Chapter 13 Plan was confirmed. Dckt. 200. On August 2, 2016, Debtor Bun Auyeung passed away. The Joint Debtor asserts that she is the lawful successor and representative of the Debtor.

Pursuant to Federal Rule of Bankruptcy Procedure 1004.1, the Joint Debtor requests authorization to be substituted in for the deceased debtor and to perform the obligations and duties of the deceased party in addition to performing her own obligations and duties. A Suggestion of Death was filed on August 29, 2016. Dckt. 258. Joint Debtor is the surviving spouse of the deceased party and is the successor's heir and lawful representative. Joint Debtor states that she will continue to prosecute this case in a timely and reasonable manner.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on September 29, 2016. Dckt. 266. The Trustee states that he has no basis to oppose the motion, but he notes that the record is not clear that a Suggestion of Death has been filed in Debtor's pending appeal (EC-14-1382).

DISCUSSION

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

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

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

> Subdivision (a) of Rule 25 of the Federal Rules of Civil Procedure deals with the situation of death of one of the parties. If a party dies and the claim is not extinguished, then the court may order substitution. **A motion for substitution may be made by a party to the action or by the successors or representatives of the deceased party.** There is no time limitation for making the motion for substitution originally. Such time limitation is keyed into the period following the time when the fact of death is suggested on the record. In other words, procedurally, **a statement of the fact of death is to be served on the parties in accordance with Bankruptcy Rule 7004 and upon nonparties as provided in Bankruptcy Rule 7005** and suggested on the record. The suggestion of death may be filed only by a party or the representative of such a party. The suggestion of death should substantially conform to Form 30, contained in the Appendix of Forms to the Federal Rules of Civil Procedure.
>
> The motion for substitution must be made not later than 90 days following the service of the suggestion of death. Until the suggestion is served and filed, the 90 day period does not begin to run. In the absence of making the motion for substitution within that 90 day period, paragraph (1) of subdivision (a) requires the action to be dismissed as to the deceased party. However, the 90 day period is subject to enlargement by the court pursuant to the provisions of Bankruptcy Rule 9006(b). Bankruptcy Rule 9006(b) does not incorporate by reference Civil Rule 6(b) but rather speaks in terms of the bankruptcy rules and the bankruptcy case context. Since Rule 7025 is not one of the rules which is excepted from the provisions of Rule 9006(b), the court has discretion to enlarge the time which is set forth in Rule 25(a)(1) and which is incorporated in adversary proceedings by Bankruptcy Rule 7025. Under the terms of Rule 9006(b), a motion made after the 90 day period must be denied unless the movant can show that the failure to move within that time was the result of excusable neglect. The suggestion of the fact of death, while it begins the 90 day period running, is not a prerequisite to the filing of a motion for substitution. The motion for substitution can be made by a party or by a successor at any time before the statement of fact of death is suggested on the record. **However, the court may not act upon the motion until a suggestion of death is actually served and filed.**
>
> The **motion for substitution together with notice of the hearing is to be served on the parties in accordance with Bankruptcy Rule 7005 and upon persons not parties in accordance with Bankruptcy Rule 7004 . . . .**

(emphasis added); *see also Hawkins v. Eads*, *supra*. While the death of a debtor in a Chapter 13 case does not automatically abate due to the death of a debtor, the court must make a determination of whether "[f]urther administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred."

Fed. R. Bank. P. 1016. The court cannot make this adjudication until it has a substituted real party in interest for the deceased debtor.

Here, Soo Han Tse has provided sufficient evidence to show that administration of the Chapter 13 case might be possible and in the best interest of creditors after the passing of the Co-Debtor. The Motion was filed within the 90 day period specified in Federal Rule of Bankruptcy Procedure 1016, following the filing of the Suggestion of Death. Dckt. 258.

However, the court has concerns as to whether Soo Han Tse is capable to serve in the capacity as the personal representative of the interests of the deceased Co-Debtor in this case, and quite possibly incapable of knowingly, competently representing her own interests, even with the assistance of knowledgeable counsel. This Chapter 13 case has not been prosecuted since 2014. The arguments of Debtor Soo Han Tse through her counsel that she did not need to propose a plan after confirmation was denied in 2014 because she believed she was right and the court denying confirmation was wrong. Merely because Debtor chooses to appeal a ruling of the court does not exempt her from the basic requirements of a Chapter 13 case that there be a plan confirmed and performed. See court's Civil Minutes from October 12, 2016 hearing on Trustee's Motion to Dismiss, Dckt. 269.

Also, as this court has noted previously, it is questionable that the two debtors were acting in their own best interests. It appears that it may be that they are (or have been now that one debtor has died while never being able to use the exempt equity for his care and basic life needs) being manipulated by those who are looking to inherit the equity in the Debtor's real property. It has been described by counsel for Debtor that Debtor was living in a converted chicken coop. Debtor's counsel provided pictures in connection with earlier hearings, with the premises in which the two debtors resided being a cross between a dilapidated shack and a hoarder's paradise with only small paths to walk amid the piles of "stuff" in the converted chicken coop. FN.1.

FN.1. The court did not find persuasive Debtor's counsel's arguments that because the debtors were from a foreign country they like/were use to/preferred to live in the converted chicken coop squalor. See photographs attached to appraisal filed by Debtor; Exhibit C, Dckt. 107. In the Civil Minutes, Dckt. 198, the court made determinations and cited to prior rulings, including (emphasis added):

A. "The court is also not impressed by the plea that the Debtors are 80 year old people living on retirement pensions. **At one point counsel's arguments bordered on contending that his clients were and are incompetent.**.... 09-35065; Civil Minutes, Dckt. 215"

B. "The Debtors admit that they have not regular monthly income sufficient to fund a plan. Rather, instead of a good faith plan being funded by the Debtors, **some other family members appear to be pulling the strings**, quite possibly **for their own financial advantage**. The **Debtors appear to be the poor sacrificial lambs** who are being **deprived of their homestead exemption** while **other family members appear to be lining their pockets** with future gain."

Based on the evidence provided, the court determines that further administration of this Chapter 13 case ~~is/is not~~ in the best interests of all parties, and that Joint Debtor, Soo Han Tse, as the surviving spouse of the deceased party and as the successor's heir and lawful representative, ~~may/is not capable to~~ administer the case on behalf of the deceased debtor, Bun Auyeung. The court ~~grants/denies~~ the Motion to Substitute Party.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Substitute After Death filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is ~~granted/denied,~~ and Soo Han Tse is substituted as the successor-in-interest to Bun Auyeung and ~~is/is not~~ allowed to continue the administration of this Chapter 13 case pursuant to Federal Rule of Bankruptcy Procedure 1016.

3. 12-34839-E-13 JSO-2 | **JAMES/SHARON PETTAY** | **Jeffrey Ogilvie** | **MOTION TO INCUR DEBT** | **9-21-16 [27]**

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

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

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 September 20, 2016. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion to Incur Debt has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen (14) days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Incur Debt is denied.

The motion seeks permission to purchase property located at 18675 Stallion Drive, Red Bluff, California. The total purchase price is $385,000.00. James Pettay and Marie Pettay ("Debtor") are approved for a loan from Veterans United Home Loans with the following terms: an interest rate of 3.5% and monthly payments of $2,270.91 for thirty years.

TRUSTEE'S OPPOSITION

David Cusick, Chapter 13 Trustee, filed an opposition to the motion on October 4, 2016. Dckt. 38. The Trustee asserts that an incorrect trustee was noticed in the Notice of Hearing (Dckt. 28). Further, Trustee asserts that Debtor is $1,504.78 delinquent in plan payments. Lastly, Trustee believes this sale may have already occurred on August 23, 2016, pursuant to a Zillow.com search that indicated that the property was sold on August 23, 2016, for $385,000.00 (a copy of which was not provided to the court).

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).

Debtor filed the case on August 14, 2012. In the original petition, Debtor listed combined average monthly income as $5,412.17 and rental expense as $1,150.00 per month (amongst other expenses), which left a monthly net disposable income of $1,869.48. Schedules I and J, Dckt. 1. This disposable income reflects Debtor's original plan payment and affords 0.2437% to unsecured creditors. Plan, Dckt. 5; Order Confirming Plan, Dckt. 16. On September 21, 2016, Debtor modified the plan payments to $385.49 for the remaining twelve months of the plan, with 10% being paid to unsecured creditors, and the court's ruling is pending. Dckt. 34. Schedule I, Schedule J, and the Means Test were all amended to reflect Debtor's new combined monthly income of $4,739.26 , which is explained by the second debtor's lack of employment and by the addition of an "anticipated" mortgage expense. Dckt. 36.

Though Debtor was unable to continue to perform the confirmed plan due to a decrease in income, Debtor now seeks to purchase a $400,000.00 home with a monthly mortgage payment of $2,270.91. This mortgage payment is $1,120.00 per month higher than the $1,150.00 in monthly rent stated on Original Schedule J. Dckt. 1. (A 100% per month greater housing cost.)

Reply and Explanation of Counsel

In response to the Trustee's Opposition, Debtor chose not (or refused) to provide any testimony under penalty of perjury. Instead, Debtor's counsel merely provided argument concerning unsupported facts. Response, Dckt. 44. First, counsel apologizes for misidentifying and mis-serving the Trustee. This alone could well be mere human error.

Counsel then argues that Debtor is not in default in the plan payments because Debtor is moving to modify the plan, with the motion to be heard on October 25, 2016. Thus, if the modified plan is approved, then the delinquency disappears.

Third, counsel argues that the purchase of the property has already occurred. While an admission against the Debtor's interest, no basis is shown for counsel having personal knowledge of a purchase having been made without proper court authorization.

The explanation for how this could have occurred is that the loan officer was provided with drafts of the motion to approve the borrowing by a helpful receptionist in counsel's office, and that the loan officer relied on the draft documents as if they were an order of the court. (This not only sounds incredible, but not a credible argument.)

Counsel further argues that the "draft documents" were then relied upon by the title company to close the escrow. No testimony is provided by any persons with personal knowledge and no testimony of the good faith, bona fide errors by the loan officers and the title company employees have been provided.

Denial of Motion

This transaction is not in the best interest of the Debtor and has not been filed in good faith. Rather than using income to obtain reasonably equivalent rent in another area, Debtor appears to be hiding under a veil of "unsafeness" in the neighborhood that they have resided in up to this point. Debtor was less than one year away from obtaining a discharge, but not satisfied with the commitment that goes with the extraordinary benefits under the Bankruptcy Code, Debtor believed that purchasing a $400,000.00 property was warranted.

In the motion to confirm the modified plan and reduce the payments, no reference is made to there being a 100% increase in Debtor's housing expense because Debtor has chosen to purchase property. Dckt. 32.

In the declaration supporting the motion to modify, both of the two debtors provide generic testimony, providing no statements under penalty of perjury of the reason for the modification. Dckt. 35. The only testimony relating to the reduced payment is:

> "Our proposed modified Chapter 13 Plan terms includes plan payments for months 1-48 (thru 08/25/2016) = $1,86~.48, and months 49-60, $385.49 per month. **The purpose of this modification is to reflect our current monthly income, which now current DMI to be $361.96, down from $1,131.17 at the time of filing.**"

Declaration, ¶ 10; *Id.*

What Debtor, and each of the two debtors, carefully avoids stating in the declaration is that their housing expense has doubled because Debtor desires (and did without court authorization) purchase a $400,000.00 property.

The motion to modify the plan was filed on September 21, 2016. The Motion for authorization to obtain the post-petition financing and purchase the $400,000.00 property was also filed on September 21, 2016, but set for an earlier hearing date. This could logically occur due to the notice period for a motion to borrower being seven days shorter than a motion to modify a plan.

In the present Motion, Debtor states that they want to purchase the $400,000.00 property so that they can keep their animals and maintain the lifestyle they prefer. Dckt. 27. The motion appears to show a significant lack of appreciation of the benefits and obligations when the extraordinary relief available under the Bankruptcy Code is obtained by a debtor. In their declaration, Debtor clearly states that notwithstanding the purported security concerns, they would not consider renting any other property unless they could also continue to keep their horses on the property. Declaration, Dckt. 30. The security concerns appear to be a minor consideration to wanting house friendly property.

The Declaration was executed on August 28, 2016, but was not filed by counsel for a month. The Trustee's Opposition asserts that the actual purchase by Debtor occurred on August 23, 2016, a week before signing the declaration and more than a month before filing the present Motion. Opposition, Dckt. 38. Debtor admits that the sale has occurred and does not dispute that it occurred on August 23, 2016. Response, Dckt. 44.

It is extremely troubling that Debtor completed the purchase of the property on August 23, 2016, without court approval and in direct violation of the confirmed plan, and hid that fact from the court in the present Motion and the motion to modify the Chapter 13 Plan. No explanation or evidence is provided for how a title company would close escrow for a debtor in bankruptcy without a certified copy of the order authorizing the borrowing and purchase. It appears more plausible that the existence of the bankruptcy case was hidden from the lender and title company, just as the completed sale was actively hidden from this court.

Debtor does disclose in the Supplemental Schedule J that the rent/mortgage expense is ($2,270.00), but does not disclose that this has been increased over what the prior statements were under penalty of perjury. In the box at the bottom of Supplemental Schedule J, is the statement, "Mortgage expense is anticipated after approval of Motion to Incur Debt." No good faith basis has been shown for Debtor making a statement that the mortgage expense is a possible future expense if Debtor already obtained the (not authorized) loan.

Though it is stated that one debtor has lost her job, the reason Debtor can afford the substantially higher housing expense is because debtor James Pettay now reports that his gross monthly income is $7,712.00, a 40% increase from the $5,466.00 gross income upon which the plan payments under the prior confirmed plan were based. In looking at the Original Schedule, Debtor did not list any separate animal expense. Dckt. 1 at 28. Debtor did list a purported additional expense of $100.00 a month for "Misc expenses while driving on road for work." *Id.*

However, on the Supplemental Schedule J (Dckt. 36), the "Misc expenses while driving on road for work" have disappeared. No testimony why the prior expense stated under penalty of perjury has disappeared. Instead, a new $100.00 per month expense appears on Supplemental Schedule J—"Animal Expenses." It appears that Debtor may have intentionally misidentified the animal expense under penalty of perjury to hide it from the court, the Chapter 13 Trustee, and creditors.

The present Motion does not seek retroactive authorization to incur the debt and purchase the property. Thus, any relief granted thereto would be ineffective to "bless" the prior unauthorized acts of Debtor.

