UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

October 24, 2017, at 3:00 p.m.

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1. **16-23016-E-13** **PATRICIA/DAVID MILLS** **MOTION TO SELL O.S.T.**
MOH-1 **Michael Hays** **10-8-17 [42]**

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)(3) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 9, 2017. By the court's calculation, 15 days' notice was provided. The court set the hearing for October 24, 2017. Dckt. 48.

The Motion to Sell Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing **----------**.

The Motion to Sell Property is denied without prejudice.

The Bankruptcy Code permits Patricia Mills and David Mills, Chapter 13 Debtor, ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movant proposes to sell the real property commonly known as 2357 Oro Quincy Highway, Oroville, California ("Property").

The proposed purchaser of the Property is not disclosed in the Motion or in Movant's supporting Declaration.

Filed as Exhibit C is a document stated to be "Page 1 of RESIDENTIAL PURCHASE AGREEMENT AND JOINT ESCROW INSTRUCTIONS." List of Exhibits, Dckt. 45 at 1. This document is not authenticated by any testimony (see declaration, Dckt. 44), and Movant does not otherwise provide for proper authentication as required by Federal Rules of Evidence 901 et seq. FN.1.

FN.1. The court also notes that the declaration testimony provided may not be testimony as to which the declarants have any person knowledge or otherwise are qualified to given non-expert testimony. FED. R. EVID. 601, 602. While the declaration begins with a statement that the declarants state under penalty of perjury that the statements are "true and correct," declarants then admit that some of the testimony (which is not identified, is based solely on information and belief, not testimony upon which they have any person knowledge. Declaration, p. 2:23.5–27; Dckt. 44. For all the court as the finder of fact knows, the declarants have no personal knowledge but are informed by their attorney that if they state what is believed in the declaration, then they win and get money. Such is not credible testimony.

The court also notes that neither Patricia nor David Mills was willing to commit to the testimony in the Declaration (even to the extent it was only on "information and belief." The Declaration appears to be drafted carefully to insulate each of them from any responsibility for false testimony, as it is stated to be:

"DECLARATION OF PATRICIA **OR** DAVID MILLS"

Id. at 2:1 (emphasis added). The signature block also has the evasive "PATRICIA **OR** DAVID MILLS" as the declarant. *Id.* (emphasis added).

The executed copy of the Declaration is signed by Patricia Mills, and then a "Supplemental Declaration" by Patricia Mills was also filed on October 17, 2017. Dckt. 52.

The unauthenticated Page 1 of what is stated to be a Residential Purchase Agreement lists the buyer as being Ellen Perdue. As stated above, no seller is identified. This is merely a document saying that Ms. Perdue is making an offer to somebody to buy the Quincy Highway Property. The Page 1 terms of the offer (the court not knowing what other terms are on the remaining pages 2 through 10 and any attachments thereto) are stated to be:

A. Purchase price of $112,500.00;

B. Closing date to be "45 or sooner Days After Acceptance;"

C. Initial deposit of $1,000.00;

D. $102,500.00 of the purchase price provided through a loan;

E. Movant represented by Keller Williams Realty Chico Area, and Buyer represented by Coldwell Banker Ponderosa Real Estate; and

F. Balance of down payment is $9,000.00.

Exhibit C, Dckt. 45.

For the Residential Purchase Agreement as presented to the court, there is no real estate commission to be paid, there are no costs and expenses to be paid, and there are no conditions of sale. Further, the court cannot tell what additional terms of the sale may exist. It may be that the buyer is offering to pay an additional $100,000.00 for the well that is on the Property, or possibly paying an additional $50,000.00 for a barn or shed on the Property. Possibly, the additional provisions may include Debtor being paid an additional $70,000.00 to vacate the Property by a date certain. The actual terms of the contract have been withheld from the court and parties in interest.

CHAPTER 13 TRUSTEE'S RESPONSE

David Cusick ("the Chapter 13 Trustee") filed a Response on October 11, 2017. Dckt. 49. The Chapter 13 Trustee notes that Movant has not obtained a court order to employ or compensate a real estate broker.

The Chapter 13 Trustee also notes that the Residential Purchase Agreement does not disclose the sellers' names, but it does include illegible initials for sellers. He argues that the proposed sale may not be in the Estate's best interest because Debtor fails to disclose where they will be living after selling their residence, and they do not discuss whether they can afford to move.

The Chapter 13 Trustee notes that Debtor has claimed a homestead exemption of $175,000.00 under California Code of Civil Procedure § 704.730, but that exemption will only remain active for six months, unless it is reinvested. Debtor has not declared an intention for the non-exempt equity of approximately $46,090.00 from the sale of the Property.

DEBTOR'S RESPONSE

Debtor filed a Response on October 17, 2017. Dckt. 51. Debtor states that they will subsequently apply *ex parte* for retroactive approval to employ and compensate real estate brokers. Debtor offers no explanation as to why the employment of a real estate broker was not sought by the broker, nor what grounds could exist for retroactive approval.

In the Response, Debtor's counsel states that even though Debtor confirmed a plan based upon financial information that they would, and could, make the mortgage payment as a Class 4 claim, Debtor has defaulted in the payment, and the creditor is moving forward to foreclose.

In a Supplemental Declaration, debtor Patricia Mills testifies (under penalty of perjury and not based on "information and belief") that Debtor is relocating to Washington for medical reasons—to be in a more "temperate climate with less heat and to be near family members. Dckt. 52 at 3.

Debtor Patricia Mills further testifies that Mr. Mills has gained full-time employment in Washington earning $2,924.00, which is $15.00 less than he was earning when this case was filed. At the same time, Ms. Mills's Social Security payments have gone up by $4.00. *Id.*

Regarding preserving their exemption, Debtor Patricia Mills testifies that they plan to buy a mobile home outright or put down money on real property.

Review of Motion for Relief From Stay

Colonial Savings, F.A., ("Creditor") filed a Motion for Relief From the Automatic Stay. Dckt. 26. In it, Creditor alleges that Debtor was $1,006.97 in default when the bankruptcy case was filed. Motion ¶ 9, *Id.*

It is further alleged that as of the February 9, 2017 filing of the Motion for Relief, Debtor was an additional four post-petition payments in default. *Id.*, ¶ 12. The amount of each payment is stated to be $524.06. The post-petition defaults, totaling $2,602.40 are attested to in the declaration filed in support of the Motion for Relief from the Automatic Stay. Declaration ¶ 6, Dckt. 28.

Debtor's response to the Motion for Relief, consisting only of their attorney's arguments (Dckt. 34), was an admission that Debtor had default, Debtor found $1,050.00 to give to the attorney to forward to Creditor, and Debtor hoped to find the additional money to cure the post-petition defaults.

The court denied without prejudice the Motion for Relief, finding that the confirmed Chapter 13 Plan, which provided for payment of Creditor's claim in Class 4 (for which there can be no pre-petition arrearage to be in Class 4) had already terminated the automatic stay to allow for Creditor to proceed with foreclosing on the Property. Order, Dckt. 38.

Creditor Claim Review and Plan Terms

On July 18, 2017, Creditor filed Proof of Claim No. 7 for its claim secured by the Property purported to be the subject of this Motion. In Proof of Claim No. 7, Creditor states that there was a $1,006.97 pre-petition arrearage as of the filing of this case (approximately two months of payments). However, upon reviewing the attachment to Proof of Claim No. 7, this "pre-petition arrearage" is identified as a future "Projected escrow shortage." Proof of Claim No. 7, p. 4.

The Chapter 13 Plan filed by Debtor requires only a $370.00 per month plan payment. Dckt. 9. Creditor's claim, with a payment of $483.05 per month, is provided for in Class 4 (no pre-petition arrearage). From a review of Schedules I and J (Dckt. 11), the financial information relied upon by Creditor, the Chapter 13 Trustee, and the court in confirming the Plan, there does not appear to be sufficient discretionary items in the budget for Debtor, if they defaulted in the payments to Creditor, to "find" $2,000 to $3,000 of "extra" money to cure the default in one subsequent month.

DISCUSSION

Movant has failed to convince the court that the sale can be approved as it has been presented for several reasons.

First, the Motion fails to plead the details of the sale with particularity, which violates Federal Rule of Bankruptcy Procedure 9013. The Motion states that Movant requests "an order authorizing the sale of their residence." Dckt. 42 at 1:17–18.5. Deeper in the Motion, Movant's residence is identified as 2357 Oro Quincy Highway, Oroville, California. *Id.* at 2:11. Movant states that a contract was signed to sell the Property for $112,500.00, with net proceeds to Movant of $46,090.00. That is all that Movant has provided to the court, however.

Movant has not identified who has offered to buy the Property. Movant has not disclosed if there is any connection with the buyer. Movant has not disclosed whether brokers or real estate agents are involved in the sale. Movant has not disclosed what the argued 8% costs of sale comprise, including any potential commissions for real estate professionals.

The Chapter 13 Trustee has raised additional concerns about how the proposed sale will affect Movant. He notes that Movant's name is not listed as a seller on the Residential Purchase Agreement, and the only indication from the seller is an illegible set of initials at the bottom of the page. Practically, the Chapter 13 Trustee questions where Movant will live after selling the Property, and he notes that Movant has not indicated what will happen to the non-exempt equity from selling the Property after the exemption expires. While Debtor has attempted to ease the Chapter 13 Trustee's concern, Debtor's plans appear speculative at best, having moved to another state without a place to live apparently.

Finally, the court does not approve this sale because Movant has not provided the full terms to the court. Movant attached the Residential Purchase Agreement as Exhibit C, but upon review, that exhibit is only the first page of the agreement; the bottom of the page states "PAGE 1 OF 10." Exhibit C, Dckt. 45.

Other than granting the Motion merely because Debtor requests (demands) it, Debtor has failed to provide the court with a basis to grant the Motion. The Motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Sell Property filed by Patricia Mills and David Mills ("Chapter 13 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 without prejudice.

2. **14-27118-E-13 MJD-2** | **MELVYN/RITA LIBMAN** **Matthew DeCaminada** | **MOTION FOR SUBSTITUTION AFTER INCOMPETENCY OF DEBTOR** **9-22-17 [92]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on September 22, 2017. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

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

The Motion to Substitute is denied without prejudice.

Joint Debtor, Melvyn Libman, seeks an order approving the motion to substitute Joint Debtor for the Incapacitated Debtor, Rita Libman. Joint Debtor relates that Incapacitated Debtor suffered a stroke on May 27, 2017, and was admitted to a hospital. Additionally, she was diagnosed with encephalopathy and has lost use of her limbs and cannot control her hands. This motion is being filed pursuant to Federal Rule of Bankruptcy Procedure 1016.

Debtor filed for relief under Chapter 13 on July 9, 2014. On November 3, 2014, Debtor's Chapter 13 Plan was confirmed. Dckt. 53.

CHAPTER 13 TRUSTEE'S RESPONSE

David Cusick ("the Chapter 13 Trustee") filed a Response on October 6, 2017. Dckt. 102. The Chapter 13 Trustee states that he does not oppose the relief requested in the Motion, but he believes that Debtor may not have provided sufficient evidence to support the Motion.

The Chapter 13 Trustee states that the final plan payment was received on July 19, 2017, and his Final Report and Accounting was issued on September 26, 2017.

Regarding possible deficiencies, the Chapter 13 Trustee states that Movant did not file evidence addressing the current medical condition of Incapacitated Debtor. The Chapter 13 Trustee notes that such a declaration was provided for the prior motion to substitute, but the statements in it may not be accurate now.

JOINT DEBTOR'S SUPPLEMENTAL DECLARATION

Joint Debtor filed a Supplemental Declaration on October 11, 2017. Dckt. 104. Joint Debtor states that he is the spouse of Incapacitated Debtor. He states that her medical condition has improved slightly since filing the original motion to waive the requirement of her signature. Nevertheless, he maintains that she remains unable to take care of herself, make rational financial decisions, and competently attest to and complete the statements required to receive a discharge in this case.

