UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

November 17, 2015 at 3:00 p.m.

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1. 13-20501-E-13 DPC-2 RAYMOND/CHRISTINE BELCHER Peter Macaluso CONTINUED MOTION TO DISMISS CASE 9-16-15 [68]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, and Office of the United States Trustee on September 16, 2015. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The court's decision is to grant the Motion to Dismiss and dismiss the case.

David Cusick, the Chapter 13 Trustee, filed the instant Motion to Dismiss on September 16, 2015. Dckt. 68. The Trustee seeks dismissal based on the Debtor's delinquency in plan payments.

DEBTOR'S RESPONSE

The Debtor filed an opposition to the instant Motion on September 30, 2015. Dckt. 72. The Debtor states that the Debtor recently contacted new counsel and intend to file, set and serve an amended plan prior to the hearing.

OCTOBER 14, 2015 HEARING

At the hearing, the court continued the hearing to 3:00 p.m. on November 17, 2015. Dckt. 81. The Debtor was ordered to file supplemental evidence in support of confirmation of the proposed plan by October 30, 2015.

To date, the Debtor has failed to file such supplemental evidence.

DISCUSSION

The Trustee seeks dismissal of the case on the basis that the Debtor is $18,645.00 delinquent in plan payments, which represents multiple months of the $6,230.00 plan payment. Failure to make plan payments is unreasonable delay which is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

To date, the Debtor has not filed any evidence that the delinquency has been cured. Under the First Modified Plan Debtor will make 28 additional payments of $5,750.00. Under the current confirmed Plan Debtor is obligated to make monthly plan payments of $6,230.00. First Amended Chapter 13 Plan, Dckt. 36.

The last payment received from the Trustee was on May 27, 2015. Motion, Dckt. 68, and Declaration, Dckt. 69. The total paid into the plan as of the last payment was $159,163.00. At the time of filing the Motion to Dismiss, Debtor was in default for the June, July, and August 2015. The proposed First Modified Plan provides that only $159,163 will be paid into the Plan through September 2015.

The effect of the proposed Modified Plan is that $24,920.00 ($6,230.00 x 4 months) which the Debtor previously said was available to fund the plan is not accounted. Even if Debtor suffered some financial shortfalls, it appears highly doubtful that all of the $24,920.00 went to other emergency or extraordinary expenses. To the contrary, Debtor states that there is at least $5,720.00 a month to fund a plan. So it appears that there is $22,880.00 of monies to fund the plan which are unaccounted for by Debtor.

The court has reviewed Debtor's declaration in support of confirmation of the proposed Modified Plan – presuming that it would provide an explanation as to why such substantial defaults had occurred, the use of the monies which were not paid to the Trustee, and why no payments for the months of June, July, August, and September 2015 were fair and in good faith.

The only explanation provided is,

> "2. We have had several changes/problems that have arose which now require us to further modify our Chapter 13 Plan. These factors include; Christine's mother died in April 2014, so our income was reduced. Our business is seasonal with the high being in February and the low in July, so
> we changed our concentration to drought prevention."

Declaration, p. 1:19.5-23.5; Dckt. 77. No information is provided as to why Debtor's had no monies in June, July, August, and September 2015 to fund a plan.

Debtor has filed income and expense updates in support of the Motion to

Confirm the proposed Modified Plan. Currently, Debtor states monthly income of $9,200 a month. Exhibit 1, Dckt. 78. When the court confirmed the First Amended Plan in this case, Debtor reported having monthly income of $8,116.86. Exhibit B, Dckt. 35. This is not consistent with Debtor's representations that income has dropped – actually, the evidence presented by Debtor show that income has increased by $1,000.00 per month.

In reviewing expenses, Debtor has increased those by $364 a month. Compare 2015 expenses, Exhibit 2, Dckt. 78; and Exhibit B, Dckt. 35. The court notes that the changes in expenses include increasing phone, internet, and cable from $350.00 to $822.00.

On the income statement, Debtor lists having wage income of $5,900.00. However, Debtor makes no provision for tax, medicare, or Social Security withholding. Exhibit 1, Dckt. 78. The wages are from Sunrays Harvest, LLC, which Debtor owns. Debtor does not list any tax payments for this income on the expenses. Exhibit 2, Dckt. 78. Debtor has significant tax claims from both the Internal Revenue Service and the California Franchise Tax Board. Proofs of Claim Nos. 8 and 9. These are for unpaid income taxes.

The Debtor has failed to address the grounds for the Motion to Dismiss – the substantial defaults in payments. Debtor has failed to provided competent, credible, properly authenticate evidence as to why the defaults occurred, why they are not likely to occur again, and the disposition of the $24,920.00 not paid into the plan, and the disposition of the $22,880.00 of what Debtor states is the disposable income to fund the plan for the months of June, July, August, and September 2015.

The court denied the Motion to Confirm on November 17, 2015 due to the Debtor failing to provide the supplemental evidence and due to the Debtor's continued delinquency even under the confirmed plan.

While Debtor states that a significant amount has been paid into the plan, all of the money has been paid to creditors having claims secured by the real property which Debtor seeks to retain (pre-petition arrearage, post-petition arrearage, and current payments) and non-dischargeable taxes. The plan continues to provide for a 0.00% dividend to creditors holding general unsecured claims. Proposed Modified Plan, Dckt. 79, and prior Confirmed Plan, Dckt. 36. All payments made in this case have been effectively "directly into the pocket of Debtor," paying the debts which they would have to pay even if they had obtained a discharge.

Cause exists to dismiss this case. The motion is granted and the case is dismissed.

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

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

IT IS ORDERED that the hearing on the Motion to Dismiss is granted and the case is dismissed.

2. 13-20501-E-13 RAYMOND/CHRISTINE BELCHER MOTION TO MODIFY PLAN
PGM-1 Peter Macaluso 10-9-15 [75]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 9, 2015. By the court's calculation, 39 days' notice was provided. 35 days' notice is required.

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

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

Raymond and Christine Belcher ("Debtor") filed the instant Motion to Confirm the Modified Plan on October 9, 2015. Dckt. 75.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an objection to the instant Motion on November 3, 2015. Dckt. 84. The Trustee objects on the ground that the Debtor is delinquent $5,750.00 under the proposed plan.

DISCUSSION

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

The Trustee's objection is well-taken. The basis for the Trustee's objection is that the Debtor is $5,750.00 delinquent in plan payments. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

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

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

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

3. 15-27101-E-13 PEDRO/MARISSA FERNANDES **OBJECTION TO CONFIRMATION OF**
DPC-1 Stephen Murphy **PLAN BY DAVID P. CUSICK**
10-21-15 [26]

WITHDRAWN BY M.P.

Final Ruling: No appearance at the November 17, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on October 21, 2015. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

Upon review of the Motion and supporting pleadings, no opposition having been filed, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

The court's decision is to overrule the Objection.

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that the plan relies on a Motion to Value Collateral of Specialized Loan Servicing.

On October 27, 2015, the court granted the Debtor's Motion to Value Collateral of Specialized Loan Servicing, valuing the secured claim at $0.00. Dckt. 30.

The Trustee filed a withdrawal of the instant Objection on November 4, 2015. Dckt. 33

The Trustee's objection being withdrawn and upon the court's own review of the plan, the plan does comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is overruled and the Plan is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause

appearing,

IT IS ORDERED that the Objection is overruled, Debtor's Chapter 13 Plan filed on September 9, 2015 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

4. 15-27002-E-13 JANE GALE
DPC-1 Bruce Dwiggins

OBJECTION TO DISCHARGE BY DAVID P. CUSICK
10-13-15 [17]

Final Ruling: No appearance at the November 17, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on October 13, 2015. By the court's calculation, 35 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 4003(b). The failure of the Debtor and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the Debtor and the other parties in interest are entered, the matter will be resolved without oral argument and the court shall 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 Debtor's Discharge on October 13, 2015. Dckt. 17.

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

The Debtor filed a Chapter 13 bankruptcy case on April 5, 2012 which was converted to a Chapter 7 on January 9, 2013. Case No. 12-26690. The Debtor

received a discharge on May 14, 2013. Case No. 12-26690, Dckt. 49.

The instant case was filed under Chapter 13 on September 3, 2015.