The credibility of Debtor is further undercut by failing to seek such retroactive approval, but instead, a month after Debtor had closed the escrow, to misrepresent to the court that Debtor was seeking authorization for a future transaction.

It is unfortunate when a debtor has prosecuted a case for four years and then stumbles when he or she comes around the last turn and is ready to head down the homestretch. But in this case, it appears that there was not a recent stumble, but an improper manipulation of the bankruptcy laws continuing since the commencement of this bankruptcy case. The present Motion, and the upcoming motion to modify, appear to just be further steps by Debtor to get bankruptcy relief on Debtor's terms— "darn any laws and rules."

If Debtor and counsel had come to the court to seek retroactive approval and pleaded "this least sophisticated consumer debtor made a mistake," the court would at least have had something to work with. If they had done so, the court could have considered how Debtor could cut other expenses to come up with a good faith amount to fund the plan and let the Debtor keep the $400,000.00 horse property.

But Debtor and counsel chose not to do so, instead boxing the court in and demanding that the court approve the loan and next the modified plan because, "Debtor has insured that there is nothing else the court can do." The federal judicial process is not one in which one of the parties becomes the martinet who writes the laws, dictates to the court the outcome, and then sticks orders in front of the court and pull the marionette strings to sign the order.

Debtor has not proceeded in good faith in presenting the present motion to the court. Debtor has not acted under the confirmed plan in good faith. Debtor is not seeking authorization to obtain a loan in the future (for a loan secretly obtained in the past) in good faith. No sufficient grounds have been given for the court to approve entering into a future loan when no such loan exists. No relief from retroactive approval has been sought, and to the extent it could be inferred that retroactive approval for the undisclosed loan from the pleadings, not grounds for such relief has been provided.

The motion is denied.

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

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

4.	**16-25208-E-13**	**WILLIAM MARKLEY AND**	**OBJECTION TO DISCHARGE BY**
	DPC-1	**SANDRA GORDON-MARKLEY**	**DAVID P. CUSICK**
		Len ReidReynoso	**8-26-16 [14]**

Final Ruling: No appearance at the October 18, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on August 26, 2016. By the court's calculation, 53 days' notice was provided. 28 days' notice is required.

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

The Objection to Discharge is sustained.

David Cusick, the Trustee ("Objector"), filed the instant Objection to Debtor's Discharge on August 26, 2016. Dckt. 16.

The Objector argues that William Markley and Sandra Markley ("Debtor") are not entitled to a discharge in the instant bankruptcy case because the Debtor previously received a discharge in a Chapter 7 case.

The Debtor filed a Chapter 7 bankruptcy case on August 19, 2014. Case No. 14-28409. The Debtor received a discharge on November 25, 2014. Case No. 14-28409, Dckt. 24.

The instant case was filed under Chapter 13 on August 8, 2016.

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

Here, the Debtor received a discharge under 11 U.S.C. § 727 on November 25, 2014, which is less than four years preceding the date of the filing of the instant case. Case No. 14-28409, Dckt. 24. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), the Debtor is not eligible for a discharge in the instant case.

Therefore, the objection is sustained. Upon successful completion of the instant case (Case No. 16-25208), the case shall be closed without the entry of a discharge, and Debtor shall receive no discharge in the instant case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Discharge filed by David Cusick, the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to Discharge is sustained.
>
> **IT IS FURTHER ORDERED** that, upon successful completion of the instant case, Case No. 16-25208, the case shall be closed without the entry of a discharge.

5.	**16-25208-E-13 DPC-2**	**WILLIAM MARKLEY AND SANDRA GORDON-MARKLEY Len ReidReynoso**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 9-21-16 [18]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on September 21, 2016. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that William Markley and Sandra Markley ("Debtor") failed to appear at the First Meeting of Creditors held on September 15, 2016. Debtor's counsel advised the Trustee on or around August 19, 2016, that he would be out of town and would be unable to attend the Meeting of Creditors. The meeting was continued to 11:00 a.m. on October 13, 2016.

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

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

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

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

6. 15-24309-E-13 KAREN PACOL — MOTION TO MODIFY PLAN
PGM-1 Peter Macaluso — 9-12-16 [63]

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

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

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 September 12, 2016. By the court's calculation, 36 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is granted.

Karen Pacol ("Debtor") filed a Motion to Confirm Modified Plan September 12, 2016. Dckt 63.

David Cusick, the Chapter 13 Trustee, filed a Response to the instant Motion on October 4, 2016. Dckt. 69. The Trustee's Response states that Section 2.06 of the Debtor's plan states that $2,650.00 in additional attorney's fees shall be paid through the Plan. However, Debtor's Plan confirmed on July 28, 2015, provides for only $2,310.00 to be paid through the Plan. The Response indicates that $1,300.07 has

been paid to date with $1,009.93 remaining to be paid. The Trustee requests that this be corrected in the order confirming.

Debtor filed a Reply on October 11, 2016. Dckt. 72. Debtor states that the amount listed is a typographical error. Debtor requests that the amount be corrected to reflect $2,310.00 in fees.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Trustee's objection is well-taken and can be corrected in the order confirming the plan.

After the Debtor corrects Section 2.06 of the Plan to state that "additional fees of $2,310.00 shall be paid through the plan," 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 September 12, 2016, as amended to state that the additional attorneys' fees to be paid through the plan are $2,310.00, is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, which states the amendment, 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.

7. 16-25115-E-13 DPC-1 | **ANTHONY BORTKO** **Candace Brooks** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **9-21-16 [17]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on September 21, 2016. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that the Debtor failed to appear at the First Meeting of Creditors held on September 15, 2016. Debtor's counsel advised the Trustee on or around September 6, 2016, that she would be out of town and would be unable to attend the Meeting of Creditors. The meeting was continued to 11:00 a.m. on October 13, 2016.

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

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.

8. **14-31916-E-13 JMC-6** | **RUPERT/JOSEFINA ARENAS** **Joseph Canning** | **MOTION TO MODIFY PLAN** **8-31-16 [114]**

NO APPEARANCE OF DEBTORS' COUNSEL REQUIRED AT HEARING.

COURT POSTED AS TENTATIVE IN THE EVENT THAT DEBTOR HAD POSSIBLE AMENDMENT RATHER THAN FILING NEW PLAN.

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

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

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 31, 2016. By the court's calculation, 48 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is denied without prejudice.

Rupert Arenas and Josefina Arenas ("Debtor") filed a Motion to Confirm Modified Plan August 31, 2016. Dckt 114.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response to the instant Motion on October 4, 2016. Dckt. 121. The Trustee notes the following points:

A. The proposed Modified Plan lists new amounts for priority creditors, Franchise Tax Board ("FTB") and Internal Revenue Service ("IRS"). The Debtor lists an additional $3,000.00 for the FTB and an additional $43,000.00 for the IRS compared to the prior amended plan. The FTB filed a Proof of Claim with a priority amount of $690.23, which was paid in full as of May 31, 2016. The IRS filed a proof of claim with a priority amount to $45,680.02, which was paid in full as of May 31, 2016. The Trustee is uncertain where the Debtor came up with the additional amounts.

B. Creditor Bank of America has filed an amended Proof of Claim, reducing the claim amount to $10,077.28. This is the same amount the Trustee has disbursed for principal and interest.

DEBTOR'S REPLY

Debtor filed a Reply on October 11, 2016. Dckt. 124. Debtor's Attorney states that after speaking to both the FTB and the IRS, they both intend to file amended claims. Additionally, Debtor's Attorney states that the FTB will be increasing its claim by $7,688.00, not the $3,000.00 listed in the proposed Modified Plan. Debtor will need to prepare a new Modified Plan.

Additionally, Debtor's next Modified Plan will address the amendment made by Bank of America to its claim. Debtor has not requested that the court confirm or deny without prejudice the instant Motion.

DISCUSSION

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

The Trustee's statements and the Debtor's response are well-taken.

Debtor's Amended Chapter 13 Plan filed July 30, 2015, Dckt. 88, lists priority debts to be paid to the FTB in the amount of $690.23 and to the IRS in the amount of $45,680.02. The proposed Modified Plan, however, lists $3,690.23 to be paid to the FTB and $88,680.02 to be paid to the IRS. The Proof of Claim filed by the FTB indicates a priority claim of $690.23, while the IRS's Amended Proof of Claim indicates a priority claim of 45,680.02. Both Proofs of Claims assert the amount listed in the Prior Amended Chapter 13. The Debtor's Declaration gives no indication as to where these new amounts come from or why they have increased. The court cannot confirm a plan with such contrasting values without any indication for the differences. 11 U.S.C. §1325(b).

Additionally, Debtor's Reply notes that the Debtor will need to file another Modified Plan based upon information that has come forth since Debtor filed the instant Motion. Debtor has not requested that the court deny the instant Motion without prejudice but has indicated that a new plan will be filed. Accordingly, there is no reason for the court to confirm the Modified Plan at this stage until all proposed changes have been made to the Plan.

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

9. **16-26217-E-13** **ROSANA/ARTURO BUSTOS** **MOTION TO EXTEND AUTOMATIC STAY**
SDH-1 **Scott Hughes**
9-21-16 [11]

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

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

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

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 September 21, 2016. By the court's calculation, 27 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. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Extend the Automatic Stay is denied.

Arturo Bustos and Rosana Bustos ("Debtor") seek to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond thirty days in this case. This is the Debtor's second bankruptcy petition pending in the past year. The Debtor's prior bankruptcy case (No. 15-20029) was dismissed on November 9, 2015, after Debtor failed to make the plan payments. *See* Order, Bankr. E.D. Cal. No. 15-20029, Dckt. 38, November 9, 2015. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor thirty days after filing of the petition.

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

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); *see also* Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209–10 (2008). 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?

In re 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. The previous case was filed only by Co-Debtor Rosana Bustos in an attempt to stop a trustee's sale on their home. The Debtor failed to make plan payments because of insufficient income to afford the plan and because of not receiving an anticipated loan modification.

Now, both Co-Debtors are filing and believe they have sufficient income to successfully complete the plan. Co-Debtor Arturo Bustos now receives extra income from his employment as an Uber driver. Additionally, the adult children and mother currently reside with the Co-Debtors and can supply additional support. Co-Debtor Arturo Bustos is also increasing his employment hours with his regular job.

TRUSTEE'S OPPOSITION

The Trustee filed an opposition on October 4, 2016. Dckt. 20. Trustee believes that the present case was not filed in good faith because the mortgage arrears have increased by $18,000.00 (twelve months of payments) between the prior case's dismissal and the filing of the current case. Furthermore, the Debtor is now asserting $38,276.27 in general unsecured debt, whereas the previous case reported $0.00 in general unsecured debt. Trustee requests that the motion be denied.

In reviewing the court's files, while this is Mrs. Bustos's second bankruptcy case in the past year, it is her third bankruptcy case and the second bankruptcy case for the co-Debtor since March 2014. A review of the prior files discloses the following:

Chapter 13 Case 15-20029 Debtor: Rosana Bustos Counsel: Scott Hughes	Filed.....January 15, 2015 Dismissed..... November 9, 2015

	1. In dismissing the case, the court determined: "The information previously provided by Debtor under penalty of perjury demonstrates that the Debtor does not have the financial ability to cure the arrearage, having only $2,372.00 in monthly projected income. Amended Schedule I, Dckt. 21at 1–3; Amended Schedule J, Id. at 4–6; and Declaration, Dckt. 20. The cure payment and arrearage are 230% of Debtor's projected disposable income and are slightly less than the Debtor's monthly income, including the $2,100 a month contribution make by three other family members." 15-20029; Civil Minutes, Dckt. 36. 2. Proof of Claim No. 2 filed by Wells Fargo Bank, N.A. in the prior case lists a pre-petition arrearage of $43,075.25, and a total claim amount of $489,411.87.
Chapter 7 Case 14-22508 Debtors Arturo Bustos Rosana Bustos Counsel James Bianchi	Filed.....March13, 2014 Discharge entered..... October 28, 2014 Case Closed.....November 3, 2014
	1. No adversary proceedings to determine any debt nondischargeable. 2. Trustee report of no distribution. 3. Wells Fargo Bank, N.A. secured claim in the amount of $484,520.36, with a pre-petition arrearage of $34,123.13, filed in the 2014 case. 14-22508; Proof of Claim No. 11. 4. The Wells Fargo Bank, N.A. secured claim is listed in the amount of $461,809 on Amended Schedule D, and the property is stated to be worth $388,000.00, showing a negative equity of ($73,809). *Id.*; Dckt. 30.

In the prior Chapter 13 case, Debtor stated that she had no creditors with any unsecured claims. 15-20029; Schedule F, Dckt. 13, and Chapter 13 Plan, Dckt. 11. On Schedule J, Debtor stated having monthly income of $5,583.00, of which $2,100.00 consisted of "contributions" from Debtor's mother-in-law, daughter, and son. Amended Schedule I. Debtor stated under penalty of perjury having expenses of ($3,211.00) on Amended Schedule J, from which Debtor then computed having Monthly Net Income of $2,372.00. Debtor's Chapter 13 Plan required a monthly plan payment of $2,372.00, which was necessary to pay Debtor's attorneys' fees of $3,000.00, the Chapter 13 Trustee's fee, the current monthly mortgage

payment of $1,423.00 on the Wells Fargo Bank, N.A. secured claim, and the arrearage payment of $683.33 to Wells Fargo Bank, N.A. on its secured claim (computed on a $41,000.00 stated arrearage in the Plan). *Id.*; Plan, Dckt. 11. The Plan restated that Debtor had $0.00 in general unsecured or priority unsecured claims.

The ability to fund the Chapter 13 Plan was dependent on the $2,100.00 month "contribution," without which Debtor demonstrated no ability to fund a plan. A review of Amended Schedule J indicates some holes in the economic calculation. Debtor stated under penalty of perjury to having three dependents—a twenty-seven-year-old son, a twenty-five-year-old daughter, and an eighty-one-year-old mother in law. It is unclear how these are "dependents" when they are having to contribute $2,100.00 per month for Debtor to fund the plan.

On Amended Schedule J, Debtor states under penalty of perjury that she has:

A.	Home Maintenance Expenses of	$ 0.00
B.	Food and Housekeeping Supplies Expense of	$1,200.00
C.	Transportation Expense of	$ 550.00

Some of these expense appear unreasonably low, such as there being $0.00 of home maintenance expenses, and others high, such as $1,200.00 food and housekeeping for Debtor and her spouse (presumably the other adult family members who had the extra money to contribute to the plan, first made sure they could pay their own food and housing expenses).