Joint Debtor also states that he has attached a medical summary of his spouse's condition as of September 13, 2017. *See* Exhibit A, Dckt. 105. The medical summary lists the sending facility as Mercy San Juan Medical Center, and it shows that Incapacitated Debtor was admitted to a hospital on September 11, 2017, because she had pulled a feeding tube out of her throat. After replacing the tube, Incapacitated Debtor once again pulled the tube out during the night, and the hospital staff determined that a different type of tube was necessary to prevent her from removing the feeding tube again.

The hospital notes indicate a "[h]istory of prior cerebrovascular accident in May of 2017 with chronic encephalopathy." *Id.* at 3. Incapacitated Debtor was discharged from the hospital on September 13, 2017.

The glaring evidence missing is that of a doctor under whose care Incapacitated Debtor is now placed. Other than Joint Debtor providing his layperson statement that Incapacitated Debtor is incapacitated, he merely provides the court with unauthenticated documents intending to provide the court with expert medical evidence. Even if properly authenticated, it merely states that Incapacitated Debtor merely removed a feeding tube in September 2017.

The confirmed Chapter 13 Plan in this case requires Debtor to make a $575.00 monthly plan payment for thirty-six months. Plan, Dckt. 35. In addition, Debtor is to make a $1,263.37 monthly mortgage payment directly as a Class 4 Claim. *Id.* The income to fund the Plan is retirement, Social Security, and family support income. Schedule I, Dckt. 1.

DISCUSSION

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

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

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

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

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

For this Motion, Joint Debtor has presented additional layperson testimony and unauthenticated exhibits for the contention that Incapacitated Debtor is incapable of completing the case and in support of a party being substituted in her place. What Joint Debtor has presented as supporting evidence seems to both contradict the relief requested in the Motion or be of no influence either for granting or denying the relief.

Joint Debtor's Supplemental Declaration indicates that Incapacitated Debtor is unable to make financial decisions and complete the certification requirements competently, but Joint Debtor also acknowledges that she "has slightly improved." Dckt. 104 at 1:27. Joint Debtor does not clarify what that means, but it appears that he no longer maintains that her current state is as debilitating as her initial state after suffering a stroke in May 2017. Joint Debtor's acknowledgment of improvement may indicate that he expects his wife to recover to a point when she can complete her duties in this case. Incapacitated Debtor's position remains unclear.

Additionally, the medical summary from September 2017 that Joint Debtor provided is not persuasive for any point about Incapacitated Debtor's condition, nor is it properly authenticated. FED. R. EVID. 901 et seq. The court is unsure what conclusion Joint Debtor wishes the court to draw from an admission summary to replace Incapacitated Debtor's feeding tube. Nothing in the medical summary speaks to Incapacitated Debtor's mental state such that the court could determine her ability to complete this case.

The Motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for 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 denied without prejudice.

3.	**17-25221-E-13** **DPC-1**	**TOMMIE RICHARDSON** **Peter Macaluso**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **9-27-17 [21]**

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

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

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

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

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

The Objection to Confirmation of Plan is sustained.

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

A. Tommie Richardson ("Debtor") failed to file a tax return for 2016;

B. The Plan is not feasible because it calls for ongoing payments to a property that was sold at public auction;

C. The plan payment may be insufficient if Debtor owes ongoing payments to Caliber Home Loans;

D. Debtor cannot afford plan payments because his scheduled income does not match what he has reported;

E. Documents in this case are inconsistent about attorney's fees;

F. Debtor may be undervaluing property;

G. Debtor has not reported all assets on Schedule I;

H. Debtor has not reported all debts on Schedule D and E/F; and

I. Debtor has not sought court approval to employ a broker or to sell property.

DEBTOR'S REPLY

Debtor filed a Reply on October 17, 2017. Dckt. 25. Debtor states that the Plan will provide a 100% dividend to unsecured claims either by gaining legal title and possession of property through an adversary proceeding and then selling it for $1.6 million, or the plan will provide for all unsecured claims by accepting an overbid of $165,000.00 that is being held by a foreclosure trustee currently.

Debtor's attorney states that a 2016 tax return is being prepared. He states that disbursements are not mandatory absent legal title and that plan payments are sufficient to pay the Plan in the absence of any real property. Debtor's attorney argue that rents from Debtor's former residence in Oakland do not belong to him because the property was sold in a foreclosure sale.

Debtor states that attorney's fees in this case are $4,000.00, with $500.00 paid already.

Debtor's attorney states that Debtor will amend his pleadings to list all business, even those that no longer operate. Debtor's attorney also admits that Debtor obtained a real estate broker in anticipation of an adversary proceeding and a sale, but he argues (without directing the court to grounds) that court approval is not "ripe."

Finally, Debtor's attorney argues that a new plan is not necessary in this case and would only be a placeholder; he requests that the court continue the hearing on this matter by ninety days instead of denying confirmation.

DISCUSSION

Despite Debtor's various arguments (for which Debtor failed or refused to provide a declaration), the court is not convinced that either confirmation or continuing this hearing is appropriate. The Chapter 13 Trustee's objections are well-taken.

Debtor admitted at the Meeting of Creditors that the federal income tax return for the 2016 tax year has not been filed still. Filing of the return is required. 11 U.S.C. § 1308. Failure to file a tax return is grounds to deny confirmation. 11 U.S.C. § 1325(a)(1).

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Property at 1902 and 1904 Filbert Street, Oakland, California, was sold at a foreclosure sale on July 17, 2017, according to the Statement of Financial Affairs, but the Plan proposes to cure arrears on

the properties as well as make ongoing monthly payments. The Additional Provisions call for Debtor to obtain possession and sell the properties within six months. Debtor admitted at the Meeting of Creditors that he may have an interest in the properties and may receive an overbid purchase amount of $163,000.00, but Schedule C exempts only $18,450.00, and the Chapter 13 Trustee argues that the funds are property of the estate that should be turned over to the Chapter 13 Trustee. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

The plan payment of $600.00 per month is insufficient to pay the even the Class 1 ongoing payments for Caliber Home Loans at $1,798.70. The Chapter 13 Trustee argues that his argument on that point may be moot if Debtor no longer owns the properties.

The Chapter 13 Trustee also argues that Debtor cannot afford the plan payment because schedule income does not match reported income. On Schedule I, Debtor listed $3,489.70 from a pension and $117.98 from retirement along with his wife's net income of $2,500.00. Schedule B does not list any interest in a retirement or pension account, though. The Statement of Financial Affairs lists income from a pension year-to-date of $26,145.00, but none was received in 2015 or 2016. The Statement does not report any other income for Debtor or his wife for 2015, 2016, and 2017. There is also rental income that has been disclosed to the Chapter 13 Trustee but that is not reported on the Statement of Financial Affairs.

Section 2.06 of the Plan states that Debtor's counsel was paid $500.00 prior to filing this case and that $3,000.00 will be paid through the Plan. On August 21, 2017, Debtor filed Rights and Responsibilities reporting that attorney's fees total $4,000.00 and that $500.00 was paid by Debtor prior to filing.

Debtor listed real property at 11179 Graeton Circle, Mather, California, on Schedule A/B as having a value of $1.00 and described as community only not on title and in non-filing spouse's name with a fair market value of $300,000.00 securing a claim of $392,000.00. The Chapter 13 Trustee questions whether Debtor has reported his accurate interest in the property because there is not enough information provided to determine whether the property is community property or separate property.

As mentioned, Schedule I includes income from a pension and retirement, but Schedule B does not list any interest in a retirement account. On the Statement of Financial Affairs, Debtor listed currently operating as T Richardson Investments, a concert-booking business, but that business is not listed on Schedule B, and no income is listed on Schedule I or the Statement of Financial Affairs. The business name is also not listed on the petition.

The Chapter 13 Trustee received a letter on June 26, 2017, about a loan to Debtor from Cal State 9 Credit Union, but the Chapter 13 Trustee does not see it listed on Debtor's list of debts and bank accounts. There may be an additional debt that Debtor has not listed.

Debtor has not sought court approval to hire a real estate broker and to sell real property, even though Debtor discloses that a broker has been hired, and even though the Plan contemplates selling property within six months of confirmation.

Additionally, to the extent that Debtor intends to reverse the foreclosure sale, no provision is made for any such litigation or efforts in the Plan. Rather, the Plan appears to be based on fiction—fiction that there is a monthly mortgage payment (that is not being paid to anyone), fiction that the foreclosure did not occur and that Debtor owns the Property, fiction that Debtor will "Obtain possession of the Oakland property" without any effort or litigation, and fiction that Debtor will sell the property that was foreclosed on within six months of the sale.

The fictional plan goes beyond mere exuberant speculation but appears to be drafted and presented in bad faith to try to fool the court into confirming a fictional plan. Such bad faith appears not to be limited to this Plan but to the filing of the case itself.

On Schedule I, Debtor states that he has $6,107.68 per month in retirement income. Dckt. 13 at 21. He states that his non-filing spouse has rental or business income of $2,500.00 per month. *Id.* No statement of business gross income and expenses is included in the Schedules. No business is listed on Schedule B, though business inventory and accounts receivable totaling $1,700 are listed. *Id.* at 8.

On the Statement of Financial Affairs, Debtor states under penalty of perjury that he has no income from operation of a business in 2017, 2016, or 2015. Statement of Financial Affairs Question 4, Dckt. 13. Debtor further states under penalty of perjury that he had $26,145.00 of pension income in 2017, but he does not list any such income in 2016 or 2015. *Id.*, Question 5. Taken at face value, Debtor states under penalty of perjury that he had no income, from any source, in 2016 or 2015.

On the Statement of Financial Affairs, Debtor further states under penalty of perjury that the Filbert Street Property, which the Plan commits him to sell in six months, was foreclosed on in July 2017. *Id.*, Question 10.

Though not listed on the Schedules, Debtor stated at the First Meeting of Creditors that he anticipates receiving $163,000.00 of proceeds from the foreclosure sale, which amount was in excess of the debt secured by the Filbert Property. Declaration ¶ 5, Dckt. 23. The Declaration also details the Chapter 13 Trustee's investigation and discovery of income and potential assets not disclosed (under penalty of perjury) on the Schedules.

The conduct of Debtor shows a pattern of intentional misrepresentation and misstatement under penalty of perjury. Given that Debtor is represented by counsel, it appears clear that he knew of his obligations to be truthful and accurate and either intentionally hid such assets from his attorney, or the scheme to hide the assets is broader than merely Debtor.

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

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

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

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

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

4. 17-25327-E-13 DPC-1 | **ROGELIO CASTANEDA** **Peter Macaluso** | **OBJECTION TO DISCHARGE BY DAVID P. CUSICK** **9-1-17 [12]**

Final Ruling: No appearance at the October 24, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on September 1, 2017. 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) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Objection to Discharge is sustained.

David Cusick, the Chapter 13 Trustee ("Objector") filed the instant Objection to Rogelio Castaneda Jr.'s ("Debtor") discharge on September 1, 2017. Dckt. 12.

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

Debtor filed a Chapter 7 bankruptcy case on May 2, 2014. Case No. 14-24688. Debtor received a discharge on August 19, 2014. Case No. 14-24688, Dckt. 18.

The instant case was filed under Chapter 13 on August 11, 2017.

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

Here, Debtor received a discharge under 11 U.S.C. § 727 on August 19, 2014, which is less than four years preceding the date of the filing of the instant case. Case No. 14-24688, Dckt. 18. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), Debtor is not eligible for a discharge in the instant case.

Therefore, the Objection is sustained . Upon successful completion of the instant case (Case No. 17-25327), the case shall be closed without the entry of a discharge, and Debtor shall receive no discharge in the instant case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Discharge filed by David Cusick ("the Chapter 13 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to Discharge is sustained, and upon successful completion of the instant case, Case No. 17-25327, the case shall be closed without the entry of a discharge.

5. **13-31931-E-13 WSS-4** | **TRAVIS/KARI MANHART** **Steven Shumway** | **CONTINUED MOTION TO MODIFY PLAN** **8-7-17 [65]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on August 7, 2017. By the court's calculation, 36 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(g) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

The Motion to Confirm the Modified Plan is denied.