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

Here, the Debtor received a discharge under 11 U.S.C. § 727 on May 14, 2013, which is less than four-years preceding the date of the filing of the instant case. Case No. 12-26690, Dckt. 49. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), the Debtor is not eligible for a discharge in the instant case.

Therefore, the objection is sustained. Upon successful completion of the instant case (Case No. 15-27002), 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.
>
> **IT IS ORDERED** that, upon successful completion of the instant case, Case No. 15-27002, the case shall be closed without the entry of a discharge.

5. 14-30704-E-13 KEVIN FLOYD — MOTION TO MODIFY PLAN
SDB-2 Scott de Bie — 9-30-15 [50]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 30, 2015. By the court's calculation, 48 days' notice was provided. 35 days' notice is required.

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

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

Kevin Floyd ("Debtor") filed the instant Motion to Confirm the Modified Plan on September 30, 2015. Dckt. 50.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on November 3, 2015. Dckt. 65. The Trustee opposes confirmation because the Debtor is delinquent $2,775.00 under the proposed plan.

DISCUSSION

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

The Trustee's objection is well-taken.

The basis for the Trustee's objection is that the Debtor is $2,775.00

delinquent in plan payments. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

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

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

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

6. 12-20006-E-13 KEITH/KELLY RYAN
PGM-1 Peter Macaluso

MOTION TO SUBSTITUTE KELLY M. RYAN FOR KEITH G. RYAN AS SUCCESSOR-IN-INTEREST TO COMPLETE THE ADMINISTRATION OF CHAPTER 13 CASE AND/OR MOTION TO WAIVE THE 1328 CERTIFICATE REQUIREMENTS FOR DECEASED DEBTOR KEITH GREGORY RYAN
10-2-15 [42]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 2, 2015. By the court's calculation, 46 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). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Substitute is denied without prejudice.

Joint Debtor, Kelly Ryan, seeks an order approving the motion to substitute the Joint Debtor for the deceased Debtor, Keith Ryan. This motion is being filed pursuant to Federal Rule Of Bankruptcy Procedure 1004.1.

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

The Joint Debtor requests authorization to be substituting in for the deceased debtor and to perform the obligations and duties of the deceased party

in addition to performing her own obligations and duties. The Suggestion of Death was filed on October 2, 2015. Dckt. 42. Joint Debtor is the wife of the deceased party and is the successor's heir and lawful representative. Joint Debtor states that she will continue to prosecute this case in a timely and reasonable manner.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on November 3, 2015. Dckt. 47. The Trustee opposes the Motion on the following grounds:

1. The Debtor has not amended Schedule B or Schedule C. The Debtor did not list the life insurance on Schedule B nor exempt the proceeds on Schedule C.

2. The Debtor may have significant money on hand. The money the Debtor received as life insurance proceeds may be property of the estate. The Debtor discloses that she received $50,000.00 in life insurance proceeds. The Debtor's Declaration states the money has been used for funeral expenses, college tuition, and to supplement income but does not disclose any amount paid or balance on hand.

3. The Debtor has not filed current Schedule I or Schedule J. The Trustee is concerned with the Debtor's ability to pay. The Debtor's Schedule I reflects that the deceased debtor had net income of $2,959.54 and Debtor Kelly Ryan had income of $3,423.25.

4. The Debtor does not cite any legal authority for continued administration of the case. The Debtor is not disclosing what monies were spent and what are remaining and is not filing a current Schedule I and J. The Trustee asserts that the case should no longer be administered as a Chapter 13 and should be converted to a Chapter 7 or dismissed.

DISCUSSION

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

Federal Rule of Bankruptcy Procedure 7025 provides "[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 representation. 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 [emphasis added],

> 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. 5 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...**

See also, *Hawkins v. Eads*, *supra*. While the death of a debtor in a Chapter 13

case does not automatically abate due to the death of a debtor, the court must make a determination of whether "[f]urther administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." Fed. R. Bank. P. 1016. The court cannot make this adjudication until it has a substituted real party in interest for the deceased debtor.

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

Here, the Trustee's objections are well-taken. The Debtor's Motion states the following as grounds for the relief sought:

> 1. The instant case was filed on January 2, 2012.
>
> 2. Keith G. Ryan passed away on February 25, 2014, as evidenced by the death certificate, attached hereto as Exhibit A.
>
> 3. The surviving spouse and co-debtor, Kelly M. Ryan was the beneficiary of a life insurance policy which paid approximately $50,000. Refer to Declaration of Kelly M. Ryan attached hereto.
>
> 4. The Debtor have paid $84,905.05 to the Chapter 13 Trustee to date and payments are current.
>
> 5. Despite the unfortunate death of Keith G. Ryan, Kelly M. Ryan has continued to make timely plan payments and the case is on tract to complete timely in the 60th month as scheduled.
>
> 6. The clerk of the Court will be unable to enter discharge for Debtor, Keith G. Ryan, without the required form or an order waiving the 11 U.S.C. § 1328 requirement.

Dckt. 42.

The Debtor's Declaration states legal conclusions, such as Debtor Kelly Ryan is "the successor in interest. . .as defined in Section 37.11 of the Code of Civil Procedure," and that "[n]o other person has a superior right to commence the above-entitled proceeding or to be substituted for Keith G. Ryan." Dckt. 44. As to the life insurance proceeds, the Debtor declares the following:

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

Id.

The Debtor attaches Schedule B and Schedule C to the instant Motion. However, the Debtor does not provide supplemental schedules, listing the life insurance proceeds or any claim exempting the monies. The Debtor does not state

in the Motion nor Declaration how or why the life insurance proceeds are not assets of the estate.

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

Debtor's counsel filed a Reply on November 10, 2015. Dckt. 50. No evidence is filed with the Reply. The evidence cited to in the Reply is the surviving Debtor's earlier declaration, Dckt. 44. (It appears that the Reply incorrectly identifies the evidence as having been filed as Docket Entry No. 42, the Motion, which is not evidence.) Unfortunately, the Surviving Debtor merely testifies that (1) she received insurance proceeds, (2) she spent insurance proceed, (3) she needs whatever insurance proceeds are left, and (4) don't worry, I'll somehow complete the Plan.

In substance, Debtor and her counsel seek to rewrite the Bankruptcy Code to be one in which the Code is what the Debtor says it is. The Debtor can have significant financial changes, but accurate information as to the changes is nobody's business but the Surviving Debtor. Even though almost 50% of the gross monthly income has been lost with the death of the Deceased Debtor, the Surviving Debtor has somehow been able to continue performing the plan which required the now missing income. Schedule I, Dckt. 1. Looking at Schedule J, Surviving Debtor and the Deceased Debtor provided financial information showing that the Deceased Debtor's income was necessary to generate the projected disposable income to fund the Plan with $1,922.00 a month. Even with the now missing income, the Surviving Debtor and Deceased Debtor could provide for only a 0.00% dividend for creditors holding general unsecured claims, while making the mortgage payment, curing the pre-petition mortgage arrearage to keep their home and pay nondischargeable taxes. Plan, Dckt. 5. How that could occur is nobody's business except that of the Surviving Debtor – no explanation to be provided.

The Surviving Debtor has elected to wait until the money has been spent and the "however I did it without half our income" operation of the plan over the past twenty-one months (since the February 24, 2014 passing of the Deceased Debtor) to bring this to the intention of the court. This effectively frustrates the exercise of judicial power of the court to properly apply the Bankruptcy Code, as written by Congress and not as dictated by the Surviving Debtor, to this case.

It is unfortunate as to how this case has been prosecuted and the Surviving Debtor's summary information approach to this Motion. It is very unfortunate that Debtor chose to operate outside of the Bankruptcy Code following the passing of her husband. Few losses can have such significant impact on one and a family. But such does not create the justification for the Surviving Debtor operating outside the Code or failing (or refusing) to provide financial information as to how she has continued to perform the plan and basis for her electing how to disburse the additional assets of the bankruptcy estate

(the insurance proceeds).

The court will not order the substitution of the Debtor when the Debtor has not provided evidence that the continued administration is in the best interest of the creditors and the estate.

Additionally, the court will not waive the 11 U.S.C. § 1328 certificate without the Debtor showing why she, as the potential representative of the deceased debtor, could not complete the certificate for him.

Therefore, due to the Debtor's failure to provide updated financial information, to properly list the life insurance proceeds, or to properly assert that continued administration is in the best interest of the estate, 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.