Debtor confirmed her Chapter 13 Plan in the prior case, with the order filed on March 25, 2015. On October 7, 2015, just six months later, the Chapter 13 Trustee filed a motion to dismiss the prior Chapter 13 case. *Id.*; Motion, Dckt. 30. As of the October 7, 2015 filing, the Trustee alleged that Debtor was in default for the September and August 2015 payments. Debtor's response to the motion to dismiss was that she would bring the payment current. However, such payment was not made, and the prior Chapter 13 case was dismissed. *Id.*; Civil Minutes, Dckt. 36.

Debtor and co-Debtor filed the current Chapter 13 case on September 19, 2016. On Schedule F, Debtor now lists, notwithstanding having obtained a discharge of all debt in 2014, now having $38,276.27 of general unsecured debt. Dckt. 9. The most significant is a $26,852.00 debt owed to Grant & Weber for 2015 credit card debt. *Id.* at 15. On Schedule I, Debtor now lists $1,300.00 in net business or rental income. *Id.* at 21. Now, the contributions of the mother-in-law, son, and daughter have been reduced to $900.00. The required business statement showing gross income and all expenses in getting to $1,300.00 net income is not attached.

Debtor now states that Debtor and co-Debtor have $5,938.00 in take-home income. *Id.* On Schedule J, Debtor stills lists having a twenty-five-year-old daughter, twenty-seven-year-old son, and eighty-one-year-old mother in law as dependants. *Id.* at 23. No income for theses "dependents" is disclosed.

Debtor's expenses on Schedule J total $3,218.00, to yield $2,720.00 of Net Monthly Income. Again, though owning a home, Debtor has no home maintenance or repair expenses. Debtor and co-Debtor

still claim that their reasonable and necessary food and home supply expense is $1,200.00 a month. Debtor lists a monthly electricity and gas expense of $450.00 ($5,400.00 per year).

For the plan filed in this case, Debtor proposes making $2,720.00 per month payments. Dckt. 5. Debtor now commits to making a monthly current installment payment of $1,423.11 to Wells Fargo Bank, N.A., and an additional $1,000.00 monthly payment on a $60,000.00 arrearage. Debtor will also pay $3,000.00 to counsel. Debtor proposes making a 0.00% dividend to the post-2014 discharge debts. However, no arrearage payment will be made until counsel is pre-paid the $3,000.00 for his fees in the first three months of the plan.

The Debtor has not sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay. Debtor offers no credible (if any) explanation as to how default occurred in the prior case (shortly after generating payments for Debtor's attorney) and why such default is not likely now. Debtor offers no explanation as to why this plan is feasible or why Debtor has incurred such substantial unsecured debt since the 2014 Chapter 7 discharge. Debtor offers no explanation as to why three adults are listed as "dependents."

In the declaration, Debtor carefully avoids providing any testimony about the prior default and dismissal. Dckt. 13. The following are stated as "dramatic change of circumstances" that warrant this relief:

A. Debtor fell behind in payments because Debtor sought a loan modification. (This provides no explanation as to the reason for a default in payments.)

B. Debtor has some "additional income" from some non-specific "new business."

C. Debtor has two working children who will provide contributions (but who provided greater contribution in the prior case, in which Debtor still defaulted in payments).

D. Debtor assures the court that Debtor has "sufficient income."

E. The prior bankruptcy case was filed to stop a foreclosure sale.

F. Debtor believes that there are "dramatic changes" since the last case.

This fails to provide clear and convincing evidence to rebut the presumption of bad faith. The testimony and Schedules show little more than Debtor could not make the payments, Debtor cannot make the payments, and Debtor will again default.

The Motion is denied. FN.1.

FN.1. In denying the Motion, the court notes that it may be of limited consequence in that 11 U.S.C. § 362(c)(3)(A) terminates the automatic stay "as to the debtor," as opposed to terminating the automatic stay in the case, as Congress provided in 11 U.S.C. § 362(c)(4).

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 to Extend Automatic Stay is denied.

10. 15-28322-E-13 LISA TOLBERT MOTION TO MODIFY PLAN
SJS-5 Matthew DeCaminada 9-7-16 [88]

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

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

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 7, 2016. By the court's calculation, 41 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is denied without prejudice.

Lisa Tolbert ("Debtor") filed a Motion to Confirm Modified Plan on September 7, 2016. Dckt 88.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition to the Instant Motion on October 4, 2016. Dckt. 102. The Trustee Opposes Confirmation on the basis that:

A. The Debtor does not appear to have the ability to make the proposed plan payment of $285.00. The Debtor filed an Amended Schedule J reflecting an ability to pay $203.00.

B. The Debtor incorrectly states in Section 6.01 of the proposed Modified Plan a total paid of $1,600.00 through August 2016. The Debtor has paid a total of $1,800.00 through August 2016 with the last payment of $200.00 posted on August 30, 2016.

DISCUSSION

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

The Trustee's objections are well-taken. While the second objection may have been able to be corrected in an order confirming, the Trustee's first objection is problematic.

The Debtor may not be able to make plan payments or comply with the plan under 11 U.S.C. § 1325(a)(6). The Debtor's amended Schedule J, filed on September 7, 2016, lists a $203.00 monthly net income, while the Plan provides for a $285.00 monthly payment. Taken together, this suggests that the Plan is not feasible. *See* 11 U.S.C. § 1325(a)(6). Without an accurate picture of the Debtor's financial reality, the court cannot determine whether the plan is confirmable. Therefore, the objection is sustained.

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

11. **12-21023-E-13 WW-4** | **SALVADOR/LAURA CORTES** **Mark Wolff** | **CONTINUED MOTION TO INCUR DEBT** **8-18-16 [80]**

Final Ruling: No appearance at the October 18, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on August 18, 2016. By the court's calculation, 33 days' notice was provided. 14 days' notice is required.

The Motion to Incur Debt 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. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The hearing on the Motion to Incur Debt is continued to 3:00 p.m. on November 3, 2016.

Salvador Cortes and Laura Cortes ("Debtor") seek permission to refinance their residence, commonly known as 9542 Alta Mesa Road, Wilton, California ("Property"). The total loan amount is $360,000.00, with monthly payments of $2,375.80 for thirty (30) years and including 3.5% interest.

Debtor states the following grounds with particularity in accordance with Federal Rule of Bankruptcy Procedure 9013:

A. "Debtors filed this case on or about January 19, 2012.

B. At the time this case was filed Debtors owned their residence located at 9542 Alta Mesa Road, Wilton California subject to a loan in favor of Indymac Bank serviced by OneWest. The Indymac Bank loan was a construction loan and the full amount is due.

C. Pursuant to the terms of Debtors' confirmed Chapter 13 Plan IndyMac is being paid as a Class 1 Creditors with an additional provision which requires that [they] refinance the property and pay IndyMac in full prior to the completion of the Chapter 13 Plan. See Declaration of Salvador Cortes and Laura Cortes which is being filed concurrently with this motion.

D. Debtors have looked into refinancing and have now found a lender willing to refinance their property. Debtors have received an estimate of loan terms which was memorialized in a 'Pre-Application Worksheet', a copy of which is attached hereto as Exhibit A.

E. Debtors wish to proceed with the refinance through American Pacific Mortgage Corp. While the terms are not yet locked, the estimated terms of the loan are as follows:

1.	Loan amount:	$360,000.00
2.	Term	30 years
3.	Interest Rate	3.5%
4.	Monthly payment (with P&I)	$2,375.80

F. Debtors are current in payments due under their Chapter 13 Plan. The refinance is also required under the terms of their plan.

G. The new debt is a single loan incurred only to refinance the existing debt and Debtors will not receive cash out of the refinance.

H. The only security for the new debt will be the property being refinanced.

I. All creditors with liens and security interests encumbering the property will be paid in full from the proceeds of the refinance.

J. The new monthly payment will be less than $2,500.00."

Dckt. 80.

TRUSTEE'S RESPONSE

The Trustee filed a Response on September 16, 2016. Dckt. 89. The Trustee states that he has no opposition to the instant Motion based upon the proposed loan terms.

SEPTEMBER 20, 2016 HEARING

At the hearing, the court continued the matter for final hearing to 3:00 p.m. on October 18, 2016. Dckt. 93. The court required the Debtor to file a copy of the final loan agreement or term sheet stating the significant terms of the loan on or before October 11, 2016.

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).

Terms of Current Plan

Debtor's confirmed Amended Chapter 13 Plan, Section 6.01 - Additional Provisions for Section 2.08 and 2.11, provides the following:

> "Debtors intend to refinance their residence prior to the completion of this Chapter 13 case. Through any refinance OneWest Bank, FSB and all other claims secured by the residence shall be paid in full in a manner consistent with this Chapter 13 Plan. Upon the refinance Debtors intend to file a modified Chapter 13 Plan to adjust payments and provide for the new lender to be paid directly."

This provision, commonly referred to as an "Ensminger Additional Provision," provides terms for a debtor to confirm a plan, proceed in the prosecution of a bankruptcy case, provide adequate protection to creditors having secured claims, and the debtor and creditors pursue in good faith a loan modification which will be part of a plan. The possible modification of the plan would follow the loan modification, with the modification to be obtained either by a noticed motion or an ex parte motion (depending on the impact of the loan modification on other creditors).

Status of the Refinance Proposal

In the Motion, Debtor states that they do not yet have an actual proposed loan modification agreed to with the new lender, but only possible proposed items.

Debtor has not filed an actual refinance agreement for the court to review, but instead, they have filed a "Pre-Application Worksheet" (Exhibit A, Dckt. 83) that states at the top in bold: "Your actual rate, payment and costs could be higher. Get an official Loan Estimate before choosing a loan." The court is concerned that Debtors have presented terms for the Motion that are not concrete and are subject to change. Within the "Pre-Application Worksheet," the court sees that the projected loan amount is different than stated in Debtors' Motion. The "Pre-Application Worksheet" lists a total loan amount of $366,300.00.

While not expressly stated in the Motion or the supporting Declaration (Dckt. 82), it appears that at this junction in Debtor's attempts to refinance the existing secured debt (which was construction, not long term financing), it appears that the possible lender is seeking confirmation that the Debtor is actually the correct party to incur this new debt, with court authorization.

While the court cannot pre-authorize a debtor to go out and get a loan on whatever terms wanted, and if they turn out different to just come back and tell the court after the fact, the court can treat this as a motion for authorization to proceed with finalizing the loan and setting the matter for a final hearing.

The court authorizes the Debtor to proceed in finalizing the terms for a loan on the following general terms:

A. Lender.....American Pacific Mtg. Corp. dba First Priority Management.

B. Collateral.....9542 Alta Mesa Rd, Wilton, California

C. Interest Terms

1. Rate.....Not to Exceed 3.75%
2. Interest Rate Terms.....Fixed

D. Term.....Not to Exceed 360 Months

E. Loan Amount.....Not to Exceed $370,000.00

F. Use of Loan Proceeds

1. Pay Claims Secured by Collateral
2. Pay Costs and Expenses Related to Loan
3. No Additional Monies for Debtors or Other Creditors (except as authorized by separate order of this court)

G. Estimated Payments From Loan Escrow

1. Stated in the Pre-Application Worksheet (Dckt. 83)

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 Salvador Cortes and Laura Cortes, the Chapter 13 Debtors under the confirmed Chapter 13 Plan in this case, are authorized to finalize the terms and conditions of a loan to refinance the claims secured by the real property commonly known as 9542 Alta Mesa Road, Wilton, California. The general terms of the loan presented to the court are stated in the Pre-Application Worksheet (Dckt. 18) as follows:

A. Lender.....American Pacific Mtg. Corp. dba First Priority Management.

B. Collateral.....9542 Alta Mesa Rd, Wilton, California

C. Interest Terms

1. Rate.....Not to Exceed 3.75%
2. Interest Rate Terms.....Fixed

D. Term.....Not to Exceed 360 Months

E. Loan Amount.....Not to Exceed $370,000

F. Use of Loan Proceeds

1. Pay Claims Secured by Collateral
2. Pay Costs and Expenses Related to Loan
3. No Additional Monies for Debtors or Other Creditors (except as authorized by separate order of this court)

G. Estimated Payments From Loan Escrow

1. Stated in the Pre-Application Worksheet (Dckt. 83)

CONTINUANCE OF HEARING

Debtor has requested a continuance to afford Debtor and Lender the opportunity to address an issue that has arisen concerning the specification of the final terms of the proposed loan. The court continues the hearing to afford these parties time to continue in their good faith efforts to put into place the terms for the loan.

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 Authorization to Enter Into Post-Petition Financing filed by Salvador Cortes having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion is continued to 3:00 p.m. on November 3, 2016. Supplemental Pleadings shall be filed and served on the lender, Chapter 13 Trustee, and U.S. Trustee on or before October 25, 2016.

12. 16-24224-E-13 JONATHAN/MARITES SUSAS
Mohammad Mokarram

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY CREDITOR SUNTRUST MORTGAGE, INC.
8-19-16 [22]

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Chapter 13 Trustee on August 19, 2016. By the court's calculation, 25 days' notice was provided. 14 days' notice is required.

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

The Objection is sustained, and the plan is not confirmed.

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

A. Jonathan Susas and Marites Susas's ("Debtor") Plan fails to provide for Creditor's claim. The Plan does not provide for arrears owed to the Creditor. Counsel for Debtor and Creditor have been negotiating a resolution, but one has not been reached yet.

SEPTEMBER 13, 2016 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on October 18, 2016. Dckt. 26.

DISCUSSION

The Creditor's objection is well-taken.

Creditor holds a deed of trust secured by the Debtor's residence. Creditor has filed a timely proof of claim in which it asserts pre-petition arrearage of $4,769.42. The Plan does not propose to cure these arrearages. Because the Plan does not provide for the surrender of the collateral for this claim, the Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments. *See* 11 U.S.C. §§ 1322(b)(2), (b)(5) & 1325(a)(5)(B). Because it fails to provide for the full payment of arrearages, the Plan cannot be confirmed.

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

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

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

13. 16-24626-E-13 **RONALD DAVIS** **OBJECTION TO CONFIRMATION OF PLAN BY MTGLQ INVESTORS, L.P.**
Michael Hays **9-15-16 [22]**

Final Ruling: No appearance at the October 18, 2016 hearing is required.

The case having previously been 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 Dismiss 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 without prejudice as moot, the case having been dismissed.

14. 16-24626-E-13 **RONALD DAVIS** **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK**
DPC-1 **Michael Hays** **9-14-16 [18]**

Final Ruling: No appearance at the October 18, 2016 hearing is required.