Travis Manhart and Kari Manhart ("Debtor") seek confirmation of the Modified Plan because (1) they obtained a loan modification; (2) because their business generates more income now, and (3) because their living expenses have increased as their five children have aged. Dckt. 67. The Modified Plan proposes that Debtor make one payment of $551.00 in August 2017, and it increases the monthly payment to CitiMortgage from $1,335.00 to $2,917.81 while also moving the claim from Class 1 to Class 4, pursuant to a proposed loan modification. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee"), filed an Opposition on August 28, 2017. Dckt. 75. The Chapter 13 Trustee notes that Debtor has paid $89,309.04 through August 7, 2017, which is more than the $86,127.91 listed in the Plan.

He also notes that the Plan states that unsecured claims will receive a 0.00% dividend, but they will actually receive a 17% dividend. Unsecured claims total $47,425.09, but the Plan lists $213,744.00. The Chapter 13 Trustee states that he has paid $3,990.34 to unsecured claims, which is 5%, and he suggests an amendment to the Plan that unsecured claims receive at least 5%.

The Chapter 13 Trustee also objects on the ground that confirmation relies upon the court granting a motion to approve loan modification. That motion was heard and granted at the September 12, 2017 hearing, thus resolving this ground of the Objection.

The Chapter 13 Trustee notes that the increased income and expenses indicated by Debtor appear to be reasonable, but he questions the increase in charitable contributions from $300.00 to $850.00 without explanation.

DEBTOR'S REPLY

Debtor filed a Reply on September 4, 2017. Debtor agrees to amendments in the order confirming for the correct amount paid so far and for increasing the unsecured dividend to 5%. Debtor also agrees that confirmation relies upon granting of the motion to approve loan modification. Finally, Debtor explains that 10% of gross income is set aside for charitable contributions, which explains the increase with the increase in Debtor's business income.

However, in making this Reply, Debtor fails (or refuses) to provide testimony of actually making $850.00 per month charitable contributions or provide evidence (such as cancelled checks or tax returns showing such contributions) of such charitable contributions actually having been made. Rather, they merely have their attorney argue that such charitable contributions are to be made by Debtor.

SEPTEMBER 12, 2017 HEARING

At the hearing, the court noted that before the Plan can be confirmed, Debtor must show not only feasibility but that it the Plan was proposed in good faith. Dckt. 86. Debtor needed to document for the court not only the actual income and self-employment taxes paid during this case and the actual income and expenses for Debtor's business in 2017, but also document the payment of the 10% charitable contribution during this case.

The court continued the hearing on this Motion to 3:00 p.m. on October 24, 2017. Dckt. 87.

CHAPTER 13 TRUSTEE'S STATUS REPORT

The Chapter 13 Trustee filed a Status Report on October 6, 2017. Dckt. 88. He reports that Debtor did not file supplemental pleadings by September 29, 2017, as ordered by the court, and he states that his grounds for opposing confirmation have not been resolved.

DISCUSSION

The Chapter 13 Trustee has noted that the Plan (or any order confirming) needs to be amended to reflect that $89,309.04 has been paid into the Plan as of August 7, 2017, and he notes that the dividend to unsecured claims should be increased to the amount he has paid through the Plan so far, which is 5%. Debtor agrees to both of those amendments. The court has also addressed and approved of the loan modification in this case. The only real remaining ground is the increase in charitable contributions. Debtor has explained that 10% of gross business income is set aside for charitable contributions, meaning that the contributions vary as business varies. Right now, business has increased; so, contributions have increased.

While charitable support is laudable, a "newly found" desire to contribute to charities rather than to see creditors be paid is inconsistent with the good faith requirement under the Bankruptcy Code. On Schedule J, Debtor stated having a $300.00 per month charitable contribution. Dckt. 1 at 35. That is based on gross income of $4,500.00 per month stated on Schedule I. *Id.* at 33. A $300.00 per month charitable contribution would be 6.66% of the gross income.

Though Debtor's counsel argued at the prior hearing that "of course" Debtor was and is making the charitable contributions in the much higher amount, given the opportunity to present evidence of such, Debtor has chosen (or refused) not to provide such evidence. The conclusion that the court draws from such inaction is that the alleged charitable contributions were not truthful and asserted in bad faith.

On Schedule J, Debtor lists having ($2,775.00) in expenses monthly. Dckt 1 at 35. However, no expense is shown for Debtor's income taxes and self-employment taxes (both debtors being self-employed).

Now, Debtor has reduced the monthly mortgage payment, with the arrearage reamortized over the new loan term, including property taxes and insurance, to ($2,689.34) per month. In support of the current Motion, Debtor provides new income and expense information. Declaration and Income/Expense Exhibits A and B, Dckts. 67 and 68. Debtor testifies that over the past four years the photography business has "grown." Dckt. 67. In the Declaration, Debtor testifies that they now have to pay "income taxes," but provides no testimony about the required self-employment taxes (including funding their required Social Security and unemployment tax payments).

Looking at the self-employment income from the business, Debtor reports having $81,584.00 in net income from their business in 2016. Exhibit B, Dckt. 68 at 5. Debtor does not provide income and expense information for the eight most recent months in 2017. Given Debtor's testimony of the increasing revenue from the business it is likely that the income has increased.

On the latest statement of Expenses (Exhibit A, Dckt. 68), Debtor now lists $500.00 in "Self-Employment Taxes" for the two debtors, but does not indicate the payment of income taxes for the two debtors.

Debtor has failed to address the court's concerns raised at the September 12, 2017 hearing, despite being provided more than a month's time to do so. Debtor's conduct manifests bad faith—bad faith

in proposing the Modified Plan, bad faith in prosecuting this case, and bad faith in filing this case. The Modified Plan does not comply with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is not confirmed.

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

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

6. **17-25234-E-13** **YVONNE JOHNSON** **OBJECTION TO CONFIRMATION OF**
DPC-1 **Stacie Power** **PLAN BY DAVID P. CUSICK**
9-27-17 [22]

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

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

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

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

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

The Objection to Confirmation of Plan is sustained.

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

A. Yvonne Johnson ("Debtor") calculated her current monthly income incorrectly and is actually over median income because of that error, meaning that the Plan is not her best effort;

B. Debtor failed to file a business budget;

C. Debtor has not proposed all disposable income go into the Plan;

D. Debtor failed to list all of her debts;

E. Debtor cannot comply with the Plan because she has shorted the amount owed to a Class 1 claim;

F. Debtor has not listed all of her expenses on Schedule J;

G. The Plan fails the liquidation analysis;

H. The documents in this case are inconsistent about how much Debtor has paid her attorney already;

I. Debtor failed to file a tax return; and

J. Debtor has not provided a tax return for the 2015 and 2016 filings.

The Chapter 13 Trustee's objections are well-taken. The Chapter 13 Trustee alleges that the Plan violates 11 U.S.C. § 1325(b)(1), which provides:

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

Debtor miscalculated her current monthly income by not deducting $300.00 for ordinary and necessary business expenses after calculating gross income. Without the deduction, Debtor's gross income is $54,000.00 annually. Debtor is above median income and failed to file Form 122C-2.

Additionally, Debtor failed to file a business budget detailing her business income and expenses. Schedule I requires Debtor to attach a statement for each property and business showing gross receipts, ordinary and necessary business expenses, and the total monthly net income. The Chapter 13 Trustee reviewed bank statements that Debtor submitted and calculates that her monthly income may be higher than reported.

The Plan proposes to pay a zero percent dividend to unsecured claims, but Debtor's projected disposable income under 11 U.S.C. § 1325(b)(2) totals $2,010.00, while the Plan calls for payments of only $1,526.50. Thus, the court may not approve the Plan.

Debtor has not included all of her debts. The Chapter 13 Trustee reviewed her bank statements and saw monthly payments to the Internal Revenue Service ("IRS"), and at the Meeting of Creditors, Debtor admitted that she makes plan payments to the IRS.

Debtor cannot comply with the Plan because Section 2.08 provides ongoing payments to Select Portfolio Servicing of $896.00, but Debtor's Class 1 Checklist indicates that the regular monthly amount is $1,279.04.

Debtor may not be able to make plan payments because she has omitted expenses from Schedule J. Debtor admitted at the Meeting of Creditors that there are additional expenses unreported on Schedule J. Those expenses include lawn care, home warranty life insurance, business expenses, and plan payments to the IRS.

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtor's plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). The Chapter 13 Trustee states that there are many inconsistencies on Debtor's Schedules. Schedule B lists only a 2003 Chevy Astrovan as a vehicle, but Schedule C exempts a 2004 Jaguar XJ8. At the Meeting of Creditors, Debtor admitted that the gave the Astrovan to her son. Schedule B lists kitchenware with a value of $0.00, but Schedule C includes an exemption for $300.00. Schedule B includes a U.S. Bank account with a value of $1,335.42, but Schedule C exempts $3,353.00. Debtor listed that she had no interest in insurance policies on Schedule B, but Debtor admitted at the Meeting of Creditors that she does have a life insurance policy.

There are also several inconsistencies regarding attorney's fees in this case. At the Meeting of Creditors, Debtor admitted that she paid her attorney fully and owes nothing more. Section 2.06 of the Plan states that counsel was paid $2,000.00 and will be paid $1,500.00 through the Plan. The Statement of Financial Affairs reports that Debtor paid $1,500.00 in attorney's fees, but it does not state when The Chapter 13 Trustee also opposes the Plan providing for $1,500.00 in attorney's fees because no Rights and Responsibilities have been filed. The plan payment of $1,526.50 is also insufficient to pay an administrative dividend.

Debtor did not provide either a tax transcript or a federal income tax return with attachments for the 2015 and 2016 years. *See* 11 U.S.C. § 521(e)(2)(A); 11 U.S.C. § 1325(a)(9); FED. R. BANKR. P. 4002(b)(3).

Debtor admitted at the Meeting of Creditors that the federal income tax return for the 2016 tax year has not been filed still. Filing of the return is required. 11 U.S.C. § 1308. Failure to file a tax return is grounds to deny confirmation. 11 U.S.C. § 1325(a)(1).

This is not Debtor's first, second, or even third recent foray into bankruptcy. Following her Chapter 7 case (in *pro se*) in which she received a discharge, Debtor has filed (represented by the same counsel as in this case) four prior Chapter 13 cases since November 19, 2013, that have been dismissed. Bankr. E.D. Cal. Nos. 16-27599, 16-22994, 14-22304, and 13-34753. It appears that the prior cases suffered from the same failures of Debtor to disclose information about assets and her business as plague this case.

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

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

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

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

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

7.	**11-22544-E-13** **HLG-1**	**FRANCISCO ALVARADO** **Leticia Tanner**	**MOTION TO AVOID LIEN OF YOANA FLORES GARCIA** **9-19-17 [68]**

Final Ruling: No appearance at the October 24, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, and Office of the United States Trustee on September 19, 2017. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Yoana Garcia ("Creditor") against property of Francisco Alvarado ("Debtor") commonly known as **2144 Pantages Circle, Rancho Cordova**, California ("Property").

OCTOBER 17, 2017 HEARING

At the hearing, the court noted that continuance of a hearing is permitted only upon approval by the court upon written request at the hearing or by oral motion at the hearing, pursuant to Local Bankruptcy

Rule 9014-1(j). Dckt. 75. The court treated the Amended Notice filed as a written request to continue the hearing. The court continued the hearing to 3:00 p.m. on October 24, 2017.

RULING

A judgment was entered against Debtor in favor of Creditor in the amount of $53,247.19. An abstract of judgment was recorded with Sacramento County on August 23, 2010, that encumbers the Property.

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of $172,000.00 as of the date of the petition. While Debtor alleges in the Motion that the unavoidable consensual liens total $262,715.00 as of the commencement of this case, Debtor fails to list those liens on Amended Schedule D. A review of the docket shows that Debtor filed an Amended Schedule D on September 19, 2017, which includes only one creditor—the creditor whose judgment lien Debtor seeks to avoid. Dckt. 65. Original Schedule D lists the two creditors with secured claims that Debtor discusses in the Motion. Dckt. 1. It appears that Debtor (erroneously) believed that the amended schedule would just list the inadvertently omitted secured claim from Original Schedule D. For this Motion, the court treats "Amended" Schedule D as stating the additional secured claim to be added to Original Schedule D.

The unavoidable consensual liens that total $262,715.00 as of the commencement of this case are stated on Debtor's original Schedule D. Dckt. 1. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(5) in the amount of $1.00 on Amended Schedule C. Dckt. 67.