7. 15-26207-E-13 TODD/MELISSA MANES MOTION TO CONFIRM PLAN
JDM-1 John Maxey 9-25-15 [22]

Final Ruling: No appearance at the November 17, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 25, 2015. By the court's calculation, 53 days' notice was provided. 42 days' notice is required.

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

Upon review of the Motion and supporting pleadings, no opposition having been filed, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

The court's decision is to grant the Motion to Confirm the

Todd and Melissa Manes ("Debtor") filed the instant Motion to Confirm the Amended Plan on September 25, 2015. Dckt. 22.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on November 11, 2015. Dckt. 33. The Trustee states that the Additional Provisions misstates when the step up payments should begin.

The Trustee requests a provision in the order confirming setting forth the payments as:

> $620.00 for one month, $680.00 for fourteen months, then $1,012.00 for the remaining 45 months.

The Trustee states that if the additional provision is corrected, he does not have an objection.

DEBTOR'S NON-OPPOSITION

The Debtor filed a non-opposition to the Trustee's proposed amended language on November 4, 2015. Dckt. 35. The Debtor requests that the

modification be added in the order confirming.

DISCUSSION

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

The Trustee's objection is well-taken. It appears that the Debtor's plan has a scrivener's error in the additional provisions that miscalculated when the step up payment should take place. The proposed amended language, which the Debtor concurs with, resolves this objection.

The court's own review shows that, after the corrected language, shows that the plan is feasible and viable. The plan provides for step-up monthly payments and provides a minimum 27% dividend to unsecured creditors.

After the additional provision is corrected in the order confirming, the amended Plan complies with 11 U.S.C. §§ 1322, 1323 and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on September 25, 2015 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, correcting the additional provision to state
>
> > $620.00 for one month, $680.00 for fourteen months, then $1,012.00 for the remaining 45 months.
>
> transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

8. 06-20808-E-13 PAUL WHELAN
EJS-1 Eric Schwab

MOTION TO APPROVE EXEMPTION OF PERSONAL INJURY CLAIM
11-3-15 [89]

CLOSED: 03/06/2015

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, Creditors, and the Office of the U.S. Trustee on November 3, 2015. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion to Approve Exemption of Personal Injury Claim is continued to 3:00 p.m. on December 15, 2015.

Paul Whelan ("Debtor") filed a petition for Chapter 13 relief on March 24, 2006. Dckt. 1. Debtor was granted a discharge on April 12, 2012. Dckt. 67. The case was closed on April 26, 2012. Dckt. 73. The court approve Debtor's Motion to reopen the Chapter 13 case on November 26, 2014. Dckt. 75.

DEBTOR'S MOTION TO APPROVE EXEMPTION OF PERSONAL INJURY CLAIM

Debtor filed the instant Motion to Approve Exemption of Personal Injury

Claim on November 3, 2015. Dckt. 89. To Debtor asserts the following grounds for his motion:

A. During the prior Chapter 13 case, Debtor had four hip replacement surgeries. All four surgeries were performed by surgeon Paul M. Sasaura, M.D. of Mercy San Juan Medical Center in Carmichael, California;

B. Debtor's right hip joint was replaced in July 2009, and the left hip joint was replaced on December 2009;

C. Both initial replacements were defective and subject to recall in 2010, so Debtor's right joint was replaced again in January 2011 and the left hip joint in April 2011;

D. The defective implant devices were DePuy ASR Hip Implants manufactured by DePuy Orthopedics, Inc;

E. Debtor filed a civil action entitled Paul Whelan et at. vs. DePuy Orthopedics, Inc., et al., in the Superior Court of California, County of San Francisco, Docket Number CGC-10-505062;

F. Debtor used $35,000.00 of an advance for the settlement to pay medical bills, legal bills related to a custody matter, expenses for elder care, home repairs, and other living expenses for adult children who were out of work. These expenses were paid in October 2012, after the Chapter 13 discharge;

G. Debtor became involved in the U.S. ASR Hip Settlement Program, which resulted in a one-time payment of $319,000.00 and interest, less the advanced amount; Debtor has not received the lump-sum settlement amount to date;

H. Debtor's civil counsel and claims processor became aware of the bankruptcy, and was advised to reopen the Chapter 13 case to disclose the claim as an asset of the estate and to file for an exemption.

Dckt. 92. Debtor filed Amended Schedules B and C, which lists the post petition personal injuries claim under California Code of Civil Procedure § 704.140(b) for the full $319,000.00. Dckt. 88.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response on November 6, 2015. Dckt. 97. Trustee objects on the grounds that Debtor has not provided sufficient information and evidence to support the exemption. To support the exemption, Debtor must provide an estimate of the costs of the treatments or a current statement of his current monthly income and expenses to demonstrate his need for the additional income for his support. Dckt. 97.

DISCUSSION

The Trustee's objection is well-taken. The Debtor does not provide specifics as to how the money was spent, how much of the funds are left, nor any supplemental Schedules I and J to determine if the exemption is proper.

When a Debtor seeks to supplement schedules post-discharge and closing, the Debtor must present evidence to the court about the updated financial situation of the Debtor as well as evidence as to how those assets have been used.

Here the Debtor states that the funds have been used "to pay medical bills, legal bills relative to a custody matter, expenses for elder care, home repairs and for other living expenses including adult children who were out of work." Dckt. 89. While this provides a generalized overview of how the funds were used, it does not provide the court with the specifics as to how the monies were spent and how they are entitled to post-discharge exemption.

The exemption claimed under California Code of Civil Procedure § 704.140(b) provides that "an award of damages or a settlement arising out of personal injury is exempt to the extent necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor." As discussed by the court in *In re Tallerico*, 532 B.R. 774 (Bankr. E.D. Cal. 2015), the burden of proof under California law for claiming an exemption is on the debtor. See Cal. C.C.P. § 703.580(a)-(b).

To afford the Debtor the opportunity to provide sufficient evidence of how the monies have been used for the "support of the judgment debtor and the spouse and dependents of the judgment debtor" as required by California Code of Civil Procedure § 704.140(b), the Motion is continued to 3:00 p.m. on December 15, 2015. The Debtor shall file and serve supplemental evidence on or before December 1, 2015. Any replies or oppositions shall be filed and served on or before December 8, 2015.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Exemption for Personal Injury 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 continued to 3:00 p.m. on December 15, 2015. The Debtor shall file and serve supplemental evidence on or before December 1, 2015. Any replies or oppositions shall be filed and served on or before December 8, 2015.

9. 15-27111-E-13 EDWARD/SUSAN CARDOZA
BF-5 Bruce Dwiggins

OBJECTION TO CONFIRMATION OF PLAN BY HSBC MORTGAGE SERVICES, INC.
10-14-15 [19]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Chapter 13 Trustee on October 14, 2015. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

HSBC Mortgage Services, Inc., as servicer for Household Fin Corp of California ("Creditor"), opposes confirmation of the Plan on the basis that:

1. The proposed plan does not fully provide for the pre-petition arrearage owed to Creditor. The Creditor is owed approximately $41,549.39 in pre-petition arrears but only provides for $26,043.23.

The Creditor's objection is well-taken.

The objecting creditor holds a deed of trust secured by the Debtor's

residence. The creditor has filed a timely proof of claim in which it asserts $40,488.57 in pre-petition arrearages. FN.1. The Plan does not propose to cure these arrearages. Because the Plan does not provide for the surrender of the collateral for this claim, the Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments. *See* 11 U.S.C. §§ 1322(b)(2), (b)(5) & 1325(a)(5)(B). Because it fails to provide for the full payment of arrearages, the plan cannot be confirmed.

FN.1. The Proof of Claim No. 4 provides for a slightly lesser amount owed than what is asserted by the Creditor in the Objection (for which no evidence is provided), which is $40,488.57. This lesser amount, for which the court has evidence in the form of the Proof of Claim is significantly greater than that provided for through the Plan.

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

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

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

10. 15-27111-E-13 DPC-1 EDWARD/SUSAN CARDOZA Bruce Dwiggins

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 10-13-15 [15]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on October 13, 2015. By the court's calculation, 35 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that the plan relies on valuing the secured claims of HFC and Springleaf Financial but the Debtor has failed to file Motions to Value Collateral.

The Trustee's objections are well-taken.