The case having previously been 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 Dismiss 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 without prejudice as moot, the case having been dismissed.

15. **16-25131-E-13** **IYANAH FLETCHER**
DPC-1 **Richard Jare**

AMENDED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
9-27-16 [35]

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on September 21, 2016. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

A. The Debtor admitted at the First Meeting of Creditors that she has not filed her tax returns during the four-year period preceding the filing of the Petition, specifically years 2012 through 2015. The Meeting of Creditors was continued to November 10, 2016, at 11:00 a.m. to allow the Debtor time to file those returns.

B. According to the Trustee's calculations, the Plan will complete in eighty-seven (87) months as opposed to the sixty (60) months proposed due to the Proof of Claim filed by the Internal Revenue Service.

C. The Plan fails the Chapter 7 Liquidation Analysis. The Debtor is proposing a 0% dividend to unsecured creditors. The Debtor is married, and her spouse is not included

in the bankruptcy, but Debtor has failed to file a Spousal Waiver for the use of the California State Exemptions under California Code of Civil Procedure § 703.140.

D. The Debtor has failed to provide the Trustee with Employer Payment Advices received sixty days prior to filing. The Trustee has received one earning statement for the pay date July 8, 2016.

The Trustee's objections are well-taken.

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 the Debtor is married, and the spouse is not included in the bankruptcy, yet the Debtor had not filed a Spousal Waiver for the use of the California State Exemptions as required by Cal. Code. Civ. Proc. § 703.140(a)(2). A review of the Docket shows that Debtor filed the Spousal Waiver on October 6, 2016. Dckt. 41. While this resolves the Trustee's third objection, the Trustee's other objections are still concerning.

The Debtor has failed to file all tax returns for all taxable periods ending during the four-year period ending on the date of the filing of the petition. Specifically, Debtor has not filed Federal Income Tax Returns for 2012, 2013, 2014, and 2015. This is cause to deny confirmation. 11 U.S.C. §§ 1308(a) and 1325(a)(9).

Debtor is in material default under the plan because the plan will complete in more than the permitted sixty months. According to the Trustee, the plan will complete in eighty-seven months due to the Proof of Claim filed by the Internal Revenue Service in the amount of $48,554.42, with $19,549.51 entitled to priority. Court Claim No. 3. This exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

Finally, the Debtor has not provided the Trustee with employer payment advices for the sixty-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv). This is reason to deny confirmation. 11 U.S.C. § 1325(a)(1).

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

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

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

16. 13-31632-E-13 JANELLE GILMORE MOTION TO MODIFY PLAN
PGM-6 Peter Macaluso 9-2-16 [149]

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

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

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 2, 2016. By the court's calculation, 46 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is denied.

Janelle Gilmore ("Debtor") filed a Motion to Confirm Modified Plan on September 22, 2016. Dckt 149.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition to the instant Motion on October 4, 2016. Dckt. 158. The Trustee opposes confirmation on the basis that:

A. The Plan will complete in sixty-two (62) months as opposed to the sixty (60) months proposed. The Plan pays 0% to creditors with unsecured claims a proposed payment of $570.00 per month, approximately $532.32 per month after Trustee fees. Approximately $10,979.67 in principal and interest remains to be paid to creditors with secured claims, and $2,382.02 remains to be paid to creditors with priority for a total of $13,361.69. The Plan as proposed will complete in approximately twenty-six (26) months. The Debtor has already completed thirty-six (36) months of the Plan, bringing the duration of the Plan to sixty-two (62) months.

B. Debtor's supporting Declaration appears to be the exact same as the as the Debtor's prior Declaration filed on June 16, 2016 (Dckt. 131), with the exception of an updated amount paid and the proposed plan payments start date.

DEBTOR'S REPLY

Debtor filed a Reply on October 11, 2016. Dckt. 161. Debtor requests that the proposed plan payment be changed to $620.00.

DISCUSSION

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

The Trustee's objections are well-taken.

As amended by Debtor's Reply, the Plan proposes payments of $620.00 per month. After Trustee fees, approximately $582.32 per month will go to creditors. With a total of $13,361.69 remaining to be paid to secured and priority claims, the Plan will complete in twenty-three months (13,361.69 / 582.32 = 22.9456). With the Debtor being thirty-six months into the Plan, the Plan will take fifty-nine months to complete (23 + 36 = 59). This is withing the maximum sixty months allowed under 11 U.S.C. § 1322(d). Therefore, that portion of the Trustee's objections is overruled.

Additionally, though, the Debtor has failed to explain the changes listed on the income and expense exhibits (using the schedules I and J forms). Dckt. 132. Debtor states under penalty that her current income and expense information is provided as "exhibit" to the Motion, but Debtor does not identify any specific exhibit or state under penalty of perjury that any specific information is true and correct under penalty of perjury. Because it is so easy for a declarant to identify "Exhibit" B as being correct income information, the court questions whether Debtor has ever seen the "exhibits" she nonspecifically references.

Looking and the income and expense Debtor's income and expenses have both increased by $619.58. The Debtor's prior plan was denied based on the Debtor's failure to sufficiently explain the change in income and expenses. The court previously stated:

> First, the Trustee is correct that the Debtor fails to explain the change in income and expenses. The Trustee's calculations determined that there has been an increase to Debtor's income and expenses of $619.00. Rather than addressing why there has been a significant income, the Debtor's reply merely addresses the line in the Debtor's declaration. The concern is that the Debtor has failed to explain how there have been these changes rather than just the Debtor inaccurately stating that her income and expenses have not changed. The court and other parties in interest cannot determine the viability and feasibility of the plan when the Debtor has not provided any testimony or evidence that the budget is correct and accurate. FN.1.
>
> ---
>
> FN.1. Adding to the Debtor's lack of credibility is that the updated Schedule I and J filed as Exhibits are stated to be both "Amended" and "Supplemental" Schedules. As "Amended Schedules, these changes date back to the commencement of this case back in 2013. However, stating that they are "Supplemental" Schedules, Debtor states under penalty of perjury that they represent the changed finances as of May 2016. The court is left in a quandary as to which statement under penalty of perjury to believe.
>
> ---

Here, the Debtor has filed the same declaration essentially. The only changes are an updated amount paid, payment start date, and removal of the sentence, "My income and expenses have not changed significantly since October 2016." Debtor indicated that this was a typographical error in a Reply to the Trustee's prior Opposition. Dckt. 138. Debtor has chosen not to address the prior identified deficiencies, but merely run it by the court a second time.

On Exhibit 2, identified as "Amended Schedules I & J," which if actually filed, would mean that all of the prior income and expense information is inaccurate. Comparing this information to the prior Amended Schedules I and J filed under penalty of perjury by Debtor, Dckt. 31, some significant differences include the following:

Income	**October 24, 2013 Amended Version, Dckt. 31**	**June 16, 2016 and September 2, 2016 Information Stated on Exhibit 2, Dckt. 153.**
Monthly Take Home Income	$2,340	$2,980
Additional Income DSO/Alimony/Family Support	$400	$717
Expenses		
Total	($2,240)	($3,697)
Net Monthly Income/Projected Disposable Income	$500	$570
Specific Expenses		
Rent	($925)	($950)
Phone, Cable, TV, Internet	($90)	($230)
Food	($300)	($600)
Clothing	($25)	($100)
Personal Care Products	$0	($150)
Transportation	($200)	($320)

If the court assumes that Debtor is stating that the current financial information is the accurate information, she offers no explanation for the 100% increase in her food expense. Debtor has a 300% increase in her clothing expense. Debtor has a 60% increase in her transportation expense, but no explanation is provided. It may be that in 2013 when she stated her expenses under penalty of perjury, those expenses were intentionally understated to create the false appearance that there was a feasible plan when

none existed. Or it may be that such expenses were, and are, accurate, and the current expenses are intentionally overstated to avoid paying monies to creditors. Neither of these paints the Debtor and counsel in a good (faith) light.

While Debtor testifies that she has a roommate who moved out and therefore Debtor has more expenses, it does not appear that such "expenses" related to a lost roommate. Debtor's rent does not double. Debtor's utility bill does not double. Debtor offers no explanation why Debtor's food bill increases when a roommate leaves.

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.

17. 16-22732-E-13 DANNY RUE
DWR-3 Pro Se

MOTION TO VALUE COLLATERAL OF ANANA BLISS REVOCABLE LIVING TRUST
8-26-16 [50]

Final Ruling: No appearance at the October 12, 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 26, 2016. By the court's calculation, 53 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen (14) days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Value secured claim of Anna Bliss Revocable Living Trust ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $0.00.

The Motion to Value filed by Danny Rue ("Debtor") to value the secured claim of Anna Bliss Revocable Living Trust ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 4831 Cibola Way, Sacramento, California ("Property"). Debtor seeks to value the Property at a fair market value of $154,900.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

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

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

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

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

No Proof of Claim Filed

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

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on October 4, 2016. Dckt. 69. The Trustee states that the asserted Creditor has not filed a proof of claim, and the holder of the first deed of trust has filed Claim No. 1, secured in the amount of $190,294.14.

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $190,294.14. Creditor's second deed of trust secures a claim with a balance of approximately $35,000.00. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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 Danny Rue ("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 Anna Bliss Revocable Living Trust secured by a second in priority deed of trust recorded against the real property commonly known as 4831 Cibola Way, Sacramento, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $154,900.00 and is encumbered by a senior lien securing a claim in the amount of $190,294.14, which exceeds the value of the Property which is subject to Creditor's lien.

18. 10-46636-E-13 JOSEPH/KIMBERLY OLIVA MOTION TO MODIFY PLAN
DPC-11 Peter Macaluso 9-7-16 [153]

Final Ruling: No appearance at the October 8, 2016 hearing is required.

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

Correct Not Notice Provided. The 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 7, 2016. By the court's calculation, 41 days' notice was provided. 35 days' notice for confirmation of a modified plan is required.

The Motion to Confirm the Modified 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(a)(5). Failure of the respondent and other parties in interest to file written opposition at least fourteen (14) days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Modified Plan is granted.

David Cusick, the Chapter 13 Trustee, filed a Motion to Modify Plan on September 7, 2016. Dckt. 153. The Trustee seeks to modify a plan that is in its seventy-first month to allow the Trustee to disburse the remaining funds to creditors, which would allow Debtor to obtain a discharge. Trustee states that no additional plan payments would be due from the Debtor.

11 U.S.C. § 1329(a) permits the Chapter 13 trustee, in addition to the debtor or a creditor, to modify a plan after confirmation to provide:

> "(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
>
> (2) extend or reduce the time for such payments;
>
> (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan; or
>
> (4) reduce amounts to be paid under the plan by the actual amount expended by the debtor to purchase health insurance for the debtor (and for any dependent of the debtor if such dependent does not otherwise have health insurance coverage). . . ."

The terms of the modification to be made by confirmation of the proposed Modified Chapter 13 Plan (Dckt. 157) as stated by the Chapter 13 Trustee in his motion are:

> "The Trustee seeks to modify a plan that is in the 71st month so that he can disburse the remaining funds on hand to creditors and the Debtors could obtain a discharge. No additional plan payments would be due from the Debtor to the Trustee under the modified plan. Priority, pre-petition secured claims, and unsecured claims would receive the same dividend as they would under the current confirmed plan. Two ongoing mortgage claims: one of Citimortgage Inc. and one for Ocwen Loan Servicing LLC, would not be paid all post-petition payments due from the Trustee, although the Debtor would be required to pay them directly."

Dckt. 153. The reason stated for this amendment, after the sixtieth month of the plan, is that Debtor has tried, but struggled to perform the plan. There have been several defaults, which led to motions to dismiss and promised cures by Debtor to salvage a plan in this case.

The Trustee is holding $1,965.68, which if distributed to creditors holding general unsecured claims, allows the Debtor to complete the promised minimum dividend under the prior confirmed plan. The interests of these creditors are not diminished. Citimortgage, Inc. has received more than sixty months of payments through the Plan and its rights are not being diminished. Ocwen Loan Servicing, LLC has received fifty-seven and seven-tenths of payments—substantially all of the maximum sixty months of payments.

The Chapter 13 Trustee provides the court with proper grounds for confirmation of the modified plan. The modification allows the Debtor, having substantially complied with the prior confirmed plan, to obtain his discharge. It allows the Trustee to distribute the final remaining amounts as the final monthly distribution to creditors.

The Debtors have filed evidence in support of confirmation. No opposition to the Motion was filed by the Debtor or creditors. The modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the 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 is granted, the Chapter 13 Plan filed on September 7, 2016, is confirmed. Counsel for the Chapter 13 Trustee shall prepare an appropriate order confirming the Chapter 13 Plan submit the proposed order to the court.

19. 16-24337-E-13 QUAY SAMONS — OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
DPC-2 Eamonn Foster — 9-14-16 [16]

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on September 14, 2016. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

The Objection to Claim of Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen (14) days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The objection to claimed exemptions is sustained, and the claimed exemptions are disallowed.

The Trustee objects to the Debtor's use of the California exemptions without the filing of the spousal waiver required by California Code of Civil Procedure § 703.140. California Code of Civil Procedure § 703.140, subd. (a)(2), provides:

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

(emphasis added). The court's review of the docket reveals that the spousal wavier was filed on September 19, 20, and 22, 2016. Dckt. 23, 24, and 25.

DEBTOR'S RESPONSE

Debtor filed a Response on September 28, 2016, stating that the spousal waiver has been filed with the court. Dckt. 27.

TRUSTEE'S REPLY

The Trustee filed a Reply on October 11, 2016. Dckt. 31. The Trustee states that on July 29, 2016 before the § 341 hearing, the Trustee's office sent an e-mail to Debtor's counsel, asking if the Debtor was married because Debtor provided conflicting responses in submitted documents. Trustee received an e-mail from Debtor's counsel stating that Debtor is no longer married because he is recently divorced.

At the September 8, 2016 Meeting of Creditors, Debtor stated that he is married, however. Debtor filed the first spousal waiver on September 19, 2016, with language stating "during the pendency of the Chapter 7 Bankruptcy of Quay Samons, filed in the U.S. Bankruptcy Court for the Southern District of California." Dckt. 23 (emphasis from Trustee's Reply). The Trustee informed Debtor's attorney that such language was incorrect, and the Objection to Exemptions would not be withdrawn. Additionally, the Trustee notes that the waiver did not include a case number.

On September 20, 2016, Debtor filed the second spousal waiver. Dckt. 24. That waiver appears to be an exact duplicate of the first spousal waiver, except that the word "Southern" is scratched out and replaced by a handwritten "Eastern." Trustee is alarmed by this document because the signatures are exactly the same and there are no initials of Debtor's counsel next to the changes. The Trustee notes that counsel "seems to have made material changes to a document signed by his client and his spouse without their knowledge or consent."