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

ISSUANCE OF A COURT-DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Francisco Alvarado ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Yoana Garcia, California Superior Court for Sacramento County Case No. 34-2009-00044532, recorded on August 23, 2010, Book 20100823 and Page 0869, with the Sacramento County Recorder, against the real property commonly known as 2144 Pantages Circle, Rancho Cordova, California, is avoided in its entirety pursuant to 11 U.S.C.

§ 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

8. **17-21345-E-13 RJ-2** **WILLIAM MCDANIELS JR.** **Richard Jare** **MOTION TO CONFIRM PLAN** **9-1-17 [69]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the U.S. Trustee on September 1, 2017. By the court's calculation, 53 days' notice was provided. 42 days' notice is required. FED. R. BANKR. P. 2002(b); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is denied.

William McDaniels Jr. ("Debtor") seeks confirmation of the Amended Plan because Debtor had fallen behind on paying his income taxes but is now able to comply with payments under the Plan. Dckt. 71. The Amended Plan takes into account that Debtor's wife's car payments are coming to an end and mentions that Debtor's mother and sister, who have thus far been financially reliant on Debtor, will soon have other means of taking care of themselves.

The Amended Plan proposes to pay $800.00 for eight months, then $1,200.00 through month thirty, and then $1,500.00 for the remainder of the Plan. The Amended Plan proposes a 25% dividend to general unsecured claims. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on September 27, 2017. Dckt. 80. The Chapter 13 Trustee asserts that Debtor is $800.00 delinquent in plan payments, which represents one month of the $800.00 plan payment. According to the Chapter 13 Trustee, the Plan in § 1.01 calls for payments to be received by the Chapter 13 Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

In addition, Debtor has not provided sufficient information regarding his wife's auto payments. In Debtor's Amended Plan, Debtor asserts that he will increase payments upon the completion of his wife's car loans, but the Motion does not state exactly which vehicle he is referring to and when that vehicle will be paid off. Moreover, Amended Schedule J indicates that Debtor has two dependants—his sister and mother—to whom he is contributing $1,050.00 per month. While the Amended Plan indicates that Debtor will be able to reduce that contribution in month thirty-two of the Plan, Debtor has offered no evidence why that assumption is reasonable and omits information about his sister and mother's upcoming living situation, income, and expenses. Without an accurate picture of Debtor's financial reality, the court cannot determine if Debtor will be able to make plan payments to comply with the Plan under 11 U.S.C. § 1325(a)(6).

DEBTOR'S REPLY

Debtor filed a Reply on October 17, 2017. Dckt. 83. Debtor states that he will need more time to response. He states that he is current with plan payments and has paid $4,800.00 into the Plan. Debtor requests a continuance to allow time to file additional pleadings.

RULING

In Debtor's Reply, he states that he *can* file payment history as an exhibit to support his contention that not only has he cured the delinquency but has also paid an additional $4,000.00 into the Plan. Facing denial of confirmation, Debtor would have been wise to present such evidence to the court without waiting to see how the court rules.

Debtor offers no testimony, but only leaves it to his attorney to argue "facts" that are not supported by evidence. It appears Debtor is playing the game of "hide the evidence," presenting necessary evidence only when he is forced to by the Chapter 13 Trustee.

The Motion is drafted in a way that it appears Debtor is unaware and unable to understand his finances to the minimum level necessary to prosecute the Plan or to provide evidence to show feasibility of the Plan. Those statements in the Motion include:

> "5. In order to make ends meet, he is still receiving much more overtime pay than anticipated. **He is trying to understand his budget, but he senses it is very complicated.** He explains that **the proposed plan *appears* to be the appropriate plan**, he explained that he can **sense that from experience** even **though he still has to put pencil to paper** so to speak as to and amended I & J later today."

Motion ¶ 5, Dckt. 69 (emphasis added).

Then in his Declaration, Debtor proceeds to provide the court with his "expert testimony" of compliance with federal law. Those include:

> "6. **My Modified Chapter 13 Plan complies with applicable law**, including the provisions of Chapter 13 and other relevant provisions of the Bankruptcy Code...The **liquidation test requires** a plan which pays nothing to unsecured creditors. The **best efforts test probably requires** a plan which pays 25% to the unsecured creditors. **The Means test** as filed at the inception of the case **does not require** a plan which pays more than 0% to unsecured creditors,...."

Declaration ¶ 6, Dckt. 71 (emphasis added). No basis is shown that Debtor has the requisite knowledge of federal law to provide such testimony under penalty of perjury. Therefore, the court draws from this testimony that Debtor will sign any declaration and give any testimony, so long as he is told that it lets him win. That does not demonstrate good faith in the proposal of the Plan or in the prosecution of this case.

Debtor's declaration also demonstrates that he does not have knowledge of what his plan provides. Rather than testifying how secured claims are actually being paid, he just parrots the provisions of 11 U.S.C. § 1325(a)(5), stating:

> "10. All secured creditors provided for have either accepted the plan, or the plan proposes a surrender of the property securing their claims, or the plan provides to pay the Class 2 creditors pursuant to section 1325(a)(5)(B) their allowed claims or cure the delinquency on long term claims pursuant to section 1322(b)(5)."

Id. ¶ 10. That lack of the basic financial knowledge of what he is committed to do dooms confirmation of this Plan.

Without any evidence that Debtor has cured the delinquency as he claims, and without any reasons provided in support of a request for continuance, the court rules on the Motion as it has been presented, and as it has been presented, the Motion is denied.

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

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

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

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

9.	**17-25947-E-13 DEF-1**	**GARY SCHOPF AND GINGER ARDREY David Foyil**	**MOTION TO VALUE COLLATERAL OF BANK OF AMERICA, N.A. 9-26-17 [16]**

Final Ruling: No appearance at the October 24, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee and Office of the United States Trustee on September 20, 2017. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Motion to Value Collateral and Secured Claim of Bank of America, N.A. ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $0.00.

The Motion to Value filed by Gary Schopf and Ginger Ardrey ("Debtor") to value the secured claim of Bank of America, N.A. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 4062 Yuma Court, Ione, California ("Property"). Debtor seeks to value the Property at a fair market value of $205,000.00 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).

CHAPTER 13 TRUSTEE'S RESPONSE

David Cusick ("the Chapter 13 Trustee") filed a Response on October 6, 2017. Dckt. 21. The Chapter 13 Trustee states that Creditor's claim is provided for in Class 2 C. 1. of the Plan for the amount of $62,750.95 valued at $0.00. He also notes that Creditor has not filed a claim in this case.

APPLICABLE LAW

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

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

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

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

NO PROOF OF CLAIM FILED

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

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $219,390.51. Creditor's second deed of trust secures a claim with a balance of approximately $62,750.95. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's secured claim is determined to be in the amount of $0.00, the value of the collateral, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value Collateral and Secured Claim filed by Gary Schopf and Ginger Ardrey ("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 Bank of America, N.A. ("Creditor") secured by a second in priority deed of trust recorded against the real property commonly known as 4062 Yuma Court, Ione, 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 $205,000.00 and is encumbered by a senior lien securing a claim in the amount of $219,390.51, which exceeds the value of the Property that is subject to Creditor's lien.

10. 14-25350-E-13 CA-1

MATTHEW O'DONNELL AND JANICE VALDEZ O'DONNELL
Michael Croddy

MOTION FOR COMPENSATION BY THE LAW OFFICE OF CRODDY AND ASSOCIATES, PC FOR MICHAEL D. CRODDY, DEBTORS' ATTORNEY(S)
9-25-17 [25]

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

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

Sufficient Notice Not 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 25, 2017. By the court's calculation, 29 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Allowance of Professional Fees is denied without prejudice.

Croddy & Associates, P.C., the Attorney ("Applicant") for Matthew O'Donnell and Janice O'Donnell, the Chapter 13 Debtor ("Client"), makes a First Interim Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period March 5, 2006, through October 24, 2017. Applicant requests fees in the amount of $6,225.00 and costs in the amount of $281.00, and he notes that $1,500.00 has been paid already as a retainer.

INSUFFICIENT NOTICE OF MOTION

Applicant provided twenty-nine days' notice of this Motion. Federal Rule of Bankruptcy Procedure 2002(a)(6) requires a minimum of twenty-one days' notice of the hearing when the requested fees exceed $1,000.00, and Local Bankruptcy Rule 9014-1(f)(1)(B) requires an additional fourteen days for parties to file written opposition. Those time periods do not run concurrently. Those two minimums total thirty-five days. Applicant has provided six fewer days than the minimum. Therefore, the Motion is denied without prejudice.

At the hearing, Applicant made an oral motion to **xxxxxxxxxxxxxxxxxxxx**.

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 Michael Croddy ("Applicant"), Attorney for Matthew O'Donnell and Janice O'Donnell, the Chapter 13 Debtor, ("Client") 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 without prejudice.

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF APPLICANT PROVIDES SUFFICIENT NOTICE

CHAPTER 13 TRUSTEE'S NON-OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed a Non-Opposition on September 27, 2017. Dckt. 36. The Chapter 13 Trustee reports that he does not oppose the $4,725.00 in requested fees above the $1,500.00 retainer.

The Chapter 13 Trustee notes that the Motion pleads that work on this case began on March 5, 2006, but the Report of Time and Expenses states that the initial consultation with Client was conducted on April 21, 2014. The Chapter 13 Trustee believes that services actually began on April 21, 2014, and not on March 5, 2006.

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). An attorney must "demonstrate only that the services were reasonably likely to benefit the estate at the time rendered," not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). 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.

APPLICABLE LAW

Reasonable Fees

A bankruptcy court determines whether requested fees are reasonable by examining the circumstances of the attorney's services, the manner in which services were performed, and the results of the services, by asking:

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the attorney exercise reasonable billing judgment?

In re Garcia, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

Lodestar Analysis

For bankruptcy cases in the Ninth Circuit, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis cab be appropriate, however. *See id.* (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

Reasonable Billing Judgment

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 demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. An attorney must exercise good billing judgment with regard to the services provided because the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to 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?

In re Puget Sound Plywood, 924 F.2d at 958–59 (citing *In re Wildman*, 72 B.R. 700, 707 (N.D. Ill. 1987)).

A review of the application shows that Applicant's services for the Estate include initiating this case, attending the Meeting of Creditors, and preparing the required documentation. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

The task billing described in the Motion does not add up to the total amount of fees requested by Applicant, but upon review of the attached exhibits, the court notes that Applicant provides a task billing analysis and supporting evidence for the services provided in Exhibit C, which are described in the following main categories. Dckt. 28.

New Client Meeting: Applicant spent 1.00 hours in this category. Applicant met with Client to discuss filing a Chapter 13 case.

Data Acquisition and Input: Applicant spent 12.90 hours in this category. Applicant met with Client to discuss documents, requested that Client provide more information, input data from Client, answered questions from Client, and filed petition.

Meeting of Creditors: Applicant spent 0.90 hours in this category. Applicant informed Client of the Meeting of Creditors and provided instructions for it, mailed documents to the Chapter 13 Trustee, and attended the Meeting of Creditors.

Compensation Application: Applicant spent 1.80 hours in this category. Applicant prepared his compensation application.

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**
Michael Croddy, attorney	16.6 hours	$375.00	$6,225.00
	0	$0.00	$0.00

	0	$0.00	$0.00
	0	$0.00	$0.00
	0	$0.00	$0.00
	0	$0.00	$0.00
	0	$0.00	$0.00
Total Fees for Period of Application			$6,225.00

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $281.00 pursuant to this application.

The costs requested in this Application are,

Description of Cost	**Per Item Cost, If Applicable**	**Cost**
Filing Fee		$281.00
		$0.00
		$0.00
		$0.00
Total Costs Requested in Application		$281.00

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First Interim Fees in the amount of $6,225.00 are approved pursuant to 11 U.S.C. § 331, and subject to final review pursuant to 11 U.S.C. § 330, and authorized to be paid by the Chapter 13 Trustee from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

Costs & Expenses

First Interim Costs in the amount of $281.00 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 are approved and authorized to be paid by the Chapter 13 Trustee from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

The court authorizes the Chapter 13 Trustee to pay 80% of the fees and 100% of the costs allowed by the court.