A review of the Debtor's plan shows that it relies on the court valuing the secured claims of HFC and Springleaf Financial. However, the Debtor has failed to file Motions to Value the Collateral of either. Without the court valuing the claim, the plan is not feasible. 11 U.S.C. § 1325(a)(6). Therefore, the Trustee's objection is sustained.

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

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

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

11. 15-26614-E-13 NICOLE DOW — OBJECTION TO CONFIRMATION OF PLAN BY WELLS FARGO BANK, N.A. 10-5-15 [23]
APN-1 Julius Engel

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on October 5, 2015. By the court's calculation, 43 days' notice was provided. 14 days' notice is required.

The Objection to the Plan was properly set for hearing on the notice

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

The court's decision is to sustain the Objection.

Wells Fargo Bank, N.A., dba Wells Fargo Dealer Services ("Creditor") opposes confirmation of the Plan on the basis that:

1. The Debtor's valuation of the 2005 Infiniti QX56 at $15,000.00

2. Creditor objects to the $184.62 monthly adequate protection payments.

3. The Creditor objects to the 4.10% interest rate proposed in the plan.

The Creditor's objections are well-taken. In sum, the Creditor is objection to the plan is that the plan does not provide the full secured claim on the Creditor.

On October 27, 2015, the court issued an order valuing the secured claim of Creditor at $15,005.95, the full value of the Creditor's claim. Dckt. 38.

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

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

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

(1) provide a treatment that the debtor and secured creditor agree to, 11 U.S.C. § 1325(a)(5)(A),
(2) provide for payment in full of the entire claim if the claim is modified or will mature by its terms during the term of the Plan, 11 U.S.C. § 1325(a)(5)(B), or
(3) surrender the collateral for the claim to the secured creditor, 11 U.S.C. § 1325(a)(5)(C).

However, these three possibilities are relevant only if the plan provides for the secured claim.

Here, the proposed plan provides for Creditor's claim in Class 2 but only for in the amount of $10,000.00. Following the court's valuation of the Creditor's secured claim, the proposed plan no longer provides for the Creditor's full claim and therefore, the plan cannot be confirmed.

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

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

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

12. 15-26614-E-13 NICOLE DOW
DPC-1 Julius Engel
OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
10-7-15 [32]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on October 7, 2015. By the court's calculation, 41 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

1. The plan is not the Debtor's best efforts. The Debtor is an above median income. The Debtor's Form B22C shows that there is a negative income of <$215.27>. However, the Trustee asserts that the Debtor's monthly disposable income totals $1,883.92.

   a. On line 16 Debtor deducts $2,850.00 for taxes but only reports $1,325.81 on Schedules I and J.

   b. The Debtor takes an additional $75.00 for motor vehicle expenses without providing justification.

   c. The Debtor deducts an additional $240.00 for OASDI/Medicare and Self Employment tax which the Debtor had already claimed on a previous line.

   d. The Debtor attempts to double deducts future tax liability on account of Debtor's husband claiming 99 exemptions.

   e. The Debtor reports that she is no longer tutoring on Form B22C yet admitted at the Meeting of Creditors that she is still tutoring.

2. Debtor's plan relies on the Motion to Value Collateral of Wells Fargo Dealer Services.

The Trustee's objections are well-taken.

To first address the Trustee's second objection, on October 27, 2015, the court issued an order valuing the secured claim of Wells Fargo Dealer Services at $15,005.95, the full value of the Wells Fargo Dealer Services's claim. Dckt. 38. Therefore, the plan does not provide for the full claim of Wells Fargo Dealer Services and the plan is not confirmable.

As to the Trustee's first objection, a review of the Debtor's schedules and Form B22C show that it is not the Debtor's best efforts. The Debtor is attempting to over-deduct expenses to give the appearance of negative disposable monthly income. The Debtor admitted to having additional income that

she failed to report, i.e. the tutoring income, and is double deducting such expenses as motor vehicle expenses and anticipated taxes from husband. The court nor can any other party in interest determine the viability and feasibility of the proposed plan when the Debtor has not accurately and fully disclosed her income and expenses. Therefore, the objection is sustained.

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

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

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

13. 15-26715-E-13 JUDITH BARNARD
APN-1 Richard Kwun
OBJECTION TO CONFIRMATION OF PLAN BY NISSAN MOTOR ACCEPTANCE CORPORATION
9-11-15 [15]

Final Ruling: No appearance at the November 17, 2015 hearing is required.

The court having previously issued an order on the Objection to Confirmation filed by Nissan Motor Acceptance Corporation (Dckt. 22), **the matter is removed from the calendar.**

14. 15-26620-E-13 KEVIN/DEBRA JOHNSON
BLG-1 Paul Bains

CONTINUED MOTION TO VALUE COLLATERAL OF NATIONWIDE ASSETS, LLC
8-31-15 [13]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on August 31, 2015. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

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

The Motion to Value secured claim of Nationwide Assets, LLC ("Creditor") is granted and Creditor's secured claim is determined to have a value of $00.00.

The Motion to Value filed by Kevin D'Andre Johnson and Debra Johnson ("Debtor") to value the secured claim of Nationwide Assets, LLC ("Creditor") is accompanied by Debtor's declaration. Dckt. 13. Debtor is the owner of the subject real property commonly known as 160 De Paul Dr, Vallejo, California ("Property"). Dckt. 15. Debtor seeks to value the Property at a fair market value of $226,000.00 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). FN1.

FN.1. Debtor has not provided the court with a basis for determining that the reference to an out of court statement from a Zillow.com report is admissible hearsay. Fed. R. Evid. 802, 803. The court will not presume to make evidentiary legal assertions for Debtor, which may or may not be so intended. Some common Hearsay Rule exceptions include records of regularly conducted activity, public records and reports setting forth the activities of the public agency or observed pursuant to a duty imposed by law, and market reports, commercial publications." Fed. R. Evid. 803(6), (8), and 803(17). However, this defect is moot as the debtor's valuation is presumptively valid.

The valuation of property which 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 which appears to be for the claim to be valued.

OPPOSITION

Creditor has filed an opposition on September 21, 2015. Dckt. 22. Creditor argues that Debtor has failed to provide sufficient evidence to value the real property at $226,000.00, and presents evidence that the value is $235,000.00. In the alternative, Creditor requests a continuation for time to value the interior and exterior of the real property. *Id.*

Creditor cites to *In re Meeks* to support the assertion that Debtor's opinion of value is not sufficient because Debtor did not make a showing of

expertise in the field. *See In re Meeks*, 349 B.R. 19, 22 (Bankr. E.D. Cal. 2006). *T*he Debtor in *In re Meeks* provided lay person testimony on the value of the house, while the Creditor also presented evidence from an expert under Federal Rules of Evidence 702. *Id.*

Here, Creditor asserts that the testimony in Declaration of Theautis Persons rebuts the testimony of Debtor. Dckt. 15 (Debtor's Declaration); Dckt. 24 (Declaration of Theautis Persons). Creditor also requests a continuation to allow Persons time to conduct an exterior and interior valuation, as Persons' valuation is based only on the exterior. Dckt. 22, 24 ¶ 5. FN2.

FN.2. The court notes two deficiencies in Creditor's evidence. First, Creditor presents no evidence to establish Persons as an expert, but merely asserts the conclusion that Persons is an expert. Fed. R. Evi. 702; Dckt. 22. Second, Creditor references a "Nationwide BPO" attached as Exhibit 1. Dckt. 22 p. 3. However, Creditor's Exhibit 1 is the Schedule D Debtor filed with Debtor's petition, valuing the real property at $226,000.00. Dckt. 23 Ex. 1. Exhibits 2, 3, and 4 are the Note, Deed of Trust, and Assignment of Deed of Trust, none of which assert a value for the real property. Id. Ex 2-4.

OCTOBER 6, 2015 HEARING

At the hearing, based on the stipulation of the parties, the court continued the hearing to 3:00 p.m. on November 17, 2015. Dckt. 34.

DISCUSSION

To date, neither party has filed a response to the instant Motion. The court infers that Creditor has conducted the discovery and has no evidence to present that counters Debtor's evidence.

The court continued the hearing in response to the stipulation of the parties for the Creditor to conduct an appraisal of the Property. However, no such reports or supplemental responses have been filed.