On September 22, 2016, Debtor filed the third spousal waiver. Dckt. 25. This document appears to be an exact duplicate of the second waiver, and therefore, a duplicate of the first waiver. The notes that the third waiver has the words "Chapter 7" scratched out. The Trustee maintains the same concerns about materially altering a document without client knowledge that he asserts for the second spousal waiver.

Overall, the Trustee asserts that the three versions of the spousal waiver suffer from the same deficiencies:

A. They do not comply with the revised guidelines for document preparation for the Eastern District;

B. They do not refer to a specific case pending in the Eastern District because they each lack a case number;

C. They each refer erroneously to an "Exhibit C" document; and

D. The waiver's last paragraph appears over broad in that it appears to have the parties waive all state exemptions during the pending of this case, instead of limiting it to the waiver of exemptions in a subsequently filed bankruptcy case.

The Trustee suggests that Debtor and his spouse may be able to clear up the Trustee's concerns by submitting declarations stating that they were aware of the changes being made to the documents by counsel.

DISCUSSION

The Trustee's objection is sustained, and the claimed exemptions are disallowed. The evidence presented by the Trustee shows that Debtor is divorced and does not have a spouse. It appears that Debtor is recycling copies of documents for another bankruptcy case to create the inaccurate appearance that Debtor can claim deductions for a married person.

Though on Schedule I Debtor states under penalty of perjury that his spouse is employed, no income is listed. Dckt. 1 at 29. No income pre-petition bankruptcy information is disclosed on the Statement of Financial Affairs for any "spouse." Dckt. 1.

Debtor has filed a supplemental declaration, in which he states that he and his wife Jamie Samons are separated, but not divorced. Dckt. 36. He further states that he has read the "703 Waiver" form, which has been amended several times. He says that he did not notice the inaccuracies in the waiver.

A declaration has been filed for Jamie Samons, identified as Debtor's separated, but not divorced, spouse. This appears to be an identical declaration to the one signed by Debtor (with the exception of stating that she is separated from her spouse, who is identified by the Debtor's name).

Nobody, including counsel, offers any explanation for the multiple interliation of changes or why counsel (presumably) prepared a document identified as being filed for a bankruptcy case in the Southern District of California.

Debtor has not amended the prior documents filed which, under penalty of perjury, provide conflicting statements as to whether Debtor is or is not married.

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

20. 16-22942-E-13 TRACI HAMILTON MOTION TO MODIFY PLAN
RJ-3 Richard Jare 8-8-16 [52]

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

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

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 August 8, 2016. By the court's calculation, 71 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is denied.

Traci Hamilton ("Debtor") filed a Motion to Confirm Modified Plan on August 8, 2016. Dckt 52.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition to the instant Motion September 19, 2016. Dckt. 69. The Trustee opposes Confirmation on the basis that:

A. Additional Provisions

1. Three of the Additional Provisions of the Plan appear to duplicate earlier provisions of the Plan and appear to be unnecessary. It is not clear whether Counsel is attempting to strike or alter the other provisions of the Plan with these provisions.

2. Section 6.03 appears to call for the Trustee to pay post-petition arrears and ongoing monthly mortgage payments to LSF8 REIT Caliber Home Loans (Cit Fin Serv.). The section calls for the ongoing payment to begin at "the end of July 2009" and also states the payment "which may change with the terms of the note and deed of trust to take into account escrow and rate changes."

A claim was filed September 4, 2016. Claim No. 14-1. While the Note and Deed of Trust have been provided, the section would appear to require the Trustee to determine what these require, rather than the Debtor reviewing the claim and advising the Trustee what changes the Debtor expects to occur.

B. The Debtor is $700.00 delinquent in plan payments to the Trustee.

C. The Debtor has not filed tax returns for the four-year period preceding the filing of the Petition, specifically, years 2014 and 2015. Debtor's First Meeting of Creditors has been scheduled and held three times and is now scheduled for September 22, 2016, to allow the Debtor to file the missing returns.

D. Plan Exceeds Time Allowed

1. According to the Trustee's calculations, the Plan will complete in 123 months as opposed to the 36 months proposed. The Debtor proposes the Trustee to pay to creditor claims a total of $106,380.76 with interest over thirty-six (36) months, but Debtor proposes to pay only $70,100.00 in plan payments.

2. In addition to plan payments, the Debtor proposes to pay in 75% of past tax refunds (if realized) and 75% of a wrongful termination suit (if realized).

3. The Debtor has listed on Schedule A/B that Debtor has tax refunds due of $20,000.99 federal and $1,000.99 state, but Debtor has not indicated the tax years as required by the question and has indicated that the funds are "held up for years due to identity theft issues." The Trustee is not certain whether the values listed are exact or estimates. No further information is present on Schedule B, and the Statement of Financial Affairs states that the Debtor was not a party to any lawsuit, court action, or administrative proceeding in the year before filing. No action appears pending to obtain these refunds.

4. The Debtor has listed on Schedule A/B a "Wrongful termination action against KFC restaurants" with a value of "Unknown." No estimate is made, nor is any date, attorney name, or further explanation given.

5. The Trustee is unable to determine if and when these payments will be received or how to determine what the amounts will be prior to settlement of the claims.

E. The Debtor cannot make the payment under the Plan or comply with the Plan.

1. Franchise Tax Board ("FTB") filed Court Claim No. 9, indicating a priority claim of $2,635.22. This claim is not provided for in Class 5.

2. Debtor's Plan relies on the Motion to Avoid Lien of Quality First Home Improvement, Inc. Debtor has not yet filed the necessary motion. Debtor previously filed a motion to avoid lien (Dckt. 23) that was heard and denied at the hearing on June 14, 2016.

   If the Motion to Avoid is not granted, Debtor's Plan does not have sufficient monies to pay the claim in full. Debtor's proposed amended Plan indicates in Class 2c that Debtor does not expect a Proof of Claim to be filed. Without a Motion to Avoid Lien, the mechanic's lien will remain on Debtor's property. The creditor may obtain relief from stay and foreclose on Debtor's home preventing the Debtor from making plan payments.

3. Debtor's Schedule J lists net disposable income of $1,800.00, including $600.00 "InLaws' Contribution to Household, as needed." The Statement of Financial Affairs shows no prior contributions, and the Debtor is not currently married and has not lived with a spouse in a community property state within the last eight years. Debtor lists three jobs on Schedule I. With six children ages 2 to 15, Debtor cannot afford the Plan.

F. Debtor's Plan may fail the Chapter 7 Liquidation Analysis.

1. On Debtor's Schedule B, Debtor lists interest in a wrongful termination suit against KFC restaurants with an unknown value. On Schedule C, Debtor exempts $2,500.00, but the Debtor has not estimated a value of the action. If the action is worth more than $10,000.00, the Plan proposes the Debtor keeps non-exempt proceeds. In Section 6.04 of the Plan, the Debtor proposes to pay in only 75% of net proceeds from wrongful termination litigation.

2. On Schedule B, Debtor lists interest in State and Federal tax refunds, which are due and owing to Debtor but have been held due to an identity theft issue. Debtor fully exempts these refunds on Schedule C. The Trustee requests a breakdown of the amounts owed for each year and evidence of the amount paid to Debtor once it is received.

   In Section 6.04 of the Plan, Debtor proposes to pay in 75% of the proceeds from the pre-petition tax refunds and estimated to be not less than $800.00 per month beginning in month fifteen, which would pay an additional $17,600.00. Debtor is proposing to pay in the tax refunds at $800.00 per month, beginning in the fifteenth month, rather than a lump sum payment upon receipt.

3. The Trustee is also concerned that the Debtor has not proposed to pay future tax refunds into the Plan, as this would be additional income for the Debtor.

G. The Debtor has failed to provide the Trustee with Business Documents, including: questionnaire; two years of tax returns; profit and loss statements; bank account statements; and proof of license and insurance or written statement of no such documentation existing.

DISCUSSION

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Trustee's objections are well-taken.

The Trustee opposes confirmation arguing that Debtor's Additional Provisions appear to be mostly duplicative of those in the Plan and unnecessary. Specifically, Sections 6.01, 6.02, and 6.04 do not appear to add or modify any portions of the Plan and should therefore, not be included.

On this point, it appears that Debtor's counsel may be "belts and suspenders" over-killing the plan, repeating these terms. The cleanest way would have been for counsel to provide in the Class 1 section of the plan "See Additional Provisions for Class 1 Claims."

Additionally, Section 6.03 seems to delegate the task of determining what the Note and Deed of Trust for the Obligation held by U.S. Bank Trust, N.A., as trustee to LSF8 Master Participation Trust require, rather than the Debtor reviewing the claim and advising the Trustee what changes the Debtor expects to occur. 11 U.S.C. §§ 521(a)(3) and 1325(a)(1). However, this appearance may be created by counsel recasting Class 1 treatment that is being used to address post-petition defaults.

A problem with both of these Class 1 treatments is that payment of the arrearage is delayed for more than one year after the filing of the case. While such delay may not appear to be "obnoxious" for the pre-petition arrearage, Debtor can fund the plan with $2,000.00 per month but then defers paying these secured claims for post-petition arrearages for more than a year. It appears that this delay may be solely to accelerate the payment of Debtor's attorneys' fees for services that will actually stretch over the five years of the plan.

Debtor is $700.00 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).

Additionally, the Debtor has failed to file all tax returns for all taxable periods ending during the four-year period ending on the date of the filing of the petition. Specifically, Debtor has not filed Federal Income Tax Returns for 2014 and 2015. This is cause to deny confirmation. 11 U.S.C. §§ 1308(a) and 1325(a)(9).

Debtor is in material default under the plan because the plan will complete in more than the permitted sixty months. According to the Trustee, the plan will complete in 123 months. While the Debtor proposes the Trustee pay $106,380.76 over thirty-six months, the Plan only calls for $70,100.00 in plan payments. This exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

Additionally, the Debtor proposes to pay, "As they come in 75% of all Net proceeds from any litigation and 75% of tax refunds for pre-petition years (which is defined to be not less than $800 a month beginning in month 15)." Further, Debtor's Schedule A/B lists tax refunds due in the amount of $21,001.98, but Debtor fails to indicate the tax year. Debtor also lists a wrongful termination action with an unknown value and no additional information provided. The nature of the Plan as presented is far too speculative for the court—with any certainty—to determine the feasibility and viability of the Plan.

The Debtor may not be able to make plan payments or comply with the plan under 11 U.S.C. § 1325(a)(6). Additionally, a review of the Debtor's plan shows that it relies on the court avoiding the lien of Quality First Home Improvement, Inc. The Debtor has failed to file a Motion to Avoid Lien of Quality First Home Improvement, Inc., however. Without the court avoiding the lien, the plan is not feasible. 11 U.S.C. § 1325(a)(6).

The Debtor's Plan fails to provide for the FTB's priority claim in the amount of $ 2,635.22. Court Claim No. 9. Further, Debtor's Schedule J relies on $600.00 from"InLaws' Contribution to Household, as needed" when calculating net disposable income. Debtor's Statement of Financial Affairs shows no prior contributions, however, and the Debtor is not currently married and has not lived with a spouse in a community property state within the last eight years. Without an accurate picture of the Debtor's financial reality, the court cannot determine whether the plan is confirmable.

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 Debtor's Schedule B lists interest in a wrongful termination suit against KFC restaurants with an unknown value. If the action is worth more than $10,000.00, the Plan proposes that Debtor keeps non-exempt proceeds. Debtor exempts $2,500.00 in Schedule C, and in Section 6.04 of the Plan, the Debtor proposes to pay in only 75% of net proceeds from wrongful termination litigation.

Debtor also lists interest in state and federal tax refunds on Schedule B, which are due and owing to Debtor but have been held due to an identity theft issue. Debtor fully exempts these refunds on Schedule C, but Debtor has not provided a breakdown of the amounts owed for each year. The Debtor must provide this as well as evidence of the amount paid to Debtor once it is received. 11 U.S.C. §§ 521(a)(3) and 1325(a)(1).

The Debtor also proposes to pay in 75% of the proceeds from the pre-petition tax refunds and estimated to be not less than $800.00 per month beginning in month fifteen, rather than a lump sum payment to the Trustee upon receipt. The lump sum payment would guarantee the Trustee receipt of the money, whereas with monthly payments, the Debtor may be tempted to spend the funds on unforeseen life expenses. It is also concerning that the Debtor has not proposed to pay future tax refunds, which would be additional income, into the Plan. The Plan provides for the submission of all or such portion of future earnings and disposable income of the Debtor to the supervision and control of the trustee as is necessary for the execution of the Plan. 11 U.S.C. §§ 1322(a)(1) and 325(b)(1)(B).

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

Fed. R. Bankr. P. 4002(b)(3). These documents are required seven days before the date set for the first meeting of creditors. 11 U.S.C. § 521(e)(2)(A)(i). Without the Debtor submitting the questionnaire; two years of tax returns; profit and loss statements; bank account statements; and proof of license and insurance or written statement of no such documentation existing, the court and the Trustee are unable to determine if the plan is feasible, viable, or complies with 11 U.S.C. § 1325.

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.

21. **16-22942-E-13** **TRACI HAMILTON** **CONTINUED MOTION TO DISMISS CASE**
DPC-2 **Richard Jare** **7-27-16 [47]**

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

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

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

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

The Motion to Dismiss 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. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing **----------.**

The Motion to Dismiss is granted, and the case is dismissed.

David Cusick, the Chapter 13 Trustee, filed the instant Motion to Dismiss on July 27, 2016. Dckt. 47.

The Trustee's Motion argues that the Debtor did not file a Plan or a Motion to Confirm a Plan following the court's denial of confirmation to Debtor's prior plan on July 19, 2016. A review of the docket shows that Debtor has filed a new plan but failed to file a motion to confirm a plan.

The Trustee argues that the Debtor did not commence making plan payments and is $3,600.00 delinquent in plan payments, which represents multiple months of the $1,800.00 plan payment. 11 U.S.C. §1307(c)(4) permits the dismissal or conversion of the case for failure to commence plan payments.

Moreover, Debtor admitted at the Meeting of Creditors that the federal income tax return for the 2014 tax year still has not been filed. Filing of the return is required. 11 U.S.C. § 1308. Debtor's failure to file the return is grounds to dismiss the case. 11 U.S.C. § 1307(e).