Applicant is allowed, and the Chapter 13 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	$6,225.00
Costs and Expenses	$281.00

pursuant to this Application as interim fees pursuant to 11 U.S.C. § 331 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 Croddy & Associates, P.C. ("Applicant"), Attorney for Matthew O'Donnell and Janice O'Donnell, the Chapter 13 Debtor, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Croddy & Associates, P.C., is allowed the following fees and expenses as a professional of the Estate:
>
> Croddy & Associates, P.C., Professional employed by the Chapter 13 Debtor
>
> Fees in the amount of $6,225.00
> Expenses in the amount of $281.00,
>
> as an interim allowance of fees and expenses pursuant to 11 U.S.C. § 331 and subject to final review and allowance pursuant to 11 U.S.C. § 330.
>
> **IT IS FURTHER ORDERED** that the Chapter 13 Trustee is authorized to pay the fees allowed by this Order from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

11. 17-25556-E-13 DPC-1 | **RICKY GREEN** **Peter Macaluso** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 9-27-17 [12]**

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

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

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

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

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

The Objection to Confirmation of Plan is sustained.

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

A. Ricky Green ("Debtor") proposed a Plan that fails the Chapter 7 liquidation analysis because Debtor retains non-exempt equity;

B. The Plan is not proposed in good faith because Debtor has not filed accurate statements and schedules; and

C. The Plan does is not Debtor's best effort because it does not provide for all disposable income in compliance with 11 U.S.C. § 1325(b).

DEBTOR'S REPLY

Debtor filed a Reply on October 17, 2017. Dckt. 19. Debtor agrees to turn over any funds garnished by Bank of America, N.A., but he asserts that the Chapter 13 Trustee fails to state authority that a debtor can be ordered to pay a non-exempt amount into the Plan absent Debtor's regularly scheduled monthly payments and absent bad faith.

Debtor argues that funds in his bank account are duplicative of garnished funds and exempted already, and he states that he amended Schedule B to list and exempt pension and retirement accounts. *See* Dckt. 17. Debtor states that he will amend Schedule B further to list employer-paid life insurance accounts.

Debtor states that he will amend the petition to list another name that he is known by: Richard L. Green.

Debtor states that he has no opposition to increasing the plan payment by $600.00 in July 2018.

DISCUSSION

The Chapter 13 Trustee's objections are well-taken. The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtor's plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). The Chapter 13 Trustee states that while Debtor has reported non-exempt equity in the amount of $26,375.00, Debtor lists his bank account at El Dorado Savings Bank with a balance of $30,000.00, leaving $3,625.00 in liquid assets not exempt. In addition, Debtor reports that $20,381.90 was garnished by Creditor Bank of America, N.A. but did not list these assets as exempted on Schedule C. While arguing that the Chapter 13 Trustee has not presented authority, Debtor seems to admit that the Plan violates 11 U.S.C. § 1325(a)(4).

In addition, the Chapter 13 Trustee asserts that Debtor has filed inaccurate statements and schedules, particularly failing to list his interest in any public or private retirement accounts or life insurance policies on Schedule B. For example, on Schedule I, Debtor indicates that he is retired from his employment as a teacher and even deducts $796.58 for mandatory retirement contributions on line #5b.

In addition, Debtor admitted at his 341 Meeting of Creditors that he has a Thrift Savings account with Voya Financial but does not indicate any of these retirement accounts on his Schedule B. Furthermore, the Chapter 13 Trustee reviewed Debtor's paystubs, which include a $5.10 per month deduction for Group Term Life. Debtor did not report that deduction on Schedule I. Finally, Debtor identifies himself as Ricky Leroy Green on his voluntary petition, but on his 2016 tax return, debtor lists his name as Richard L. Green. Debtor is required to report all known names.

Debtor has filed amended schedules, but they have not addressed all of the issues raised by the Chapter 13 Trustee, meaning that grounds exist still for sustaining the Objection.

The Chapter 13 Trustee alleges that the proposed Chapter 13 Plan violates 11 U.S.C. § 1325(b)(1), which provides:

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

Debtor is above median income and proposes a sixty-month plan paying $435.00 per month with 100% dividend to unsecured claims, with such "100%" to be without interest over the sixty months of payments. On Schedule J, Debtor deducts $600.00 for child support for his youngest son, who will be graduating high school in June, 2018. Debtor's child support payments will end at that time. However, Debtor's plan fails to propose plan payment increases after that date. Rather, Debtor proposes to put the $600.00 a month in his pocket while continuing to extend the interest free repayment over the full sixty months of the Plan.

The Chapter 13 Trustee does not object to Debtor providing an amendment to this Plan that provides for an increase of $600.00 in plan payments once Debtor's son graduates from high school.

However, even with this potential amendment, all allegations made by the Chapter 13 Trustee taken together indicate that the Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The Objection is sustained, and the Plan is not confirmed.

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

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

12.	**13-23157-E-13 JPT-1**	**HOSSEIN BAKTVAR AND LALEH MOGHADAM Peter Macaluso**	**MOTION FOR ADMINISTRATIVE EXPENSES 9-8-17 [67]**

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. FN.1.

FN.1. Applicant has not specified clearly whether the Motion is noticed according to Local Bankruptcy Rule 9014-1(f)(1) or (f)(2). The Notice of Motion states that a hearing will be held for Applicant to request an allowance of administrative fees. No language is provided suggesting whether responding parties need to file written opposition fourteen days before the hearing or whether opposition will be presented at the hearing. Based upon language that there will be a hearing, the court treats the Motion as being noticed according to Local Bankruptcy Rule 9014-1(f)(2). Counsel is reminded that not complying with the Local Bankruptcy Rules is cause, in and of itself, to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(c)(l).

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney and the Chapter 13 Trustee on September 7, 2017. By the court's calculation, 47 days' notice was provided. 14 days' notice is required.

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

The Motion for Allowance of Administrative Expenses is denied without prejudice.

Trulite WSG, LLC ("Applicant") requests payment of administrative expenses in the amount of $60,387.45, incurred during the period of August 1, 2013, to November 26, 2013, for selling and delivering glazing materials to Hossein Baktvar's ("Co-Debtor") retail glass business Promax Glass. FN.2.

FN.2. Throughout the Motion, Applicant refers incorrectly to Debtor in Possession and Debtor in Possession's Estate. A debtor in possession is defined in 11 U.S.C. § 1101(1) as being a "debtor except when a person that has qualified under section 322 of this title is serving as trustee in the case," and that term is limited to Chapter 11. The case before the court was filed under Chapter 13, which does not incorporate Chapter 11's concept of a debtor in possession.

CHAPTER 13 TRUSTEE'S RESPONSE

David Cusick ("the Chapter 13 Trustee") filed a Response on September 15, 2017. The Chapter 13 Trustee states that he has no opposition to Applicant seeking an order allowing Applicant to incur a post-petition debt for glass and glazing materials sold and delivered to Co-Debtor's retail glass business Promax Glass as actual and necessary costs and expenses of preserving the Chapter 13 Estate.

DEBTOR'S OPPOSITION

Hossein Baktvar and Laleh Moghadam ("Debtor") filed an Opposition on October 9, 2017. Dckt. 92. The Opposition consists of a two-page argument by counsel for Debtor. No evidence is offered in opposition to the Motion.

Debtor first argues that based upon the information provided by Applicant, the actual balance due to Applicant is $26,114.46. Debtor chooses not to explain how the information establishes such fact, but elects to merely state such factual finding and legal conclusion to the court.

Debtor then admits in the Opposition that the amount of the administrative expense is at least $26,114.46, stating:

> "1. CORRECT AMOUNT OF CLAIM IN DISPUTE IS $26,114.46
>
> It is the belief of the debtor, that based on the information provided by the creditor, that the balance is due a creditor [sic] of $17,662.53 received from the General Contractor, J.R. Lennen Construction, and that **the amount of $26,114.46 is the applicable balance owed that is not in dispute**."

Opposition, p. 1:20–24; Dckt. 92 (emphasis added).

Debtor next argues that the Declaration of Anna Velasquez is inadmissible because the testimony is not based on personal knowledge, but only "to the best of my knowledge and belief" (Declaration, p. 1:23–25; Dckt. 69), about a continuing personal guarantee. Thus, any legal conclusions, and any statement of facts are beyond the personal knowledge of Ms. Velasquez.

In considering that contention, the court first notes that Ms. Velasquez does not so qualify her testimony in the declaration, having certified, "I declare under penalty of perjury that the foregoing is true and correct. Executed at Fremont, California on the date shown below." *Id.* Declaration, p. 5:11–12. The

"best of" and "belief' qualification are to the books and records for which Ms. Velasquez has produced documents or identified information.

Debtor also argues that there was a Superior Court case between Applicant and Co-Debtor's business in which the case was dismissed without entry of judgment. Debtor argues that Applicant cannot have a post-petition claim without the support of a valid judgment. Debtor offers no legal authority for the contention that a federal bankruptcy judge is prohibited from determining the amount of an obligation to pay an administrative expense (11 U.S.C. § 503) as a matter of federal law is prohibited unless and until a judge of the state court enters a judgment for such administrative expense.

APPLICANT'S REPLY

Applicant filed a Reply on October 17, 2017. Dckt. 95. Applicant asserts a new argument that Debtor has violated Local Bankruptcy Rule 3015-1(b)(2) by purchasing more than $50,000.00 worth of glazing materials without court permission to do so. Applicant presents that argument for a proposition that Debtor's conduct "is not conducive to further the policy of the Bankruptcy Code to induce vendors, materialman and supplies to continue to do business with a debtor-in-possession under the reorganization Chapters of the Code." *Id.* at 2:6–8.

Applicant also argues that Debtor violated the United States Trustee's Guidelines for Debtors in Possession (District 8) by not paying all post-petition obligations in full when due. FN.3.

FN.3. As the court noted before, Applicant has confused the concept of debtors and debtors in possession, which the provisions cited in Applicant's Reply are irrelevant for this case.

Additionally, the applicable U.S. Trustee in this court is the United States Trustee, Region 17. The court is unsure what "District 8" means when referring to the United States Trustee. If that is a reference to Region 8 for the U.S. Trustee, then the referenced guidelines apply in Kentucky and Tennessee.

Unfortunately, Applicant seeking to raise new grounds does not constitute a reply to the Opposition, but would be unfair new grounds thrown up shortly before the hearing without allowing for any written opposition by Debtor. If Applicant desired to state with particularity such grounds as a basis for the requested relief (Federal Rule of Bankruptcy Procedure 9013), it would have been included in the Motion.

DISCUSSION

Applicant argues that Co-Debtor purchased glass and glazing materials for his business, which Applicant delivered. FN.4. According to Applicant, the purchases were made by written credit sales agreements, credit applications, and a personal guarantee. Applicant states that it had no notice of this bankruptcy case and was not listed as a creditor.

FN.4. Local Bankruptcy Rule 9004-2(d)(1) states that "[e]xhibits shall be filed as a separate document from the document to which it relates and identify the document to which it relates (such as 'Exhibits to Declaration of Tom Swift in Support of Motion For Relief From Stay'). A separate exhibit document may

be filed with the exhibits which relate to another document, or all of the exhibits may be filed in one document, which shall be identified as 'Exhibits to [Motion/Application/Opposition/ . . .].'"

Here, Applicant attached fifteen separate exhibit documents all in support of the Motion. That is not the practice in bankruptcy court. The documents may have been split into multiple exhibit documents if the separated documents related to different pleadings, but for this Motion, all of the exhibits related to the same motion, and Applicant was required to file them together in a single exhibit document.

No points and authorities has been filed in support of the Motion. The Motion does reference 11 U.S.C. § 503(b)(1)(A), with the statement that the expense is "as actual, necessary costs and expenses of preserving the estate." Motion, p. 1:23.5–23.6; Dckt. 67.

Applicant argues that all of the purchases for which an allowance of an administrative expense is sought were made after this case was filed. The unpaid purchase price with interest for products totals $36,334.85. Applicant argues that an additional $10,769.92 in interest was incurred, which raises the unpaid balance and interest to $47,104.77.