Reviewing declaration of Theautis Persons, Mr. Persons states the following:

> Pursuant Movant's request, I reviewed the Property, conducted na exterior inspection of the Property and compared the Property to other comparable units in the area to derive a valuation.
>
> My opinion of the value of the Property as of September 16, 2015, based upon the information that I have been able to father to dater concerning, among other things, the current market conditions in the subject area, is that as of September 16, 2015, the Property had a current market value of $235,000.00. A true and correct copy of my Broker's Price Opinion Report on the Property is attached as Exhibit "1" hereto and incorporated herein by reference.

Dckt. 24. However, the Creditor failed to attach the report of the appraisal.

Mr. Persons' valuation was admitidly based on the exterior of the Property. Mr. Persons does not provide further specifics as to the process used nor is there any evidence that the valuation determination based solely on the exterior is sufficient to rebut the Debtor's own valuation.

The Debtor values the Property at $226,000.00 based on their opinion and the knowledge of the surrounding home area. Mr. Persons' declaration and valuation does not provide sufficient grounds to rebut that valuation. The difference between the two is $9,000.00 which in context of home value is relatively de minimus.

The court finds based on the evidence provided and the knowledge of the Debtor versus the exterior valuation of Mr. Persons, that the value of the Property is $226,000.00

The senior in priority first deed of trust secures a claim with a balance of approximately $230,219.91. Creditor's second deed of trust secures a claim with a balance of approximately $77,871.91. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Kevin D'Andre Johnson and Debra Johnson ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Nationwide Assets, LLC secured by a second in priority deed of trust recorded against the real property commonly known as 160 De Paul Dr., Vallejo, 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 $226,000.00 and is encumbered by senior liens securing claims in the amount of $230,219.91, which exceed the value of the Property which is subject to Creditor's lien.

15. 15-26620-E-13 KEVIN/DEBRA JOHNSON
DPC-1 Paul Bains

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
9-30-15 [28]

Final Ruling: No appearance at the November 17, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on September 20, 2015. By the court's calculation, 37 days' notice was provided. 14 days' notice is required.

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

Upon review of the Motion and supporting pleadings, no opposition having been filed, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

The court's decision is to overrule the Objection.

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that the plan relies on a Motion to Value Collateral of Nationwide Assets LLC.

At the October 6, 2015 hearing, the court continued the Motion to Value Collateral of Nationwide Assets LLC to 3:00 p.m. on November 17, 2015 based on the stipulation of the parties. Dckt. 36.

On November 17, 2015, the court granted the Debtor's Motion to Value Collateral of Nationwide Assets, LLC, valuing the secured claim at $0.00.

Therefore, with the Trustee's objection being resolved and the court's own review of the plan, the plan does comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is overruled and the Plan is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection is overruled, Debtor's Chapter 13 Plan filed on August 21, 2015 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

16. 15-25422-E-13 HAROLD/KIMBERLY BROWN — MOTION TO CONFIRM PLAN
BRO-1 Yasha Rahimzadeh — 9-22-15 [39]

Final Ruling: No appearance at the November 17, 2015 hearing is required.

The Debtor having filed a "Withdrawal of Motion" for the pending Motion to Confirm the Amended Plan, the "Withdrawal" being consistent with the opposition filed to the Motion, the court interpreting the "Withdrawal of Motion" to be an ex parte motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rule of Bankruptcy Procedure 9014 and 7041 for the court to dismiss without prejudice the Motion to Dismiss the Bankruptcy Case, and good cause appearing, **the court denies without prejudice the Debtor's Motion to Confirm and the plan filed on October 14, 2015 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.

A Motion to Confirm having been filed by the Debtor, the Debtor having filed an ex parte motion to dismiss the Motion without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, dismissal of the Motion being consistent with the opposition filed, and good cause appearing,

IT IS ORDERED that the Motion to Dismiss the Bankruptcy Case is denied.

IT IS ORDERED that the plan filed on October 14, 2015 is not confirmed.

17. 10-51723-E-13 RONALD WILLIAMS
FHS-3 Frederick Schill

MOTION TO MODIFY PLAN AND/OR MOTION FOR TURN OVER OF FUNDS IN SUSPENSE ACCOUNTS
9-30-15 [46]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 30, 2015. By the court's calculation, 48 days' notice was provided. 35 days' notice is required.

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

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

Ronald Williams ("Debtor") filed a plan on April 9, 2012, which was confirmed by this court on May 29, 2015. Dckt. 42.

On September 30, 2015, Debtor filed a Modified Plan with accompanying Motion to Confirm. FN.1.

FN.1. The Trustee notes, and Debtor concedes, that the Motion is both a Motion for Confirmation and a Motion to Turn Over Property drafted in one motion. Dckt. 56. Fed. R. Civ. P. 18 was not incorporated into the bankruptcy law and motion practice. Furthermore, Local Bankr. R. 9014-1(d)(1) requires that "[e]xcept as otherwise provided in these rules, every application, motion, contested matter or other request for an order, shall be filed separately from any other request, except that relief in the alternative based o the same

statute or rule may be filed in a single motion." Thus, the court will only consider the Motion to Confirm Modified Plan and not the Motion to Turn Over Property.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition on November 3, 2015. Dckt. 55. Trustee opposes confirmation of the September 30, 2015 Plan on the following grounds:

A. Trustee has "made monthly contract installment payments based on the plan confirmed 2/10/2011 and the Notice of Mortgage Payment Change filed 4/27/2015." Under that Plan, Trustee has disbursed $530.02 principal and $307.59 in interest to Butte County Tax Collector, as provided in Proof of Claim #7. Thus, there should be no deficiency to this creditor;

B. Section 6.04 seems to modify § 4.02 by giving further plan payments to Wells Fargo. Trustee asserts this may violate 11 U.S.C. § 1327(b), as the payments would only be necessary if "(1) Wells Fargo asserts a post-petition arrears, and (2) Wells Fargo has a post-petition arrears;"

C. Debtor is delinquent $1,585.00 under the proposed plan: a total of $91,405.00 has become due through month 58 of the proposed plan, while Debtor has only paid $89,820.00 as of September 29, 2015.

Dckt. 54. FN.2.

FN.2. Trustee declares that they followed the February 10, 2011 confirmed plan. However, a review of the court's docket shows that the court confirmed a Chapter 13 Plan filed on April 9, 2012; the confirmation order was entered on May 28, 2012. Dckt. 42. Debtor's Reply, described below, also assumes the May 22, 2012 Plan was implemented by Trustee.

DEBTOR'S REPLY

Debtor addresses the Trustee's concerns by stating:

A. Debtor agrees that the Trustee has made payments based on the May 22, 2012 plan and that the funds paid to the creditors are appropriate; the instant Motion seeks to modify that previous Plan due to Debtor's error in the Monthly Contract Installment Amount owed to Wells Fargo. Thus, the proposed plan grants "additional funds [to be] paid to Wells Fargo rather than to the Class 7 unsecured claims;"

B. Debtor's motion "alleges that Wells Fargo asserts the existence of a post-petition arrearage. The Debtor's motion also expresses the frustration of not being able to communicate with Wells Fargo to determine its position."

C. Debtor promises to cure the delinquency of $1,585.00 before the

hearing date.

Dckt. 56.

DISCUSSION

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. However, Trustee raises some concerns that Debtor has not adequately addressed.

Trustee's concerns on the Additional Provisions seem to be founded on 11 U.S.C. § 1327 grounds generally. First, § 6.04 of the Proposed Plan seeks to provide additional funds to Butte County Tax Collectors, who the Trustee states has already been paid $530.02 in principal and $307.59 in interest. The court's review of the confirmed April 9, 2012 Amended Plan shows that Butte County Tax Collector was classified as a Class 2 secured creditor, with a claimed balance of $621.61 at 18% interest and monthly dividend of $32.57. It appears that prior to the instant Motion and proposed plan, the Butte County Tax Collectors' claim was paid in full, including interest. 11 U.S.C. § 1327(b) provides "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor."

With respect to Wells Fargo Bank, N.A.'s claim and the treatment of under the proposed modified plan, the current treatment and proposed treatment are as follows:

	Confirmed Second Modified Plan, Dckt. 35	Proposed Third Modified Plan, Dckt. 51
Class 1 Current Monthly Contract Installment	$854.57	$896.12
Class 1 Monthly Arrearage Payment (Based on $12,163.07 arrearage, with 6.25% compounded interest on arrearage)	$548.23	$417.64
Section 6.04, Increase in monthly payment for post-petition deficit of $2,237.76	Nothing Provided.	No Payment Amount, Date of First Payment, and Term of Payment Stated.