AMENDED PLAN FILED

On July 27, 2016, Debtor filed an amended plan. Dckt. 51. No motion to confirm or supporting pleadings were filed and served. The Amended Plan terms are summarized as follows:

A. Debtor is to make a $100.00 plan payment for June 2016 and then $2,000.00 a month payment for the next 35 months.

B. Debtor is to also pay 75% of the net proceeds from litigation and 75% of tax refunds from pre-petition years (which shall not be less than $800.00 a month commencing in month 15) into the plan.

C. For the Class 1 claim, monthly post-petition current installment payments do not commence until month 2 of the plan and will be $1,572.77. In addition, in month 15 Debtor will commence making $685.00 a month plan disbursements for the arrearage due on this claim. The arrearage is stated in the Plan by Debtor to be $19,187.32. With a monthly arrearage payment of $685.00, it would take 28 months to cure the arrearage, which (by beginning in month 15) exceeds the 36 month term of this plan.

D. For the Class 2 claim, the $4,406.48 stated secured claim is to be paid by "$83 initially" and then increase it to $230 a month for months 25 through 36 of the Plan, with 4.5% interest.

E. Unsecured claims (stated in the Plan to be $66,475.00) are to receive no less than a 7% dividend.

F. In the additional provision, conflicting dollar amounts and treatment are stated for the Class 1 claim:

1. "§6.03 General Conditions: The trustee shall pay post petition arrears on the Class 1 obligation held by US Bank as trustee to LSF8 REIT Caliber Home Loans, (Cit Fin Serv.) through disbursements beginning with month 15, at $56.20 per month, as if it were a class 1 arrears as 0% interest for the sum of $1572.77. Since this plan pays post petition arrears, the ongoing class 1 conduit distributions beginning with the end of July 2009 shall resume with the trustee making paying only 1 (one) mortgage installment per month as of that date in the monthly sum of $1572.77 (which may change with the terms of the note and deed to trust to take into account escrow and rate changes)."

The Debtor has not provided the Trustee with employer payment advices for the 60-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv). Also, the Trustee argues that the Debtor did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. *See* 11 U.S.C. § 521(e)(2)(A); Fed. R. Bankr. P. 4002(b)(3). This is unreasonable delay which is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

AUGUST 10, 2016 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on October 18, 2016 to be heard in conjunction with a Motion to Confirm Plan. Dckt. 61.

TRUSTEE'S STATUS UPDATE

The Trustee filed a Status Update on September 19, 2016. Dckt. 72. The Trustee states that the grounds for dismissal are outstanding still. Debtor is delinquent, has not filed tax returns, and has not provided business documents. Additionally, the Trustee states that his issue with a new plan not having been filed remains an issue because the Trustee has objected to the proposed Amended Plan.

DEBTOR'S "SUPPLEMENTAL OPPOSITION"

Debtor filed a "Supplemental Opposition" on September 29, 2016. Dckt. 77. Debtor states that she needs time to address the Trustee's issues because Debtor became ill with pneumonia recently. Debtor expects to have her tax returns ready on October 7, 2016, and her income summaries and pay history ready on October 8, 2016. Debtor intends to pay $2,700.00 by October 3, 2016. Unfortunately for the Debtor, promises to perform are not evidence of such.

No evidence of curing the Trustee's issues has been filed with the court. Cause exists to dismiss this case. The motion is granted, and the case is dismissed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is granted, and the case is dismissed.

22. **16-26349-E-13** **RICARDO VEGA** **MOTION TO EXTEND AUTOMATIC STAY**
PGM-1 **Peter Macaluso**
10-4-16 [9]

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

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

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

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 October 4, 2016. By the court's calculation, 14 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. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Extend the Automatic Stay is granted.

Ricardo Vega ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond thirty days in this case. This is the Debtor's second bankruptcy petition pending in the past year. The Debtor's prior bankruptcy case (No. 16-23290) was dismissed on August 23, 2016, after Debtor failed to make all required installment payments. *See* Order, Bankr. E.D. Cal. No. 16-23290, Dckt. 36, August 23, 2016. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor thirty days after filing of the petition.

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

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

A. Why was the previous plan filed?

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

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

Here, Debtor states that the instant case was filed in good faith and provides an explanation for why the previous case was dismissed, as Debtor was distracted by sudden illness of his grandfather and missed the deadline to pay the installment fee, which was paid late. Dckt. 11. Debtor states that he has paid the installment fees for the current case in advance.

The Debtor has sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay.

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

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

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

23. **16-23056-E-13 WSS-2** | **ANDREW KNIERIEM**
W. Steven Shumway | **MOTION TO VALUE COLLATERAL OF THE BANK OF NEW YORK MELLON**
8-25-16 [48]

Final Ruling: No appearance at the October 18, 2016 hearing is required.

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

Correct Not Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 13 Trustee, creditors, and Office of the United States Trustee on August 25, 2016. By the court's calculation, 54 days' notice was provided. 28 days' notice is required. The Debtor incorrectly served Jan Johnson, rather than David Cusick, the Chapter 13 Trustee. David Cusick has waived this service defect. Dckt. 62.

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

The Motion to Value the secured claim of the Bank of New York Mellon is granted.

The Motion to Value filed by Andrew Knieriem ("Debtor") to value the secured claim of The Bank of New York Mellon formerly known as The Bank of New York as Trustee for the Certificate Holders of CWHEQ, INQ., Home Equity Loan Asset Backed Certificates Series 2006-S5 ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 9431 Eagle Springs Court, Roseville, California ("Property"). Debtor seeks to value the Property at a fair market value of $570,000.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

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

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

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

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

The court has reviewed the Claims Registry for this bankruptcy case. It appears that Proof of Claim No. 2-1 filed by Real Time Resolutions, Inc., as agent for The Bank of New York as Trustee for the Certificate Holders of CWHEQ, INQ., Home Equity Loan Asset Backed Certificates Series 2006-S5 is the claim that may be the subject of the present Motion.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on September 8, 2016. Dckt. 62. The Trustee states that he does not oppose the motion.

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $775,265.83. Creditor's second deed of trust secures a claim with a balance of approximately $358,042.26. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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 Andrew Knieriem ("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 The Bank of New York as Trustee for the Certificate Holders of CWHEQ, INQ., Home Equity Loan Asset Backed Certificates Series 2006-S5 secured by a second in priority deed of trust recorded against the real property commonly known as 9431 Eagle Springs Court, Roseville, 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 $570,000.00 and is encumbered by a senior lien securing a claim in the amount of $775,265.83, which exceeds the value of the Property that is subject to Creditor's lien.

24. 16-23056-E-13 WSS-3 | **ANDREW KNIERIEM** / **W. Steven Shumway** | **MOTION TO CONFIRM PLAN** / **8-25-16 [52]**

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

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

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 25, 2016. By the court's calculation, 54 days' notice was provided. 42 days' notice is required.

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

The Motion to Confirm the Amended Plan is denied.

Andrew Knieriem ("Debtor") filed a Motion to Confirm Amended Plan on August 25, 2016. Dckt 52.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition to the instant Motion on September 27, 2016. Dckt. 67. The Trustee opposes confirmation on the basis that:

A. The Debtor is $2,425.00 delinquent in plan payments to the Trustee to date.

B. The Debtor cannot make the payments under the Plan or comply with the Plan. The Debtor's Plan is proposed as a thirty-six month Plan paying 0% to unsecured claims.

1. The Amended Plan calls for adequate protection payments to Deutsche Bank in Class 1 of $2,200.00 per month for the Plan term of thirty-six months. This requires that the adequate protection payments alone total $79,200.00.

2. However, the Plan provides for monthly payments of only $140.00 a month for June through August, 2016, and then the payments step up to $2,425.00 per month for the final thirty-three months of the plan. The proposed plan payments total $80,165.00.

3. The Plan, as written and funded, does not provide the Trustee with sufficient monies to make the $2,200.00 per month adequate protection payments for June through September 2016. The plan funds only $2,845.00 for that period, but requires adequate protection payments of $8,800.00. After estimated Trustee's fees of 7%, there is only $2,645.00 of monies available for the adequate protection payments—a 70% shortfall.

C. The Plan relies on the Motion to Value Collateral of Deutsche Bank National Trust Co./Bank of New York, Mellon, which is set for hearing on October 18, 2016. If the Motion to Value is not granted, Debtor's Plan does not have sufficient monies to pay the claim in full.

The court has granted the Motion to Value, resolving this part of the Objection.

D. It appears Debtor cannot make the payments required under the Plan. Debtor's Amended Schedule I fails to report deductions for tax withholding. Schedule J does not report any allowance for tax savings. The Trustee objects that Debtor may be incurring post-petition tax debt if he has no deductions from payroll for his ongoing tax. In reviewing Amended Schedules I and J in light of this Opposition, the court notes the following:

1. Amended Schedule I, Dckt. 60:

a. Debtor states his gross income, from his new employment is $3,800.00 per month.

b. Debtor states that he has no withholding or payroll deductions for anything, and expressly states:

(1) Tax, Medicare, Social Security.....$0.00
(2) Retirement.....$0.00
(3) Insurance.....$0.00

c. Debtor states that in addition to the gross employment income, Debtor's spouse also receives $500.00 per month rent from a daughter and $500.00 per month rent from a sister.

d. Debtor computes the gross employment income and gross rent income to be $4,800.00 per month.

2. Amended Schedule J, *Id.*:

a. Debtor states that he and his spouse (showing wife income on Schedule I and stating he is married on the Statement of Financial Affairs, Part 1) have monthly expenses of only ($1,954.00) per month.

b. To state only ($1,954.00) of expenses per month, Debtor states under penalty of perjury having the following reasonable and necessary monthly expenses for two adults:

(1) Home Maintenance.....($ 50)
(2) HOA Dues.....($154)
(3) Water/Sewer/Garbage.....($115)
(4) Phone/Cable/Internet.....($250)
(5) Food/Housekeeping Supplies.....($600)
(6) Clothing/Laundry.....($ 50)
(7) Personal Care Products.....($ 25)
(8) Transportation.....($300)
(9) Health Insurance..... $0.00
(10) Vehicle Insurance.....($110)
(11) Taxes..... $0.00

E. The additional provisions of the Plan Section 1.01 has a typographical error, proposing "Debtor will make 33 payments of $2,450.00 each beginning 9/25/15." The effective date of the increased payment should be September 25, 2016.

The Trustee's objections are well-taken.

The basis for the Trustee's objection is that the Debtor is $2,425.00 delinquent in plan payments. According to the Trustee, the Plan in Section 1.01 calls for payments to be received by the Trustee not later

than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. The Debtor's delinquency indicates that the Plan is not feasible, and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Next, while the Amended Plan calls for adequate protection payments of $140.00 paid in total for the first three months of the Plan, followed by $2,425.00 per month for the remaining thirty-three months, the Plan has insufficient funds to pay the claims as proposed. The Trustee does not have sufficient funds to make the first three adequate protection payments. Additionally, Debtor has not made his September payment, making it impossible for the Trustee to distribute the first $2,425.00 adequate protection payment. This is an indication that the Debtor will not be able to make all payments under the Plan or comply with the Plan. 11 U.S.C. § 1325(a)(6). It is also not clear whether the Plan is to pay the first three months of adequate protection payments or if the Debtor made these payments directly to the lender. Without this information, the court and the Trustee are unable to determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325.

A review of the Debtor's plan shows that it relies on the court valuing the secured claim of Deutsche Bank National Trust Co./Bank of New York, Mellon. The court having granted the Motion to Value Collateral, this portion of the Trustee's objections is overruled.

The Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). The Debtor's Amended Schedule I fails to report deductions for tax withholding, and Debtor's Schedule J does not report any allowance for tax savings. Debtor may be incurring post-petition tax debt if he has no payroll deductions for his ongoing income tax. Without an accurate picture of the Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

The Trustee's final objection is based on a typographical error. The Additional Provisions of the Plan propose that Debtor will make thirty-three payments of $2,425.00 beginning September 25, 2015, but the effective date of the increased payment should be September 25, 2016. While this is a mere scrivener's error and could typically be corrected in the order confirming, in light of the Trustee's other objections the Plan as proposed cannot be confirmed.

CREDITOR'S OPPOSITION

Deutsche Bank National Trust Company, as Trustee for HarborView Mortgage Loan Trust, Mortgage Loan Pass-Through Certificates, Series 2006-9, its assignees and/or successors in interest ("Creditor") filed an Opposition to the instant Motion on September 27, 2016. Dckt. 70. The Creditor opposes confirmation on the basis that:

A. The Amended Plan is not adequately funded. The Proof of Claim filed by Creditor establishes pre-petition arrearages in the amount of $305,779.33, not $0.00 as provided in the Plan. The Plan fails to provide for Creditor's secured claim. Thus, the Plan does not provide adequate protection of Creditor's interest.

Creditor holds a deed of trust secured by the Debtor's residence. The Creditor has filed a timely proof of claim in which it asserts $305,779.33in pre-petition arrearages. The Plan does not propose to cure

these arrearages. Because the Plan does not provide for the surrender of the collateral for this claim, the Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments. *See* 11 U.S.C. §§ 1322(b)(2), (b)(5) & 1325(a)(5)(B).

However, the plan seeks to address the claim through the good faith prosecution of a loan modification request. As a condition of keeping the automatic stay in effect, Debtor proposes to make adequate protection payments to Creditor. However, as shown above, the adequate protection payments to Creditor are delayed for three months.

Creditor argues that confirmation must be denied until Debtor has prosecuted the loan modification. Taken at face value, Creditor contends that it is improper for it to receive adequate protection payments for its interests in the property, and the court is compelled to stay any prosecution in this bankruptcy case until the loan modification process is completed. Such arguments would then require the court to only consider "adequate protection" as discussed by the Supreme Court in *United Savings Association of Texas v. Timbers of Inwood Forest*, 484 U.S. 365 (1988). Nothing Creditor has advanced indicates that the value of its collateral is decreasing. Rather, it appears that such collateral is increasing in value, assuming that it follows the same financial trends as other homes for which evidence has been presented in other cases.

The bulk of the Creditor's objections focus on Debtor's proposal to obtain a loan modification. The plan appears to utilize what has commonly been called in this court as the "Ensminger Provisions" proposing to provide adequate protection payments while delaying payment to mortgage arrears due to a pending loan modification. These provisions attempt to balance the rights and interests of Creditor with the automatic stay and adequate protection provisions of 11 U.S.C. § 361 put into place by Congress. Such provisions do not attempt to modify Creditor's rights, but to adequately protect Creditor while the Debtor obtains the relief afford by Congress in 11 U.S.C. § 362 through diligently prosecuting the Chapter 13 case.