Applicant argues that the credit application and personal guarantee signed by Co-Debtor include terms calling for payment of court costs and attorney's fees incurred by Applicant, which include:

A.	$224.00	County Recorder's fees,
B.	$50.00	Notary fees,
C.	$435.00	Clerk's fees,
D.	$250.00	Process server's fees, and
E.	$1,500.00	Attorney's fees, for a total of
F.	**$2,459.00**.	

With the inclusion of various fees, Applicant argues that its claim rises to $49,563.77. Applicant argues that its claim has incurred additional interest in the amount of $10,823.68, which brings Applicant to its final amount claimed: $60,387.45.

Review of 11 U.S.C. § 503(b)(1)(A)

Section 503(b)(1)(A) of the Bankruptcy Code accords administrative expense status to "the actual, necessary costs and expenses of preserving the estate . . . ." Here, Applicant argues that it sold material's to Co-Debtor's business post-petition and that Co-Debtor is liable for the expenses. A review of the petition in this case shows that Co-Debtor lists Promax Glass as one of his aliases. Dckt. 1.

Such "actual, necessary costs and expenses of preserving the estate" is a nonexclusively defined term, which includes goods, materials, and services provided for the post-petition operation of the business of a bankruptcy estate. *Toma Steel Supply, Inc. v. Transamerican Natural Gas Corp. (In re Transamerican Natural Gas Corp.)*, 978 F.2d 1409 (5th Cir. 1992), *reh. denied en banc*, 983 F.2d 1060, *cert. dismissed*, 507 U.S. 1048 (1993); 4 COLLIER ON BANKRUPTCY ¶ 503.06[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).

These are for the actual "costs" and "expenses" of preserving the bankruptcy estate, not merely post-petition contractual arrangements without regard whether "necessary" or the "actual" costs. *Id.* at 1416. The burden of persuasion rests with the moving party by a preponderance of the evidence. *Saxton v. Lisowski (In re Saxton)*, No. NV-06-1354-ESD, 2007 Bankr. LEXIS 4934, at *16 (B.A.P. 9th Cir. July 30, 2007) (citing *Toma Steel*, 978 F.2d at 1416).

Evidence For Administrative Expense

Debtor admits that the administrative expense is at least $26,114.46.

For the Motion, Applicant does not clearly state the cost of the goods sold and how the current asserted administrative expense is computed. The Motion directs the court to read various exhibits to assemble the computation. In hunting down the information, the court computes the expense for the goods purchased as follows:

> A. Cost of Post-Petition Goods Sold to Debtor.....$50,231.84
> (Declaration, p. 3:22–24, stating $32,579.38 of unpaid principal
> debt after application of $17,652.53 third-party payment, Dckt. 69;
> Exhibits E–E-47, Dckts. 74-84)

The Motion then states that Applicant has been paid $17,652.53 from a third-party, the general contractor, based on Applicant's asserted Mechanic's lien rights.

Applicant then seeks to add on $10,769.92 in finance charges (stated to be computed at 18% per annum, with no computation methodology shown), $954.00 in costs, and $1,500.00 in legal fees.

In substance, the Motion and evidence appear to try to cobble together parts of allegations in a manner similar to a general state court complaint, much left to be figured out later at trial. No legal basis is provided for some of the items, such as 18% interest, and costs and expenses that appear to have nothing to do with selling the glass to Debtor.

Identification of Party to Whom Goods Sold

The Opposition admits that the glass and materials were sold to Debtor, with the only dispute being as to the amount of the administrative expense. In the Motion, Applicant first states that the glass and materials were sold to Debtor's business Promex Glass. Motion, p. 1:20.5–24.5; Dckt. 67. However, the Motion continues, and as stated in the contract filed as Exhibit A, Applicant entered into a contract to sell goods with a corporation named Promax/Glass Doctor. Dckt. 70. However, the signature block identifies the entity entering into the contract as Zagros, Inc. d.b.a. Glass Doctor." *Id.* at 3.

The plot thickens, with the Motion alleging that Zagros, Inc. had its corporate powers suspended. Exhibit D is a screen shot of what is stated to be the California Secretary of State website showing that Zagros, Inc.'s corporate powers have been suspended. Dckt. 73. That is not a certified copy of a Secretary of State record. FED. R. EVID. 901 et seq. Applicant's witness merely states in her declaration that Exhibit D is a copy of what was posted on the website. FN.5.

FN.5. For general informational purposes, the court has pulled the Zagros, Inc. thread teased out by Applicant. Using the LEXIS-NEXIS public records data based, for "Zagros, Inc." it is reported that it is a corporation (whose business is auto repair) that owns "Glass Doctor." For Zagros, Inc., LEXIS-NEXIS reports that entity having a mailing address in Long Beach, California, the mail to be sent "c/o AMIR ABBASS ILKHAN," and that its corporate powers have been suspended.

The California Secretary of State website provides, for informational purposes, that the agent for service of process for Zagros, Inc. is "Hossein Mike Azar Baktvar," whose address and the corporations addresses are 3300 Auburn Blvd. #2 SACRAMENTO CA 95821. For the registration documents linked to Zagros, Inc., the officers are identified as Hossein Baktvar, a.k.a. 'Mike Axar' and Leah Moghadam. The directors of the corporation are stated to be the same as the two officers.
https://businesssearch.sos.ca.gov/CBS/Detail.

In the Motion, Applicant then makes the legal leap (without any legal authority stated therefore) that the glass and materials were sold to Hossein Aliasghari Baktvar, the Debtor, as a sole proprietorship. Motion, p. 3:4–6. It is further alleged that the "Mike Baktvar" who signed a personal guarantee is Hossein Baktvar, a debtor in this bankruptcy case. *Id.* 3:6–8. The personal guarantee is on page 2 of the contract filed as Exhibit A.

On Schedule B, Debtor states under penalty of perjury having a "sole proprietorship" named ProMax Glass, for which there are no employees. Dckt. 1 at 14. No interests in any corporations are listed on Schedule B. On Schedule I, both debtors state under penalty of perjury that they have been self-employed as owners of Promax Glass for fifteen years. *Id.* at 33. Taking this statement under penalty of perjury of being self-employed for fifteen years operating Glass Doctor, that would take the sole proprietorship back to 1998 (fifteen years before the 2013 filing of this bankruptcy case). That conflicts with the two debtors apparently filing documents with the Secretary of State that Zagros, Inc. owned and operated Glass Doctor.

Confusion of Judicial Proceedings and Legal Theories Evidenced By Motion

Applicant has not provided limited testimony and has not properly authenticated all of its numerous exhibits into evidence. In addition to a few other deficiencies in the pleadings (discussed in the footnotes), Applicant has provided a Declaration of Anna Velasquez that was clearly not prepared for this bankruptcy case and appears to be part of a motion for entry of default judgment in a state court proceeding. *See* Dckt. 69. Throughout the Declaration, there are numerous references to another proceedings, such as:

A. Case title includes "Defendants" after identifying Debtor.

B. "The books and records for DEFENDANTS' account . . . ."

C. "I make this declaration . . . in support of TRULITE's request for entry of default judgment by court against two Defendants . . . ."

D. "Defendant BAKTVAR has breached his obligation owed to Plaintiff under the Personal Guarantee by failing to pay Plaintiff the sums owed to Plaintiff by ZAGROS, despite demand therefore."

Not only has Applicant provided a declaration that on its face does not apply to the Motion, but also Applicant has not demonstrated any authority to the court about how Ms. Velasquez is capable of stating legal conclusions in her declaration for the court to adopt without conducting its own analysis of relevant law.

E. "TRULITE has received partial payment from defendant J.R. LENNEN CONSTRUCTION, INC., of $17,652.53, which was received on May 7, 2014, by our Company's attorney, and in exchange it has released its mechanic's lien, and it has also filed request for dismissal as to the general contractor J.R. LENNEN CONSTRUCTION, INC., and the jobsite owner FOREVER 21, INC. A notice of dismissal was filed with the Clerk of the Court on June 5, 2014."

No such dismissal was filed in this bankruptcy case on June 5, 2014, and there has been no related adversary proceeding in which dismissal of a party would have been appropriate.

F. "After said dismissal, the only remaining named parties are BAKTVAR and ZAGROS, against whom our Company reserved all rights of recovery."

Again, no dismissal has occurred, and there is no adversary proceeding.

G. "Receiving no answer to our Company's Complaint, or to our First Amended Complaint, we have requested that the Court enter the defaults of BAKTVAR and ZAGROS. Our request for entry of their defaults was dated June 16, 2014."

No request for entry of default was entered in this bankruptcy case on June 16, 2014, nor would one have been appropriate.

H. "Attorney's Fees Per Court's Schedule per Credit Application and Personal Guarantee (adjusted to conform to prayer of First Amended Complaint) . . . ."

I. "Pursuant to the Court's requirements, I am also attaching an account statement for the unpaid invoices due, and owing, from the Defendant for glass and glazing products delivered to him."

J. "As of this date and for the reasons I am hereby requesting that the court enter a Judgment by Default against both of the DEFENDANTS, BAKTVAR and ZAGROS, in the form of judgment proposed herewith . . . ."

K. "Dated: January 9, 2016."

L. "DECLARATION OF ANNA VELASQUEZ IN SUPPORT OF DEFAULT JUDGMENT BY COURT."

Practice in bankruptcy court abides by the Federal Rules of Evidence, including Rule 901 requiring a witness with knowledge to present and authenticate exhibits for the court for the matter at hand. For this Motion, Applicant has merely dumped its pleadings from a state court motion for entry of default judgment on the court as though they are satisfactory for seeking approval of an administrative expense.

Allowance of Administrative Expense

Much of the legal and evidentiary shortcomings have been resolved by Debtor's admission that an administrative expense is owing for goods purchased from Applicant. The only dispute is as to the dollar amount.

From the evidence presented, the goods sold had an actual and necessary cost of $50,231.84. Applicant acknowledges having received a partial payment of $17,652.53 from a third-party.

For the $2,454.00 in costs and expenses, the court accepts Applicant's contention that such may be first applied to the partial payment. After application thereof, there remains $15,198.53.

Applicant then asserts the right to recover 18% per annum interest for the unpaid obligation. Applicant provides no legal authority for why 18% interest (as opposed to the federal rate of interest) is the actual and necessary cost for preserving the bankruptcy estate. Applicant in large part ignores that it is seeking the allowance of an administrative expense and instead appears to merely plead this as a simple complaint for an unsecured claim. Nor does Applicant provide any method of computing such interest. With no basis for interest of 18% per annum, the court does not allow such as an administrative expense in this case.

The allowable administrative expense in this bankruptcy case is properly computed by the court as follows:

A. Cost of Post-Petition Goods Sold to Debtor.....$50,231.84

B. Reduction for Third-Party Payment.....($15,198.53)
(After reduction for $2,454.00 in expenses)

$35,033.31

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 Allowance of Administrative Expense filed by Trulite WSG, LLC ("Applicant") 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 Trulite WSG, LLC is allowed an administrative expense (11 U.S.C. § 503(b)) in the amount of $35,033.31 in this case for goods and materials sold to Hossein Aliasghari Baktvar, Debtor, operating the business of this bankruptcy estate.

13. 14-29659-E-13 DPC-2 | **JUAN ZARAGOZA-BRAVO** **Mary Ellen Terranella** | **OBJECTION TO CLAIM OF FINANCIAL ASSISTANCE, INC., CLAIM NO. 3** **9-13-17 [60]**

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 3007-1 Objection to Claim—No Opposition Filed.

Sufficient Notice Not Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor, Debtor, Debtor's Attorney, and Office of the United States Trustee on September 13, 2017. By the court's calculation, 41 days' notice was provided. 44 days' notice is required. FED. R. BANKR. P. 3007(a) (requiring thirty days' notice); LOCAL BANKR. R. 3007-1(b)(1) (requiring fourteen days' notice for written opposition).

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

The Objection to Proof of Claim Number 3 of Financial Assistance, Inc. is overruled without prejudice.

David Cusick, the Chapter 13 Trustee, ("Objector") requests that the court disallow the claim of Financial Assistance, Inc. ("Creditor"), Proof of Claim No. 3 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $23,195.92. Objector asserts that the Claim

has not been timely filed. *See* FED. R. BANKR. P. 3002(c). The deadline for filing proofs of claim in this case is January 28, 2015. Notice of Bankruptcy Filing and Deadlines, Dckt. 9.