The Motion, Dckt. 46, states that on September 16, 2015, the Debtor "discovered" that there is a $4,278.21 arrearage on the Wells Fargo Bank, N.A. Class 1 secured Claim. The $4,278.21 arrearage is explained in the Motion as follows:

A. In the Second Modified Plan filed on April 9, 2012, the current monthly post-petition payment was listed in error by Debtor of being $854.57.

B. The correct amount of the current post-petition monthly payment as of the April 9, 2012 filed Second Modified Chapter 13 Plan

was $896.12.

C. The misstating of the amount of the secured claim in the Plan has resulted in a $41.55 per month under payment of the Wells Fargo Bank, N.A. Class 1 secured claim.

D. Though the Wells Fargo Bank, N.A. note upon which the Class 1 claim is based, requires Debtor to make the property tax payments and insurance payments directly, not through escrow, Wells Fargo Bank, N.A. made property tax advances of $774.25 in April 2014 and $218.19 in December 2014. (The Motion does not allege that Debtor made the 2014 property tax payments.)

E. In August 2015, Wells Fargo Bank, N.A. notified counsel for Debtor that the Bank was unilaterally requiring Debtor to make the insurance and property tax payments into escrow through the Bank.

F. Debtor does not know the actual amount of any arrearage caused by Wells Fargo Bank, N.A. increasing the monthly payment and the Debtor understating the payment in the Second Modified Plan.

G. Wells Fargo Bank, N.A. has failed or refused to provide an accounting of the claim and any arrearage.

Wells Fargo Bank, N.A. filed its original proof of claim on December 22, 2010. Proof of Claim No. 4. The claim was stated in the amount of $106,330.03 and the arrearage stated to be $11,863.07. On the attachment to Proof of Claim No. 4 the monthly payments are stated to be $896.12, of which there were eight pre-petition payments in default. In additional, Wells Fargo Bank, N.A. sought to recovery foreclosure costs and an “Escrow Shortage” of $1,338.34. On January 15, 2014, Wells Fargo Bank, N.A. withdrew Proof of Claim No. 4.

On February 2, 2011, Wells Fargo Bank, N.A. filed a second proof of claim, listing the amount of the claim to be $106,330.03, with the pre-petition arrearage of $12,163.07. Proof of Claim No. 6. This second proof of claim is stated to amend Proof of Claim No. 4. The change in the arrearage is identified in footnote 2 to the attachment for Proof of Claim No. 6 to be for $300 in post-petition attorneys’ fees related to the bankruptcy case. There are no other differences.

On January 22, 2014, Wells Fargo Bank, N.A. filed another amended proof of claim, No. 6-1. For this Proof of Claim, the amount of the secured claim has been reduced to $105,780.57 as of the filing date. The arrearage on the claim is reduced to $11,904.92 as of the filing date. The reduction in the arrearage in Amended Proof of Claim No. 6-1 is for a $258.14 credit due Debtor. The asserted arrearage is not specified in Amended Proof of Claim No. 6-1, but just stated as $12,163.07 (before the credit) as set forth in the prior proof(s) of claim.

In the Attachment to Proof of Claim No. 6, Wells Fargo Bank, N.A. states that the escrow shortage is $1,338.34.

On April 27, 2015, Wells Fargo Bank, N.A. filed a Notice of Mortgage Payment Change. This Notice purports to relate to Proof of Claim No. 4. Since the only claim of Wells Fargo Bank, N.A. in this case is Proof of Claim No. 6, which was filed as an amended Proof of Claim No. 4, this appears to relate to the Class 1 claim.

The Notice of Payment Change states that the current escrow payment of $97.90 is reduced to $91.59. The new payment amount will be $987.71, effective June 1, 2015. The Notice of Payment Change includes the following history for the August 2014 to March 2015 period:

Date	Projected Payments to Escrow	Actual Payments to Escrow	
August 2014	$35.72	$0.01	
September 2014	$35.72	$0.01	
October 2014	$35.72	$97.91	
November 2014	$35.72	$97.91	
December 2014	$35.72	$97.91	
January 2015	$35.72	$0.00	
February 2015	$35.72	$195.80	
March 2015	$35.72	$0.00	
	==========	==========	
Over/Under Escrow Funding For Period	$285.76	$489.55	203.79

Notice of Mortgage Payment Change, Attachment; Filed April 27, 2015.

On its face, it appears that the escrow payments for the reported period have been overfunded. For August 2014, the Attachment states that the actual escrow balance at that time was ($1,278.06). With a monthly escrow payment of $35.72, that would represent 36 months of escrow payments. It appears that this shortage may well be just the pre-petition arrearage stated in Proof of Claim No. 6.

After filing multiple proofs of claim, withdrawing multiple proofs of claim, filing notices of mortgage payment change, withdrawing notices of mortgage payment change, Wells Fargo Bank, N.A. has left the court in a quandary as to what claim it has in this case. Additionally, Wells Fargo Bank, N.A. has not provided the court with information as to what post-petition arrearage, if any, exists. Equally, Debtor has been circumspect in his testimony, and the court has no idea whether Debtor has made the required insurance and property tax payments, doubling up on the Wells Fargo Bank, N.A. advances.

The paralegal for Debtor’s counsel testifies that she spoke with Butte County, which confirmed that it was receiving the Trustee’s payments but

refusing to apply them until they reached payment in full. Declaration, Dckt. 48. The Declaration does not state the basis given by Butte Country for refusing to comply with the terms of the Chapter 13 Plan and continuing to inaccurately list the amount of the tax arrearage notwithstanding the monthly payments being made through the Chapter 13 Trustee. The Debtor has not sought relief against Butte County concerning this conduct.

In addition to the above concerns, Trustee's objection is that the Debtor is $1,585.00 delinquent in plan payments, which represents one month of the $1,585.00 plan payments. According to the Trustee, the Plan in § 1.01 calls for payments to be received by the Trustee not later than the 25th day of each month beginning the month after the order for relief under Chapter 13.

Taken as truthful, it appears that the most current financial information as to income and expenses is from December 2010, when this case was filed. At that time, Debtor's Average Monthly Income was $3,911.01. Debtor's expenses were $3,023.12, yielding Monthly Net Income of $887.89. Dckt. 1 at 21-23. Notwithstanding this information, Debtor's confirmed plan required monthly payments of $1,550.00 - a seeming impossibility.

The current plan requires that the monthly payments are $1,585.00 for the last forty-five months of the plan, plus apparently an additional $1,118.88 for November and December 2015 to cure the $2,237.76 arrearage. Debtor has provided no evidence that (1) he can make the monthly $1,585.00 payments, that the Debtor has an extra $1,585.00 to double up the payment in one month to cure the arrearage, and an additional $1,118.88 a month to cure the asserted Wells Fargo Bank, N.A. post-petition arrearage.

The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6). Unfortunately, Debtor's reply does not provide evidence that the delinquency has been cured.

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

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

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

18. 13-27223-E-13 MIGUEL/SONIA ESCOBAR — MOTION TO MODIFY PLAN
PGM-1 Peter Macaluso — 10-9-15 [66]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 9, 2015. By the court's calculation, 39 days' notice was provided. 35 days' notice is required.

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

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

Miguel Escobar, Jr. and Sonia Escobar filed the instant Motion to Confirm the Modified Plan on October 9, 2015. Dckt. 66.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on November 3, 2015. Dckt. 73. The Trustee objects on the ground that the Debtor's plan fails to provide adequate protection payments to State Board of Equalization for post-petition debt. The Trustee states that the Trustee received a letter from the State Board of Equalization stating that the Debtor has accumulated post-petition debt in the amount of $6,674.69.

DISCUSSION

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

The Trustee's objection is well-taken.

Local Bankr. R. 3015-1(b)(4) requires that the Debtor's "financial and business affairs shall be conducted in accordance with applicable nonbankruptcy law including the timely filling of tax returns and payment of taxes."

Here, the Trustee received notification from the State Board of Equalization that the Debtor has accumulated $6,673.69 in post-petition debt. The proposed plan, while providing for the pre-petition debts, does not provide for the post-petition debt.