Debtor does not explain in his declaration the status of any loan modification efforts. He does explain that shortly after filing this bankruptcy case he lost his job, has obtained new employment, and is seeking to address that financial event in this case (presumably rather than just dismissing this case and filing a new case).

Debtor proposes to make $2,200.00 per month adequate protection payments to Creditor, from which the property taxes and insurance are to be paid. In its Proof of Claim, Creditor states that the monthly escrow amount is $835.99. Proof of Claim No. 4. That would leave $1,664.00 of the adequate protection being paid Creditor for the delay on the obligation.

Creditor's secured claim is filed in the amount of $775,265.83. This consists of $535,527.87 principal, $163,353.14 interest, $8,280.37 fees and costs, and $67,104.45. The pre-petition arrearage is stated to be $305,779.33. *Id.*

Looking at Amended Schedule A, Debtor states that the property that secures Creditor's claim has a value of $570,000.00. Dckt. 60 at 11. Creditor does not argue that such valuation is incorrect. (The court notes that merely because such an argument is not asserted does not mean that it is admitted by Creditor.) For purposes of addressing the part of the Opposition asserted that Debtor has no realistic

financial ability to pay even a modified loan, the court considers that argument in light of the asserted $570,000.00 value (and such asserted value only for purposes of the present matter).

If Creditor were to write down the loan to such asserted value and Debtor could qualify for a 4% interest rate, using the Microsoft Excel Loan Amortization Program, when amortized over thirty years, the monthly payment of principal and interest would be $2,721.27. When adding the $835.99 for insurance and taxes, the monthly payment of principal, interest, taxes, and insurance is $3,557.26.

Creditor argues that Debtor has not shown it to be colorable that he can feasibly seek a loan modification and be able to make the payments on the modified loan have merit. While Debtor may want to retain the home, he has not shown a colorable ability to prosecute a loan modification to keep the home.

In looking at the Statement of Financial Affairs, in 2014 Debtor's family income was $57,537 and in 2015 it was $56,287.00. Dckt. 60 at 33. That is higher than the current annual gross employment income of $45,600.00 stated on Amended Schedule I. *Id.* at 27. Adding in the extra $1,000.00 per month of family rent paid, Debtor gets his annual gross income up to $57,600.00 per month. But, Debtor, as every other person, has to pay taxes, so he will not have that much in take-home income to spend.

Creditor is correct, that while a debtor can provide for adequate protection payments as part of a Chapter 13 plan to pursue a loan modification, there must be some reasonable ability shown to obtain a loan modification. Taken at face value, Debtor's statement of value of the property, income (even including the $1,000.00 per month of rent income, treating it as a tax free gift), and expenses demonstrates that proposing to do so is not reasonable as part of a Chapter 13 plan.

B. The Plan fails to require the maintenance of the ongoing post-petition monthly payments to Creditor. Debtor's Plan delays post-petition payments of adequate protection for three months, but fails to provide for a cure of this post-petition delinquency in the Plan.

If Debtor could show a colorable ability to fund payments for a financially reasonable modified loan, in light of the circumstance and job loss, providing for the adequate protection payments to begin a couple months into the plan would not be fatal. But, Debtor has not shown that there is a financially reasonable modification to be pursued. Even more significantly, Debtor has not show that he can even make the proposed adequate protection payments. Debtor has shown no grounds for which he is exempted from the federal and state tax laws.

C. The Plan may not have been proposed in good faith. The Debtor has filed four prior bankruptcy cases since 2010. The Creditor argues that Debtor's proposed payment is insufficient to maintain adequate protection payments. The Debtor proposes a payment of $2,200.00 (including principal, interest, taxes, and insurance) while the Debtor's loan modification application is pending. No proof that a loan modification has actually been submitted to Creditor is supplied.

1. Even with a loan modification, Debtor has insufficient income to maintain taxes and insurance. In the event that no loan modification is achieved, the Debtor's proposed payment of principal and interest payment of $1,365.00 does not even service interest. Creditor argues that the only purpose of the Plan is to delay the inevitable.

The court has addressed this argument above.

D. Debtor is attempting to avoid the lien of Deutsche Bank National Trust Company as Trustee for HarborView Mortgage Loan Trust, Mortgage Loan Pass-Through Certificates, Series 2006-9 via motion without providing any statutory or legal authority. Deutsche Bank National Trust Company as Trustee for HarborView Mortgage Loan Trust, Mortgage Loan Pass-Through Certificates, Series 2006-9 is the current beneficiary of a consensual Deed of Trust secured by real property. Creditor argues that Debtor may not avoid this lien without filing an adversary proceeding and may not alter the contract terms without the consent of the Creditor.

Creditor misstates the terms of the Plan, and such opposition is overruled.

E. Debtor's proposed Plan attempts to modify Creditor's original Note and Trust Deed. A Debtor may modify the rights of holders of secured claims, other than a claim secured only by an interest in real property that is the Debtor's principal residence. The approximate payoff amount of the subject loan at the time of the bankruptcy filing was $775,265.83. Creditor objects to any valuation of the subject property to the extent that it may modify its secured claims.

Because the proposed plan does not modify the claim, this part of the opposition is overruled.

F. The proposed Plan does not provide for payments to the Creditor until the month of June after confirmation. The Creditor objects to any proposed Plan that does not provide for payments beginning immediately after confirmation of the Plan.

The court has addressed this issue above. To the extent that Creditor asserts that any delay in payments is a per se ground for denying confirmation, it is overruled.

G. The Debtor appears to be attempting to modify Creditor's lien. The Debtor's attachment to modify the normal and standard Plan terms in Class 1 regarding secured claims in default is problematic in that the Trustee will have no knowledge as to whether the Debtor has filed a loan modification application; complied with document requests; or when the loan modification is denied or the terms thereafter. Creditor argues that the Plan should be denied until the loan modification is completed.

This ground for opposition is overruled.

H. The Plan impermissibly attempts to modify Creditor's claim.

This ground for opposition incorrectly states the proposed plan terms and is overruled.

I. Debtor's Chapter 13 Plan fails to provide for pre-confirmation adequate protection payments and delays the start of adequate protection payments after the petition date creating a gap in payment.

The court has addressed this grounds for the objection above, and it is overruled. The contention that any delay in any payment is a per se grounds to deny confirmation is incorrect.

The Creditor generally objects on the basis that Debtor has not established that the Plan has been filed in good faith. 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)). Factors to consider include:

A. The amount of the proposed payments and the amounts of the debtor's surplus;

B. The debtor's employment history, ability to earn, and likelihood of future increases in income;

C. The probable or expected duration of the plan;

D. The accuracy of the plan's statements of the debts, expenses and percentage of repayment of unsecured debt, and whether any inaccuracies are an attempt to mislead the court;

E. The extent of preferential treatment between classes of creditors;

F. The extent to which secured claims are modified;

G. The type of debt sought to be discharged, and whether any such debt is nondischargeable in Chapter 7;

H. The existence of special circumstances such as inordinate medical expenses;

I. The frequency with which the debtor has sought relief under the Bankruptcy Reform Act;

J. The motivation and sincerity of the debtor in seeking Chapter 13 relief; and

K. The burden which the plan's administration would place upon the trustee.

Warren, 89 B.R. at 93 (citing *In re Brock*, 47 B.R. 167, 169 (Bankr. S.D. Cal. 1985) (quoting *In re Estus*, 695 F.2d 311, 317 (8th Cir. 1982))). While Debtor has filed several prior bankruptcies, that in and of itself

does not mandate a determination of bad faith. Two cases were filed in 2010, in pro se by Debtor. The Chapter 13 case, 10-30250, was dismissed on May 3, 2010. The Chapter 7 case, 10-34354, was successfully prosecuted in pro se, and Debtor received his discharge on September 13, 2010.

The third case, a Chapter 13 case filed on May 11, 2015, (15-23632) was filed by Debtor in pro se. That case was dismissed on June 29, 2015. The current case was filed ten months later on May 1, 2016. This case was filed and is being prosecuted with the assistance of counsel. Creditor incorrectly asserts that the filing of these three prior cases establishes bad faith.

Creditor is correct that Debtor has failed to show a financial ability to prosecute a plan in this case that would provide for repayment of Creditor's claim pursuant to a good faith negotiated loan modification. While not in "bad faith," Debtor has not show a good faith, bona fide ability to prosecute this case and provide for creditor claims. The court sustains the lack of good faith basis of the Opposition, as it relates to Debtor showing a colorable ability to fund a plan providing for a modified loan based upon the value of the property that secures the claim (which is a very liberal standard and would presume a creditor writing down the loan to the value stated by the debtor and reamortizing it over thirty years at a good borrower interest rate for confirming a plan with an Ensminger Additional Provision).

However, given the former objections of the Creditor and the Trustee, the amended Plan does not comply with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is not confirmed.

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

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

25. 16-24957-E-13 DPC-1 | **KAREN HART** / **Peter Macaluso** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** / **9-21-16 [35]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on September 21, 2016. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

A. Debtor is over the unsecured debt limit. Debtor's Schedules E and F list total priority and unsecured debts of $379,434.42. The Internal Revenue Service filed a Proof of Claim on September 2, 2016. The Creditor lists priority claims of $50,809.85 and unsecured general claims of $15,507.84 for a total of $66,317.69, bringing Debtor's priority and unsecured debts to $445,751.11.

B. The Debtor cannot make the payments under the proposed Plan.

1. The Plan calls for payments of $500.00 for twelve months, then $1,500.00 for forty-eight months. Debtor's Schedule J lists monthly net income of $500.34.

2. Debtor admitted at the First Meeting of Creditors that she does not receive any spousal or child support. Schedule I lists $2,250.00 received as spousal

support. The Debtor admitted the $2,250.00 is correctly listed on Schedule J as an expense she pays.

3. The Debtor admitted at the First Meeting of Creditors that she is receiving both short- and long-term disability income. Debtor stated that she will receive this form of income through October 2016.

C. The Plan fails the Chapter 7 Liquidation Analysis. The Debtor is proposing a 0% dividend to creditors with unsecured claims. The Debtor is married, and her spouse is not included in the bankruptcy. The Debtor has failed to file a spousal waiver for use of the California State Exemptions under California Code of Civil Procedure § 703.140.

The Trustee's objections are well-taken.

The Debtor is over the unsecured debt limit. Debtor's Schedule E and F list total priority and unsecured debts of $379,434.42. The Internal Revenue Service has since filed a Proof of Claim, indicating a priority claim of $50,809.85 and unsecured general claims of $15,507.84, for a total of $66,317.69. This brings Debtor's total priority and unsecured debts to $445,751.11, which is over the $394,725.00 limit proscribed in 11 U.S.C. § 109(e). This is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

The Debtor may not be able to make plan payments or comply with the plan under 11 U.S.C. § 1325(a)(6). The Plan calls for payments of $500.00 for twelve months followed by $1,500.00 for forty-eight months, but Debtor's Schedule J lists monthly net income of only $500.34. Debtor admitted at the First Meeting of Creditors that she does not receive any spousal or child support, despite her Schedule I listing $2,240.00 received as child support. Debtor confirmed that the $2,250.00 listed on Schedule J as an expense for child support is correct. Additionally, Debtor admitted at the First Meeting of Creditors that she will be receiving short- and long-term disability income through October 2016. Without an accurate picture of the Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

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). Debtor's Plan proposes a 0% dividend to creditors with unsecured claims. Debtor has failed to file a Spousal Waiver for the use of California's State exemptions. This is required under California Code of Civil Procedure § 703.140(a)(2). The Debtor has not explained how, under the proposed plan and the schedules filed under the penalty of perjury, that the unsecured claimants are entitled to a 0% dividend when there may be non-exempt assets.

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

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

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

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

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

26. 15-24065-E-13 DPC-4 | **MAURICE CARR** **Pro Se** | **OBJECTION TO CLAIM OF SOUTHGATE M.E. INVESTORS, CLAIM NUMBER 3** **8-24-16 [97]**

Final Ruling: No appearance at the October 18, 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 (*pro se*), claimant, and Office of the United States Trustee on August 24, 2016. By the court's calculation, 55 days' notice was provided. 28 days' notice is required.

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

The Objection to Claim is sustained, and the claim is allowed as a secured claim in the amount of $6,263.00.

David Cusick, the Chapter 13 Trustee ("Objector"), requests that the court allow the claim of Southgate M.E. Investors ("Creditor"), Proof of Claim No. 3 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be $4,800.00 at the time of filing and $6,263.00 as secured and unsecured and priority. Objector asserts that the Debtor has not included any attachments to demonstrate how and why this debt is owed, but Debtor's Plan did call for this creditor to be paid as secured for $6,263.00 if a claim was filed for that class and amount.

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 Plan calls for payments to this claim as secured, and the claim has been filed. Debtor has not asserted any basis for this to be a priority claim, however. Based on the evidence before the court, the creditor's claim is allowed as a secured claim in the amount of $6,263.00. 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 Southgate M.E. Investors, Creditor filed in this case by David Cusick, Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the objection to Proof of Claim No. 3 of Southgate M.E. Investors is sustained, and the claim is allowed as a secured claim in the amount of $6,263.00.

27. 16-25173-E-13 DPC-1 | **RONALD GRASSI** **Peter Cianchetta** | **MOTION FOR DENIAL OF DISCHARGE OF DEBTOR UNDER 11 U.S.C. SECTION 727(A) 8-30-16 [19]**

Final Ruling: No appearance at the October 18, 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, Debtor's Attorney, and Office of the United States Trustee on August 30, 2016. By the court's calculation, 49 days' notice was provided. 28 days' notice is required.

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

The Objection to Discharge is sustained.

David Cusick, the Trustee ("Objector"), filed the instant Objection to Debtor's Discharge on August 30, 2016. Dckt. 19.

The Objector argues that Ronald Grassi ("Debtor") is not entitled to a discharge in the instant bankruptcy case because the Debtor previously received a discharge in a Chapter 7 case.

The Debtor filed a Chapter 13 bankruptcy case on January 11, 2013. Case No. 13-20358. The case was converted to Chapter 7 on January 28, 2016. Dckt. 74. The Debtor received a discharge on May 17, 2016. Case No. 13-20358. Dckt. 90.

The instant case was filed under Chapter 13 on August 5, 2016.

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

Here, the Debtor received a discharge under 11 U.S.C. § 727 on May 17, 2016, which is less than four years preceding the date of the filing of the instant case. Case No. 13-20358, Dckt. 90. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), the Debtor is not eligible for a discharge in the instant case.