INSUFFICIENT NOTICE OF MOTION

Objector provided forty-one days' notice of this Motion. Federal Rule of Bankruptcy Procedure 3007(a) requires a minimum of thirty days' notice of the hearing, and Local Bankruptcy Rule 3007-1(b)(1) requires an additional fourteen days for parties to file written opposition. Those time periods do not run concurrently. Those two minimums total forty-four days. Objector has provided three fewer days than the minimum. Therefore, the Objection is overruled without prejudice.

At the hearing, Objector made an oral motion to **xxxxxxxxxxxxxxxxxxxx**.

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 Objection to Claim of Financial Assistance, Inc. ("Creditor") filed in this case by David Cusick ("the Chapter 13 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is overruled without prejudice.

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF APPLICANT PROVIDES SUFFICIENT NOTICE

DISCUSSION

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

The deadline for filing a proof of claim in this matter was January 28, 2015. Dckt. 9. Creditor's Proof of Claim was filed on June 16, 2016. No order granting relief for an untimely-filed proof of claim for Creditor has been issued by the court.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Financial Assistance, Inc. ("Creditor") filed in this case by David Cusick ("the Chapter 13 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Proof of Claim Number 3 of Financial Assistance, Inc. is sustained, and the claim is disallowed in its entirety.

14. 17-24875-E-13 DPC-1 — LINDA VANPELT, Mark Lapham — MOTION TO DISGORGE FEES 9-13-17 [32]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on September 13, 2017. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

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

The Motion to Disgorge Attorney Fees is granted.

David Cusick ("the Chapter 13 Trustee") moves the Court for an order disgorging Mark Lapham's ("Attorney") attorney fees in this case pursuant to 11 U.S.C. §§ 329 & 526. The Chapter 13 Trustee argues that the documents filed in this case are "clearly deficient," and he alleges that neither Linda VanPelt ("Debtor") nor Attorney appeared at the Meeting of Creditors.

The Chapter 13 Trustee targets numerous deficiencies in this case. First, the Disclosure of Compensation of Attorney for Debtor states that Attorney was paid $1,000.00 prior to filing the Disclosure and that the balance of his fees was $0.00. *See* Dckt. 19.

Additionally, the Chapter 13 Trustee notes from the Disclosure that the fee does not include motions for relief from stay or judicial lien avoidances.

A plan was filed on August 22, 2017, that shows $1,000.00 paid to Attorney with $0.00 paid through the Plan, but it does not specify if Attorney is complying with Local Bankruptcy Rule 2016-1(c) or is planning to file and serve a motion under 11 U.S.C. § 330. No Rights and Responsibilities have been filed in this case, and the Statement of Financial Affairs does not list the date on which attorney fees were paid. *See* Dckt. 30.

Second, the Chapter 13 Trustee argues that fees should be disgorged because the case was skeletal when filed; only the petition, Schedules A/B, and the creditor matrix were filed. The remaining documents were filed on August 22, 2017, after the court extended the deadline to file the documents. Those documents were filed after the Notice of Commencement of Case had been mailed out to all parties without the Chapter 13 Plan attached. Additionally, no creditors or interested parties have been served with the Plan yet, and Debtor has not set a confirmation hearing.

Third, neither Debtor nor Attorney appeared at the Meeting of Creditors held on September 7, 2017. The Chapter 13 Trustee continued the meeting to November 2, 2017, but he has not been contacted by Attorney and has not received any explanation about why he failed to appear.

Fourth, Debtor has four prior bankruptcy cases that were not disclosed on the petition: Case Nos. 11-30525-7, 14-27048-13, 15-20897-13, and 15-24979-13. The Chapter 13 Trustee notes that Attorney does not appear to have represented Debtor in those cases.

Fifth, the proposed plan is not confirmable. The Plan proposes payments of $600.00 for ten months, then $2,500.00 for twenty months, and then $9,187.08 for thirty months with a zero percent dividend to unsecured claims, but Debtor has not provided any evidence of how she can afford the increases. The Plan also fails to provide for the first and third deeds of trust that are listed on Schedule D. The Plan proposes to pay the second deed of trust in Class 2 with a monthly dividend of $936.55, but the plan payments are $600.00 for the first ten months, which means that payments to Class 2 would be insufficient until the eleventh month.

Additionally, no personal property is listed on Schedule B, but Schedule C includes a 2000 Toyota Landcruiser. Schedule J shows net excess income of $2,040.00, but the Chapter 7 Trustee has not been provided with pay stubs or tax returns. The Franchise Tax Board filed a claim indicating that tax returns had not been filed for 2014, 2015, and 2016. Schedule I shows monthly income of $6,000.00 as a realtor employed for twenty-one years.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on October 17, 2017. Dckt. 40. Debtor argues that the Schedules have been amended to cure the grounds raised by the Chapter 13 Trustee. Additionally, Debtor has mailed the Amended Plan to creditors and has filed a proof of service with the court.

Debtor also reports that tax returns have been filed and sent to the Chapter 13 Trustee. Debtor also filed an Amended Statement of Attorney Compensation, an Amended Statement of Financial Affairs, and an Amended Form B22C1.

Additionally, Debtor states that she will file a motion to participate in a mortgage modification program, with the applicable fees paid already. Debtor also states that she will file a motion to expunge the second mortgage.

Debtor states that due to issues beyond her attorney's control, finalizing the schedules and other documents has been difficult. Debtor argues that all alleged defects have been cured, and she requests that the extreme Motion be denied.

APPLICABLE LAW

The court has the authority, and responsibility, to consider attorney's fees obtained or to be paid prior to or during a bankruptcy case. 11 U.S.C. §§ 329, 330, 331; *see also Law Offices of Nicholas A. Franke v. Tiffany (In re Lewis)*, 113 F.3d 1040, 1045 (9th Cir. 1997). Fees in excess of the reasonable value of such services may be ordered repaid. *See In re Lawas*, No. 13-33513-E-13, 2014 Bankr. LEXIS 623 (Bankr. E.D. Cal. Feb. 12, 2014). The application of 11 U.S.C. § 329 and the Federal Rules of Bankruptcy Procedure may seem harsh, but they are necessary not only to protect vulnerable consumers and business owners, but also to protect the integrity of the federal judicial process. *See Neben & Starrett v. Charwell Fin. Corp. (In re Park-Helena Corp.)*, 63 F.3d 877, 881 (9th Cir. 1995). Debtor's counsel must lay bare all dealings regarding compensation and must be direct and comprehensive. *See Kavanagh v. Leija (In Re Leija)*, 270 B.R. 497, 501 (Bankr. E.D. Cal. 2001) (citation omitted); *In re Bob's Supermarket's, Inc.*, 146 B.R. 20, 25 (Bankr. D. Mont. 1992), *aff'd in part and rev'd in part*, 165 B.R. 339 (B.A.P. 9th Cir. 1993). The burden is on the person to be employed to come forward and to make full, candid, complete disclosure. *In re B.E.S. Concrete Products, Inc.*, 93 B.R. 228 (E.D. Cal. 1988). The federal courts are not mere devices to be used to generate fees for attorneys irrespective of any bona fide rights to be adjudicated.

RULING

Despite Debtor and Attorney's contentions that the problems raised by the Chapter 13 Trustee have been fixed, the problems do not appear to be fixed based upon the court's review of the pleadings on the docket.

In this case, Attorney has failed to provide the basic services that an attorney representing a Chapter 13 debtor should provide. Attorney has not completed the plan sections indicating whether he is adopting the no-look fee attorney's fees provided by Local Bankruptcy Rule 2016-1(c) or whether he will

be filing a separate motion for compensation under 11 U.S.C. § 330 for the work performed in this case. Even the Statement of Financial Affairs does not disclose when he received funds for this case.

Attorney filed this case without all of the required documents, and after the court granted his request to extend the filing deadline to August 22, 2017, Attorney only barely met the deadline by filing the remaining documents on August 22 itself. Attorney has not presented any argument to the court about why there have been so many delays in this case. As of the October 24, 2017, the Plan filed on August 22, 2017, was not set for a confirmation hearing, and the Amended Plan filed on October 17, 2017, was filed without any other supporting documents—such as a Motion to Confirm, a Notice of Hearing, a Proof of Service, or any Declaration in support of confirmation.

Both Attorney and Debtor failed to attend the Meeting of Creditors on September 7, 2017, and according to the Chapter 13 Trustee, Attorney has not been communicating with him about this case. Attorney does not appear to be managing this case well, as evidenced by filing a petition that failed to disclose any of Debtor's prior four bankruptcy cases.

Additionally, the schedules conflict with one another, not listing property in place, only to list it somewhere else unexpectedly, such as happened on Schedule B where no personal property is listed, but on Schedule C there is an exemption for personal property in the form of a vehicle. Finally, the plan filed in this case presents terms that are not confirmable—dividend of $936.55 to Class 2 while plan payments are only $600.00, Schedule D claims unaccounted for in the Plan, and unsupported plan payment increases of thousands of dollars. Debtor claims that the problems have been fixed in amended schedules, but no such schedules have been filed with the court.

The court finds that Attorney has not performed in a way in this case that merits an award of $1,000.00 in attorney fees. The court orders the $1,000.00 Attorney has received in this case already to be disgorged, paid to the Chapter 13 Trustee, and the Chapter 13 Trustee disburse the full $1,000.00 to Debtor.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Disgorge Attorney Fees filed by David Cusick ("the Chapter 13 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Mark Lapham ("Attorney") is ordered to disgorge $1,000.00 of attorney's fees in this case. Attorney shall the $1,000.00 to the Chapter 13 Trustee on or before November 24, 2017. The Chapter 13 Trustee shall disburse the $1,000.00 received from Attorney directly to Linda VanPelt ("Debtor").

15. 17-24979-E-13 DPC-1 | **MARIO LOPEZ AND LEAH ALBERTO** | **OBJECTION TO DISCHARGE BY DAVID P. CUSICK**
Lucas Garcia | **9-1-17 [22]**

Final Ruling: No appearance at the October 24, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on September 1, 2017. 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) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Objection to Discharge is sustained.

David Cusick, the Chapter 13 Trustee, ("Objector") filed the instant Objection to Mario Lopez and Leah Alberto's ("Debtor") discharge on September 1, 2017. Dckt. 22.

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

Debtor filed a Chapter 7 bankruptcy case on May 22, 2015. Case No. 15-24142. Debtor received a discharge on September 8, 2015. Case No. 15-24142, Dckt. 27.

The instant case was filed under Chapter 13 on July 29, 2017.

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

Here, Debtor received a discharge under 11 U.S.C. § 727 on September 8, 2015, which is less than four years preceding the date of the filing of the instant case. Case No. 15-24142, Dckt. 27. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), Debtor is not eligible for a discharge in the instant case.

Therefore, the Objection is sustained. Upon successful completion of the instant case (Case No.17-24979), the case shall be closed without the entry of a discharge, and Debtor shall receive no discharge in the instant case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Discharge filed by David Cusick ("the Chapter 13 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to Discharge is sustained, and upon successful completion of the instant case, Case No. 17-24979, the case shall be closed without the entry of a discharge.

16. 17-26379-E-13 ERIKA DAVIS
PGM-1 Peter Macaluso

MOTION TO EXTEND AUTOMATIC STAY
10-3-17 [10]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on October 3, 2017. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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

The Motion to Extend the Automatic Stay is denied.

Erika Davis ("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 Debtor's second bankruptcy petition pending in the past year. Debtor's prior bankruptcy case (No. 16-20849) was dismissed on September 7, 2017, after Debtor became delinquent in plan payments. *See* Order, Bankr. E.D. Cal. No. 16-20849, Dckt. 34, September 7, 2017. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to Debtor thirty days after filing of the petition.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on October 6, 2017. Dckt. 19.

The Chapter 13 Trustee states that Debtor has four previous filings on her petition. Case No. 15-26379 was dismissed on October 19, 2015, for delinquency. Debtor's reported monthly income was $2,180.56 while her monthly expenses were $2,030.56.