The Debtor's proposed plan cannot be confirmed without providing for the pre- and post-petition debts of the State Board of Equalization.

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

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

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

19. 10-50125-E-13 EDWIN/PAMELA MAHONEY MOTION TO MODIFY PLAN
MMN-9 Michael Noble 9-22-15 [138]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 22, 2015. By the court's calculation, 56 days' notice was provided. 35 days' notice is required.

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

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

Edwin and Pamela Mahoney ("Debtor") filed the instant Motion to Confirm the Modified Plan on September 22, 2015. Dckt. 138.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response to the instant Motion on November 3, 2015. Dckt. 144. The Trustee responds that the Debtor's proposed plan provides for Ally Financial regarding a 2007 Chevy HHR in Class 2 but does not indicate the amount claimed by the creditor, the value of the creditor's interest, the interest rate, nor the monthly dividend.

The Trustee has disbursed $10,500.00 in principal pursuant to the plan and the Motion to Value which was granted on March 24, 2011, and $1,253.75.

The Trustee does not oppose Debtor's proposed plan provided Debtor acknowledges the treatment and payments made to Ally Financial.

DISCUSSION

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

The Trustee's response is well-taken. The proposed modified plan contains a provision for Ally Financial 2007 Chevy HHR in Class 2 but does not provide any further information. It appears that the Debtor placed the Creditor in to provide a complete list of claims but, since the secured claim has been paid in the entirety, the Debtor did not provide treatment.

However, the correct method to address the Ally Financial's paid secured claim would be to include a provision in the additional provision. This appearing to be a mere scrivener's error, the order confirming can contain a provision stating that the secured claim of Ally Financial has been fully paid and payments made.

The modified Plan complies with 11 U.S.C. §§ 1322, 1325(a) and 1329 after the additional provision in the order confirming and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on September 22, 2015 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, adding a provision that the Ally Financial secured claim for the 2007 Chevy HHR has been paid, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

20. 15-25827-E-13 DAVID ARESTAD **MOTION TO CONFIRM PLAN**
WW-1 Mark Wolff **10-1-15 [31]**

Final Ruling: No appearance at the November 17, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 1, 2015. By the court's calculation, 47 days' notice was provided. 42 days' notice is required.

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

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

David Arestad ("Debtor") filed the instant Motion to Confirm the Amended Plan on October 1, 2015. Dckt. 31.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response to the instant Motion on November 3, 2015. Dckt. 44. The Trustee notes that there I a small discrepancy as to attorney fees. The Amended Disclosure of Attorney compensation shows $800.00 paid pre-petition (Dckt. 37) when the Trustee has evidence that $1,174.00 was paid pre-petition (Dckt. 28). The Trustee consulted the Debtor's attorney and determined that the discrepancy is accounted for by the filing fee and credit report.

The Trustee does not oppose the requested attorney fees and requests that the court grants the Motion.

DISCUSSION

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Debtors have provided evidence in support of confirmation.

No opposition to the Motion has been filed by the Chapter 13 Trustee or creditors. The response filed by the Trustee provides clarification to the Debtor's attorney fees paid. The amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on October 1, 2015 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

21. 10-43028-E-13 DPC-2 MARGARITA/LUCIO CORONA Peter Macaluso

OBJECTION TO CLAIM OF KIMCO STOCKTON 324, INC., CLAIM NUMBER 8 AND/OR OBJECTION TO CLAIM OF KIMCO STOCKTON 324, INC., CLAIM NUMBER 9 9-15-15 [133]

Final Ruling: No appearance at the November 17, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Debtor, Debtor's Attorney, parties requesting special notice, and Office of the United States Trustee on September 15, 2015. By the court's calculation, 63 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

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

The Objection to Proof of Claim Number 8-1 and 9-1 of Kimco Stockton 324, Inc. is sustained.

David Cusick, the Chapter 13 Trustee, requests that the court disallow the claim of Kimco Stockton 324 ("Creditor"), Proof of Claims No. 8-1 and 9-1, Official Registry of Claims in this case.

Claim No. 8-1 is asserted to be priority in the amount of $185,807.44.

Claim No. 9-1 is asserted to be another priority claim in the amount of $185,807.44. The claim is not marked as an amended and appears to be a duplicate of Proof of Claim Number 8-1.

The Trustee asserts that Claim No. 8-1 does not qualify as a priority status under 11 U.S.C. § 507(a)(2) and that Claim No. 9-1 is a duplicate of Claim No. 8-1.

The Trustee requests the that the court disallow Proof of Claim No. 8-1 as priority and to disallow Proof of Claim No. 9-1 as duplicative.

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).

As to Proof of Claim No. 8-1, the Creditor filed the Proof of Claim on December 29, 2010. The Creditor indicated that it is entitled to priority pursuant to 11 U.S.C. § 506(a)(2) which provides:

> (2) Second, administrative expenses allowed under section 503(b) of this title, unsecured claims of any Federal reserve bank related to loans made through programs or facilities authorized under section 13(3) of the Federal Reserve Act (12 U.S.C. 343), and any fees and charges assessed against the estate under chapter 123 of title 28.

On March 15, 2011, the court denied the Creditor's Motion for Allowance of Administrative Expenses pursuant to 11 U.S.C. § 503(b), 507(a)(2), and 365(d)(3). The court denied the Motion because the Creditor failed to provide evidence of an administrative expense. Dckt. 107.

The Creditor has not provided evidence that the claim is entitled to priority pursuant to 11 U.S.C. § 507(a)(2). Therefore, the Trustee's objection as to Claim No. 8-1 is sustained and the claim is disallowed as a priority claim.

As to Claim No. 9-1, the claim appears to be an identical of Claim 8-1, filed just one day after Claim 8-1. There is no indication that this is an amended Claim. In fact, Claim 9-1 is signed the same date as Claim 8-1.

Based on the evidence before the court, the creditor's claim 9-1 is disallowed in its entirety as duplicative. 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 Kimco Stockton 324, 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 8-1 of Kimco Stockton 324, Inc. is sustained and the claim is disallowed as a priority claim, with the balance of the claim to be provided for as an unsecured claim.

IT IS FURTHER ORDERED that the objection to Proof of Claim Number 9-1 of Kimco Stockton 324, Inc. is sustained and the claim is disallowed in its entirety, without prejudice to the rights of the creditor pursuant to Proof of Claim Number 8-1.

22. 13-22028-E-13 FAITH EVANS **OBJECTION TO CLAIM OF DANIEL**
BLG-4 Chad Johnson **MOULTON, CLAIM NUMBER 7-1**
9-30-15 [101]

Final Ruling: No appearance at the November 17, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Debtor, Debtor's Attorney, Chapter 13 Trustee, Creditors, parties requesting special notice, and Office of the United States Trustee on September 30, 2015. By the court's calculation, 48 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

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

The Objection to Proof of Claim Number 7-1 of Daniel Moulton is sustained and the claim is disallowed in its entirety.

Faith Evans, the Chapter 13 Debtor ("Objector") requests that the court disallow the claim of Daniel Moulton ("Creditor"), Proof of Claim No. 7-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $295,000.00. Objector asserts that, after the court's determination in adversary case 14-02105, Creditor has no claim to the proceeds from the sale of the Liquor License and, to the extent Claim 7-1 is based on the Liquor License, it should be disallowed.

David Cusick, the Chapter 13 Trustee, filed a non-opposition October 15, 2015.