Therefore, the objection is sustained. Upon successful completion of the instant case (Case No. 16-25173), the case shall be closed without the entry of a discharge, and Debtor shall receive no discharge in the instant case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Discharge filed by David Cusick, the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to Discharge is sustained, and upon successful completion of the instant case, Case No. 16-25173, the case shall be closed without the entry of a discharge.

28. **16-24979-E-13** **DAVID ALLENDORF** **OBJECTION TO CONFIRMATION OF**
DPC-1 **Pro Se** **PLAN BY DAVID P. CUSICK**
9-21-16 [20]

Final Ruling: No appearance at the October 18, 2016 hearing is required.

The case having previously been 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 Dismiss 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 been dismissed.

29. 16-23888-E-13 ALFREDO RODRIGUEZ MOTION TO CONFIRM PLAN
PLL-1 Peter Lago 8-29-16 [28]

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

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, and Office of the United States Trustee on August 29, 2016. By the court's calculation, 50 days' notice was provided. 42 days' notice is required.

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

The Motion to Confirm the Amended Plan is denied.

Alfredo Rodriguez ("Debtor") filed a Motion to Confirm Amended Plan August 29, 2016. Dckt 28.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition to the instant Motion on September 28, 2016. Dckt. 38. The Trustee opposes confirmation on the basis that:

A. The Trustee filed an objection to Debtor's First proposed Plan based on the Following:

1. The Debtor does not appear to be able to make the plan payment. The Debtor admitted at the First Meeting of Creditors that the mortgage expense of $1,949.49 listed on Schedule J does not include any real property tax or insurance expense. The Debtor admitted his monthly real property tax expense is $300.00, and the property insurance expense is $100.00 per month. The Debtor also admitted he has a whole life insurance policy, although it is not listed on Schedule B. Debtor admitted the monthly expense for the policy is $289.00 per month.

The Trustee's Objection to Confirmation of the prior plan was sustained by the court.

B. The Debtor has failed to file a Declaration in support of the Motion to Confirm. The Declaration should provide sufficient evidence to prove all the components of 11 U.S.C. § 1325(a).

DEBTOR'S SUPPLEMENTAL DECLARATION

Debtor filed a Declaration on October 10, 2016. Dckt. 41. Debtor states that he has monthly expenses of $300.00 for real property taxes, $100.00 for real property insurance, and $289.00 for life insurance. Debtor states that his wife began babysitting to cover additional expenses, and her approximate monthly income from babysitting is $700.00. Debtor states that he can make plan payments with the additional income from his wife.

DISCUSSION

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

The Trustee's objections are well-taken.

Debtor may not be able to make plan payments or comply with the plan under 11 U.S.C. § 1325(a)(6). Debtor's Second Modified Plan proposes monthly plan payments of $825.00, which the court notes is $0.51 less than the net monthly income listed on Debtor's Schedule J. Debtor's Second Modified Plan, however, does not address Trustee's concerns about Debtor being able to make plan payments. At the First Meeting of Creditors, Debtor admitted to several expenses that would reduce his monthly net income to $136.51. Debtor does not appear to have sufficient income to support proposed plan payments, especially if his wife is unable to earn the expected $700.00 each month, and Debtor has failed to adequately explain his expenses. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable. Therefore, the objection is sustained.

As the court has noted in other cases, when a party (whether debtor or creditor) makes statements under penalty of perjury and then changes them when challenged just to get back to the position asserted, the credibility of all of the statements by that party is suspect. This is a strange case as Debtor is proposing a 100% dividend plan. Presumably Debtor would be 100% accurate and would have little incentive to fudge the facts. But Debtor has treated the accuracy of the facts lightly, as if they are of little significance.

Quite possibly Debtor actually has significantly more income, and as such, can pay his creditors holding unsecured claim in less than sixty months of interest free payments. Alternatively, it may be that Debtor's financial information is inaccurately and unrealistically under-stated. In looking at Schedule J, Debtor states under penalty of perjury that the following expenses for two adults and three teenage children are reasonable and actual:

A. Home Maintenance.....$0.00

It appears to be wholly unrealistic to expect that there will be no home maintenance or repair during the sixty months of this Plan.

B. Electricity/Gas.....$65.00

For both electricity and gas this appears to be unrealistically low for a family of five persons in Vallejo, California.

C. Telephone, Cell Phone, Cable, Internet.....$43.00

D. Food and Housekeeping Supplies.....$550.00

Allowing $50.00 per month housekeeping supplies, that leaves $100.00 per month per person for food, which works out to be $1.11 per meal for a thirty day month.

E. Medical and Dental.....$0.00

Debtor has provided no evidence that over five years there will no routine medical or dental expenses to be paid.

F. Transportation.....$200.00

On Schedule B, Debtor lists owning two vehicles. No provision is made for any vehicle expenses on the business expense attachment to Schedule A. No vehicle insurance is provided for on Schedule J. Even if those insurance expenses are included in the business insurance expenses, $100.00 per month for registration and gas for two vehicles, which includes Debtor's business vehicle, does not appear reasonable.

It may be that Debtor cannot afford to pay the unsecured claims in full, but has actual expenses higher than may be misstated on Schedule J. It may be that Debtor has actual income and actual expenses quite higher than may be misstated on Schedules I and J. The court does not know which, but does know that the financial information provided under penalty of perjury is not credible.

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

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

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

30. 16-25089-E-13 DPC-1 | **MARK/JENNIFER GALISATUS** **Daniel Davis** | **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **9-7-16 [23]**

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

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

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

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). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Objection is sustained, and the plan is not confirmed.

David Cusick, the Chapter 13 Trustee, opposes confirmation of Mark Galisatus and Jennifer Galisatus's ("Debtor") 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. Debtor's 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 Debtors 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.

OCTOBER 4, 2016 HEARING

At the hearing, the parties requested that the court continued the hearing, the Trustee believing that Debtor has and is attempting to prosecute this case, and has provided information to the Trustee. The court continued the matter to 3:00 p.m. on October 18, 2016. Dckt. 30.

TRUSTEE'S STATUS REPORT

The Trustee filed a Status Report on October 13, 2016. Dckt. 31. The Trustee states that Debtor and Counsel appeared at the continued Meeting of Creditors, Debtor provided the requested business documents, and Debtor filed an Amended Schedule I. Trustee notes that his concern about the Internal Revenue Service claim has (to his knowledge) not been resolved.

DISCUSSION

The Trustee's objections are well-taken.

The Trustee objects on the basis that the Debtor is 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 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.

31. 16-22990-E-13 DEMAR RICHARDSON MOTION TO CONFIRM PLAN
CA-2 Michael Croddy 8-31-16 [26]

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

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

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, parties requesting special notice, and Office of the United States Trustee on August 31, 2016. By the court's calculation, 48 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is denied.

Demar Richardson ("Debtor") filed a Motion to Confirm Modified Plan on August 31, 2016. Dckt 26.

David Cusick, the Chapter 13 Trustee, filed an Opposition to the instant Motion on September 28, 2016. Dckt. 36. The Trustee opposes confirmation on the basis that:

A. The Debtor is $2,340.01 delinquent in plan payments. This appears to be slightly less than one month's payment of $2,347.00.

B. The Plan continues to misstated the Wells Fargo claim, Court Claim No. 2, as long-term debt extending beyond the length of the Plan. The claim includes the Note that shows a final payment due December 27, 2020, which is within the term of the Plan.

The Plan ends with a payment on May 25, 2021. The Trustee's Objection to Debtor's prior Plan was sustained by the court and was brought in part for this reason.

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

The Trustee's objections are well-taken.

The Trustee opposes confirmation offering evidence that the Debtor is delinquent in plan payments. In the Trustee's Notice of Dismissal that was filed on September 28, 2016, regarding the Trustee's Motion to Dismiss, the Trustee stated that Debtor has not made the September plan payment is therefore delinquent by $2,347.00. Dckt. 41. This is 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 Trustee's second objection relates to the inability of the court to confirm a Plan where all the information is not properly provided. The Trustee is correct that the Debtor has misplaced the Wells Fargo claim in Class 4 when it should be a Class 2 claim, given the arrearage amount and the fact that the contract will mature during the life of the Plan. The court is concerned that Debtor has failed to correct this error when it was addressed in the Trustee's prior Objection to Plan, which was sustained.

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.

32. **16-22990-E-13** **DEMAR RICHARDSON** **OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS**
DPC-2 **Michael Croddy** **8-26-16 [19]**

WITHDRAWN BY M.P.

Final Ruling: No appearance at the October 18, 2016 hearing is required.

The Chapter 13 Trustee having filed a Notice of Dismissal of Trustee's Objection to Exemptions, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041 **the Trustee's Objection to Exemptions was denied, and the matter is removed from the calendar.**

33. **16-25292-E-13** **PRANEE AREND** **OBJECTION TO DISCHARGE BY DAVID P. CUSICK**
DPC-1 **Mark Wolff** **9-9-16 [25]**

Final Ruling: No appearance at the October 18, 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, Debtor's Attorney, and Office of the United States Trustee on September 9, 2016. By the court's calculation, 39 days' notice was provided. 28 days' notice is required.

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

The Objection to Discharge is sustained.

David Cusick, the Trustee ("Objector"), filed the instant Objection to Debtor's Discharge on September 9, 2016. Dckt. 25.

The Objector argues that Pranee Arend ("Debtor") is not entitled to a discharge in the instant bankruptcy case because the Debtor previously received a discharge in a Chapter 7 case.

The Debtor filed a Chapter 7 bankruptcy case on October 30, 2013. Case No. 13-33941. The Debtor received a discharge on February 5, 2014. Case No. 13-33941, Dckt. 19.

The instant case was filed under Chapter 13 on August 12, 2016.

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

Here, the Debtor received a discharge under 11 U.S.C. § 727 on February 5, 2014, which is less than four years preceding the date of the filing of the instant case. Case No. 13-33941, Dckt. 19. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), the Debtor is not eligible for a discharge in the instant case.

Therefore, the objection is sustained. Upon successful completion of the instant case (Case No. 16-25292), the case shall be closed without the entry of a discharge, and Debtor shall receive no discharge in the instant case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Discharge filed by David Cusick, the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to Discharge is sustained, and upon successful completion of the instant case, Case No. 16-25292, the case shall be closed without the entry of a discharge.

34. 14-31993-E-13 SJS-4 | **DAVID/ROWENA ABBOTT** **Matthew DeCaminada** | **MOTION TO MODIFY PLAN** **9-9-16 [82]**

Tentative Ruling: The Motion to Confirm the Modified Plan 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—Opposition Filed.

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on September 9, 2016. By the court's calculation, 39 days' notice was provided. 42 days' notice is required.

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

The Motion to Confirm the Modified Plan is denied.

David Abbott and Rowena Abbott ("Debtor") failed to provide sufficient service to all parties in interest with sufficient notice. Debtor served all moving papers on the parties in interest with 39 days' notice, but 42 days' notice is required.

Insufficient notice having been provided, the Motion is denied.

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

The court has issued a conditional order of dismissal in this case. Order, Dckt. 89. Debtor was required to be current on all payments as of September 30, 2016.

Trustee's Supplemental Declaration re Conditional Dismissal

The Trustee filed a Supplemental Declaration of Yvette Sanders on October 7, 2016. Dckt. 93. The Declaration states that Debtor is delinquent under the terms of the proposed Modified Plan. Debtor being in delinquent in the payments as of September 30, 2016, the condition for dismissal of the case without further hearing has been satisfied, and the case will be dismissed.

DISCUSSION

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Trustee has provided evidence that Debtor is delinquent under the terms of the proposed Modified Plan. Additionally, the case is being dismissed pursuant to this court's prior conditional dismissal order. The Debtor's delinquency indicates the Plan is not feasible, and default has caused the case to be dismissed, which are reasons to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

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

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

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

35. **11-45395-E-13** **NADER SHAHCHERAGHI** **MOTION FOR COMPENSATION FOR**
PGM-1 **Peter Macaluso** **PETER G. MACALUSO, DEBTOR'S ATTORNEY**
9-7-16 [101]

Final Ruling: No appearance at the October 18, 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 September 7, 2016. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

Peter Macaluso, the Attorney ("Applicant") for Nader Shahcheraghi, the Chapter 13 Debtor ("Client"), makes a Request for the Additional Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period of April 21, 2016, though August 22, 2016. Applicant requests fees in the amount of $1,500.00.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

(i) unnecessary duplication of services; or
(ii) services that were not--
(I) reasonably likely to benefit the debtor's estate;
(II) necessary to the administration of the case.

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

Benefit to the Estate

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

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

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including preparing and filing a Modified Plan in response to a Motion to Dismiss and monitor a significant amount of mortgage payment changes to maintain the case. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

"No-Look" Fees

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

"(a) Compensation. Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c). The failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall signify that the attorney has opted out of Subpart (c). When there is an objection or when an attorney opts out, compensation shall be determined in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017, and any other applicable authority."
...
(c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.

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

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

(3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for

> additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor's attorney for all pre-confirmation services and most post-confirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6)."

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

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

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on September 16, 2016. Dckt. 108. The Trustee states that he does not oppose the requested attorney's fees, especially because the requested amount seems to be less than what was incurred.

FEES REQUESTED

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

Motions to Dismiss and for Relief : Applicant spent 3.9 hours in this category. Applicant assisted Client with reviewing, preparing, and appearing for the Motion to Dismiss and Motion for Relief from the Automatic Stay.

Settlement: Applicant spent 1.9 hours in this category. Applicant assisted Client with discussing possible settlements or stipulations and discussing payment structure for stipulation.

The fees requested are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The persons providing the services, the time for which compensation is requested, and the hourly rates are:

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Peter Macaluso	5.8	$300.00	$1,740.00
Total Fees For Period of Application			$1,740.00

FEES ALLOWED

The unique facts surrounding the case, including reviewing, preparing, and appearing for the Motion to Dismiss and Motion for Relief from the Automatic Stay, as well as negotiating and accepting settlements and stipulations, all raise substantial and unanticipated work for the benefit of the estate, Debtor, and parties in interest. The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. Counsel has reduced the requested fees to $1,500.00. The Request for Additional Fees in the amount of $1,500.00 is approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

Applicant is allowed, and the Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees $1,500.00

pursuant to this Application as final fees pursuant to 11 U.S.C. § 330 in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Peter Macaluso ("Applicant"), Attorney having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Peter Macaluso is allowed the following fees and expenses as a professional of the Estate:
>
> Peter Macaluso, Professional Employed by Chapter 13 Debtor

Fees $1,500

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

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