Case No. 16-20849 was dismissed on September 7, 2017, for delinquency. Debtor's reported monthly income was $2,251.36, while her monthly expenses were $2,151.36.

Current Case No. 17-26379 was filed on September 26, 2017. Debtor's reported monthly income was $2,105.82, while her monthly expenses are $2,005.82.

The Chapter 13 Trustee believes that Debtor does not appear likely to confirm the plan or to successfully complete the plan. He states that there does not appear to be any significant improvement in Debtor's financial circumstances. The Chapter 13 Trustee notes that Debtor stated in her declaration that her rent increased during the previous case. However, the Chapter 13 Trustee points out that Debtor has not changed addresses and that the rent reported on Schedule J in the previous case and the current case is $500.00 monthly.

Lastly, the Chapter 13 Trustee states that Debtor claims in her declaration not to have acquired any new debt since her previous case was dismissed. However, Schedule J reports a payment to Aaron's Furniture of $178.49, which was not included in the previous case. The Chapter 13 Trustee notes that Debtor has scheduled this creditor in Class 4 of the proposed plan.

DISCUSSION

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed because she did not have a financial support system set up when she became sick with hemicrania migraine headaches, which are flare-ups from her brain tumor.

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). As this court has noted in other cases, Congress expressly provides in 11 U.S.C. § 362(c)(3)(A) that the automatic stay **terminates as to Debtor**, and nothing more.

In 11 U.S.C. § 362(c)(4), Congress expressly provides that the automatic stay **never goes into effect in the bankruptcy case** when the conditions of that section are met. Congress clearly knows the difference between a debtor, the bankruptcy estate (for which there are separate express provisions under 11 U.S.C. § 362(a) to protect property of the bankruptcy estate) and the bankruptcy case. While terminated as to Debtor, the plain language of 11 U.S.C. § 362(c)(3) is limited to the automatic stay as to only Debtor. The subsequently filed case is presumed to be filed in bad faith if one or more of Debtor's cases was pending within the year preceding filing of the instant case. *Id.* § 362(c)(3)(C)(i)(I). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* § 362(c)(3)(C).

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); *see also* Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209–10 (2008). An important indicator of good faith is a realistic prospect of success in the second case, contrary to the failure of the first case. *See, e.g.*, *In re Jackola*, No. 11-01278, 2011 Bankr. LEXIS 2443, at *6 (Bankr. D. Haw. June 22, 2011) (citing *In re Elliott-Cook*, 357 B.R. 811, 815–16 (Bankr. N.D.

Cal. 2006)). Courts consider many factors—including those used to determine good faith under §§ 1307(c) and 1325(a)—but the two basic issues to determine good faith under § 362(c)(3) are:

A. Why was the previous plan filed?

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

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

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 has a history of being delinquent in her plan payments, even though her reported monthly expenses are lower than her reported monthly income. Debtor also has made no changes to improve her financial circumstances even though she claimed to do so. Lastly, Debtor has acquired new debt and did not include payment for this debt in the previous case.

The Motion is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Extend the Automatic Stay, which would terminated as to the debtor by operation of law pursuant to 11 U.S.C. § 362(c)(3)(A), filed by Erika Davis ("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 the automatic stay as to the Debtor pursuant to 11 U.S.C. § 362(c)(3)(B) is denied.

17. 17-25480-E-13 DPC-1 | **MITCHELL LOGAN** **Lucas Garcia** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **9-27-17 [12]**

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

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

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

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

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

The Objection to Confirmation of Plan is sustained.

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

A. Mitchell Logan ("Debtor") is delinquent.

B. Debtor's Plan may not be filed in good faith.

C. Debtor's Plan exceeds sixty months.

D. Debtor has prior related cases that may also have not been filed in good faith.

E. Debtor did not provide his tax transcripts or Federal Income Tax Return for the most recent pre-petition tax year.

F. Debtor failed to report Business Operations.

The Chapter 13 Trustee's objections are well-taken.

DISCUSSION

The Chapter 13 Trustee asserts that Debtor is $750.00 delinquent in plan payments, which represents one month of the $750.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

The Chapter 13 Trustee asserts that Debtor's Plan may not be filed in good faith because Debtor claimed on his Statement of Current Monthly Income a household size of three. However, Debtor lists on Schedule J that his dependants are his wife and his twenty-seven year old daughter who has a medical degree from University of California, Irvine.

Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to the Chapter 13 Trustee, the Plan will complete in 119 months due to claims filed to date. Debtor has general unsecured claims totaling approximately $45,137.71 as of September 2017. On September 5, 2017, Toyota Motor Credit filed a unsecured claim on a 2004 Nissan for $7,559.24 due to an auto deficiency. On September 12, 2017, IRS filed a claim for $27,039.54 in outstanding unsecured taxes for years 2008 to 2014. On September 12, 2017, Consumer Portfolio Service/CPS filed a claim for a 2010 Honda Accord stating $13,000.00 as secured and $2,089.03 as unsecured. On September 12, 2017, Santander Consumer USA Inc. filed a claim for a 2011 Lexus stating $16,075.00 as secured, and $10,765.29 as unsecured. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

The Chapter 13 Trustee alleges that Debtor's Plan may not be filed in good faith after reviewing Debtor's schedules, statements, plans, and compared those documents to the ones filed in Debtor's wife's current Case No. 15-28551.

Debtor's wife's Case No. 15-28551 was filed in November 2, 2015. The Modified Plan called for $2,525.00 payments for months one through nine, and $2,750.00 payments for months ten through sixty. Her plan proposes to pay $2,000.00 toward attorney fees, $1,914.31 to Wells Fargo Home Mortgage's monthly mortgage payment, and $34,000.00 in arrearages and 0% to general unsecured claims and trustee fees.

Debtor filed this case on August 18, 2017. The plan proposes $750.00 payments for sixty months. The plan proposes to pay $4,000.00 toward attorney fees, $13,000.00 at 4% interest to Consumer Portfolio, $19,000.00 at 4% interest to Santander Consumer USA in Class 2, payments to Wells Fargo Home Mortgage in Class 3 paid by Debtor's spouse's Chapter 13, and 100% to unsecured claims and trustee fees.

The Chapter 13 Trustee notes that Debtor's plan was filed to pay two vehicles not paid for in his spouse's case. The Chapter 13 Trustee is concerned that both vehicle loans (one for Consumer Portfolio Services concerning a 2010 Honda Accord and another for Santander Consumer USA Inc. concerning a 2011 Lexus ES) were obtained prior to filing Debtor's spouse's case and were not accurately reported.

The Chapter 13 Trustee also notes that Debtor deducts on Schedule J, $2,900.00 for his spouse's Chapter 13 payment. The Chapter 13 Trustee states that this figure is inaccurate, and Debtor has falsely reported his spouse's plan payment to report an addition $150.00 per month to contribute to his monthly payment plan.

The Chapter 13 Trustee notes that the income reported on Schedule I is identical to the Schedule I income in Debtor's spouse's Case No. 15-28551 filed almost two years prior on November 2, 2015. The difference between Debtor's spouse's pay advice and the amount on Schedule I is $1,487.31 per month to contribute to Debtor's monthly plan payment.

Debtor admitted at the Meeting of Creditors that the federal income tax return for the 2016 tax year has not been filed still. Filing of the return is required. 11 U.S.C. § 1308. Failure to file a tax return is grounds to deny confirmation. 11 U.S.C. § 1325(a)(1).

The Chapter 13 Trustee argues that Debtor has failed to report his business Import/Export earning gross receipts of $9,500.00 on his Statement of Financial Affairs. Debtor also has reported a net loss of $19,210 on Debtor's 2015 Tax Return 1040.

CONCLUSION

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

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

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

18. **17-24882-E-13 DPC-1** | **SCOTT/KATHLEEN PHILLIPS** **Mikalah Liviakis** | **OBJECTION TO DISCHARGE BY DAVID P. CUSICK** **9-1-17 [17]**

Final Ruling: No appearance at the October 24, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on September 1, 2017. 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) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Objection to Discharge is sustained.

David Cusick, the Chapter 13 Trustee, ("Objector") filed the instant Objection to the discharge of Scott Phillips and Kathleen Phillips ("Debtor") on September 1, 2017. Dckt. 17.

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

Debtor filed a Chapter 13 bankruptcy case on May 8, 2015. Case No. 15-23758. Debtor received a discharge on November 3, 2015. Case No. 15-23758, Dckt. 84.

The instant case was filed under Chapter 13 on July 25, 2017.

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

Here, Debtor received a discharge under 11 U.S.C. § 727 on November 3, 2015, which is less than four years preceding the date of the filing of the instant case. Case No. 15-23758, Dckt. 84. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), Debtor is not eligible for a discharge in the instant case.

Therefore, the Objection is sustained. Upon successful completion of the instant case (Case No.17-24882), the case shall be closed without the entry of a discharge, and Debtor shall receive no discharge in the instant case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Discharge filed by David Cusick ("the Chapter 13 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to Discharge is sustained, and upon successful completion of the instant case, Case No. 17-24882, the case shall be closed without the entry of a discharge.

19. 17-25309-E-13 RTD-1 | **ANTHONY/LAURA GONZALEZ** **Mikalah Liviakis** | **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY SCHOOLS FINANCIAL CREDIT UNION** **9-21-17 [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 Objection. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on September 21, 2017. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

Schools Financial Credit Union ("Creditor") holding a secured claim opposes confirmation of the Plan on the basis that:

A. The Chapter 13 Plan is infeasible because the parties stipulated to a higher value for property on Schedule B than has been provided for in the Plan; and

B. The interest rate on Creditor's claim is too low.

DEBTOR'S RESPONSE

Anthony Gonzalez and Laura Gonzalez ("Debtor") filed a Response on September 27, 2017. Dckt. 51. Debtor proposes to modify the Plan by increasing plan payments, which includes increasing

monthly dividends to Creditor. Debtor proposes plan payments of $1,990.00 for the first month, $2,195.00 for the next sixteen months, and then $2,550.00 for the following forty-three months of the Plan. Debtor plans to pay Creditor monthly dividends of $180.00 for the 2009 Acura and $223.00 for the 2006 Ford until the secured claims are paid in full.

CREDITOR'S REPLY

Creditor filed a Reply on October 10, 2017. Dckt. 53. Creditor does not oppose the proposed plan payments of $1,990.00 for the first month, $2,195.00 for the next sixteen months, and $2,550.00 for the remaining months. Also, Creditor does not object to the proposed dividends of $180.00 per month for the 2009 Acura TL and $223.00 per month for the 2006 Ford F-150.

Creditor does continue to object, however, to the proposed interest rate on the secured claims.

OCTOBER 17, 2017 HEARING

At the hearing, the court continue the matter to 3:00 p.m. on October 24, 2017. Dckt. 57.

DISCUSSION

Creditor'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). Creditor contends that the dividends set forth in the plan are insufficient to pay the secured claims for a 2006 Ford and a 2009 Acura. Debtor listed the value of the 2006 Ford as $5,500.00, however, the sum to be paid over sixty months is $6,189.60. The court entered an order determining the 2006 Ford to have a secured claim of $11,170.00 with the remaining balance unsecured. Dckt. 43.

Debtor listed the value of the 2009 Acura as $6,500.00, however, the sum to be paid over sixty months is $7,315.20. The court entered an order determining the 2009 Acura to have a secured claim of $9,449.00 with the remaining balance unsecured. Dckt. 44. Creditor states that the amounts to be paid are significantly higher than set forth in the Plan. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

Creditor objects to the confirmation of the Plan on the basis that the Plan calls for adjusting the interest rate on its loan with Debtor to 4.75%, but the stipulations between the parties call for a 5.5% interest rate. The court approved the motions to value Creditor's secured claims pursuant to the stipulations that were filed between the parties. Dckts. 43 & 44. Each of the stipulations included language that the interest rate on Creditor's claims would be 5.5%, which the court must now consider. In light of Debtor stating agreement to such an interest rate, and such rate not being unreasonable, the Plan as now presented does not provide for such interest rate.

At the hearing, Debtor addressed the interest rate issue, advising the court that **xxxxxxxxxxx.**

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 Creditor Schools Financial Credit Union ("Creditor") holding a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.