ADVERSARY PROCEEDING 14-02105

A review of the docket for Adversary Proceeding 14-02105 shows the Court entered a judgment on August 21, 2015, against Daniel Moulton with the following order language:

> **IT IS ORDERED, ADJUDGED, AND DECREED** that judgment is entered for Faith A. Evans, the Plaintiff-Debtor, and against Daniel Moulton, Defendant, hereby determining that Faith A. Evans and Daniel Moulton are not, were not, and have not been married. Further, the court determines no basis has been shown for the court to find an exception to the prohibition on common law marriages pursuant to Florida Statute § 741.211, and no basis has been shown for any determination that Daniel Moulton was the putative spouse of Faith A. Evans as provided by the California Family Code.
>
> **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that judgment is entered for Faith A. Evans, Plaintiff-Debtor, and against Daniel Moulton, Defendant, determining the California General Liquor License, No. 21-479183, which Faith A. Evans was authorized to sell as the Chapter 13 Debtor by order of this court in her bankruptcy case (13-22028; Order, Dckt. 54) was the property of Faith A. Evans, in which Daniel Moulton has and had no interest, and that the $75,000.00 in proceeds from the sale of said Liquor License is the property of the Faith A. Evans Bankruptcy Estate in Bankruptcy Case No. 13-222028 pending in this court.
>
> **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that judgment is entered for Faith A. Evans, Plaintiff-Debtor, and against Daniel Moulton, Defendant, determining that the $2,375.72 held in the client trust account of David L. Brown and the $3,289.07 held in the client trust account of Harrison Goodwin, both of which have been delivered to the possession of the Chapter 13 Trustee in the Faith A. Evans Bankruptcy Case, were monies of Faith A. Evans in which Daniel Moulton did not and does not have an interest, and are property of the Faith A. Evans Bankruptcy Estate.
>
> **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that judgment is entered for Daniel Moulton, Defendant, and against Faith A. Evans, Plaintiff-Debtor, denying all relief sought and awarding no damages relating to any sale of (1) the

business identified as Discount Mart Liquor (also identified in the testimony as Discount Mart Liquor, Inc. or (2) relating to any inventory and equipment of said business, including, without limitation, the court granting no relief for the turnover of any proceeds of the sale or accounting of any such proceeds by Defendant Daniel Moulton.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment is entered for Daniel Moulton, Defendant, and against Faith A. Evans, Plaintiff-Debtor, denying all relief sought relating to the proceeds from the sale of the real property commonly known as 2025 Rhodes Lane, Roseville, California, with the exception to the determination above that the $3,289.07 of the proceeds held in the client trust account of Harrison Goodwin, Esq. and turned over to the Chapter 13 Trustee was property of Faith A. Evans and is now property of the Faith A. Evans Bankruptcy Estate.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment is entered for Daniel Moulton, Defendant, and against Faith A. Evans, Plaintiff-Debtor, denying any monetary damages pursuant to 11 U.S.C. § 362(k) for the alleged violation of the automatic stay, with the exception for attorneys' fees and costs which may be granted pursuant to a post-judgment motion.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Harrison L. Goodwin, Esq. and David L. Brown, Esq. having turned over the monies in their respective client trust accounts as plead in the Complaint, all relief requested against them in the Complaint has been granted and obtained pursuant to prior orders of the court, and no further relief is granted Plaintiff Faith Evans against either of the two aforementioned attorneys.

IT IS FURTHER ORDERED that on or before **September 18, 2015**, Faith A. Evans, Plaintiff-Debtor, shall file and serve a costs bill and a motion for prevailing party attorneys' fees, if any, and that such costs, attorneys' fees, and expenses allowed shall be enforced as part of this judgment.

E.D. Cal. Bankr. Case No. 14-2105, Dckt. 81.

PROOF OF CLAIM NO. 7-1

Daniel Moulton filed Proof of Claim No. 7 on April 17, 2015. The amount asserted is $295,000.00 and the basis for the claim is listed as "Exhibits A - C." No further information is provided for by the Creditor in the Proof of Claim.

A review of the attachments to the Proof of Claim state the following, in relevant part:

1. Exhibit A - Findings and Order After Hearing

   a. Superior Court of California, County of Placer

b. Dated February 11, 2013

c. “Listing and Sale of Business (Discount Liquors) at $295,000: The listing agreement with Remax (Mark Edwards) is now signed and accepted by [David Moulton]. It has been provided to [Faith Evans] for review. [Faith Evans] shall immediately consult with anticipated counsel (Sandra Myers). She shall advise if she will not sign the listing and do so by February 11, 2013 and identify her reason therefore. The court shall reserve jurisdiction for further orders upon motion by Dan Moulton as to sale in the event of dispute or failure to accept the listing agreement by Faith Evans.”

2. Exhibit B – Business Listing Agreement

a. Listing agreement for “”Discountmart Liquor Inc., Faith Evans (“Owner”) doing business as: Discountmart Liquor”

b. Listing price: $295,000.00

c. The listing agreement is unsigned by all parties.

3. Exhibit C - Order After Hearing

a. Superior Court of California, County of Placer

b. Dated March 7, 2013

c. “The court orders the liquor license number 21479183 for Discount Mart Liquor, 1811 Douglas Blvd., Roseville CA sold forthwith by [Faith Evans] under court supervision for not less than $87,000.00. An ABC Bulk Sale Transfer shall be established in escrow with all necessary signatures signed by the parties or if necessary, by the court under ex parte motion. Net escrow proceeds shall be held pending further court order.”

d. “[Faith Evans] is ordered to return all items taken by her or her agents from the liquor store to the liquor store premises forthwith including, but not limited to,: a) All business books and records; and b) All liquor, wine, beer or other inventory of the store including cigarettes or other inventory.”

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 Objector's bases for objecting to the Proof of Claim are well-taken. While there is a prima facia validity to a proof of claim, the Objector can overcome that validity. Here, the Objector has pointed out that the basis of the claim, namely the alleged sale of the Discountmart Liquor Inc property, has not taken place. As discussed supra, the Creditor is basing the Proof of Claim on the orders of the Superior Court of California and a listing agreement but does not provide any evidence of how or why the Creditor is entitled to any monies. The listing agreement is unsigned. The two orders attached to the Proof of Claim do not provide any basis for the Creditor's claim. Instead, the two orders appear to discuss the events leading up to an alleged sale but do not order any rights of the Creditor to any proceeds. In fact, the listing agreement lists Objector as the owner. There is nothing provided for in the Proof of Claim that supports the Creditor's claim.

Based on the evidence before the court, the Creditor's claim 7-1 is disallowed in its entirety. The Objection to the Proof of Claim is sustained.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Daniel Moulton, 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 7-1 of Daniel Moulton is sustained and the claim is disallowed in its entirety.

23. 13-22028-E-13 FAITH EVANS
BLG-5 Chad Johnson

OBJECTION TO CLAIM OF DANIEL MOULTON, CLAIM NUMBER 6-1
9-30-15 [106]

Final Ruling: No appearance at the November 17, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Creditor's attorney, Debtor, Chapter 13 Trustee, and Office of the United States Trustee on September 30, 2015. By the court's calculation, 48 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

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

The Objection to Proof of Claim Number 6-1 of Daniel Moulton is sustained and the claim is disallowed in its entirety.

Faith Evans, the Chapter 13 Debtor, ("Objector") requests that the court disallow the claim of Daniel Moutlon ("Creditor"), Proof of Claim No. 6-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $295,000.00. Objector asserts that the Claim is a duplicate of Proof of Claim Number 7-1. Objector also asserts that the Proof of claim does not contain any evidence of the claim (which appears to be attached to Claim 7-1) and that there was no sale of any business located at 1811 Douglas Blvd., Roseville, California. Furthermore, the Objector asserts that any other amounts asserted in the claim have been determined in an adversary proceeding to belong to the Objector, not the Creditor.

The Objector filed an Objection to Proof of Claim No. 7-1 at the same time as the instant Objection. The Objector states that the basis for the objection for Proof of Claim 7-1 is substantively the same but that Proof of Claim 6-1 appears to be a duplicate of Proof of Claim 7-1.

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).

A review of Proof of Claim 6-1 and Proof of Claim 7-1 shows that both claims assert the same amount – $295,000. Both claims were filed on April 17, 2013. Both are signed April 17, 2013 by Creditor. Proof of Claim 6-1 does not contain any attachments as indicated on the claim, while Proof of Claim 7-1 does contain attachments. The only difference appears to be in the "Basis for Claim" section, Proof of Claim 6-1 states "Placer County Superior Court Order - See Exhibits" while Proof of Claim 7-1 states "Exhibits A-C."

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Daniel Moulton, Creditor filed in this case by Faith Evans, 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 objection to Proof of Claim Number 6-1 of Daniel Moulton is sustained and the claim is disallowed in its entirety.

24. 12-31929-E-13 DORA CARRION — CONTINUED MOTION TO AMEND
EWV-70 Eric Vandermey — 8-24-15 [51]

NO APPEARANCE OF COUNSEL FOR DEBTOR REQUIRED IF DEBTOR CONCURS WITH THE PROPOSED LANGUAGE IN THE ORDER AMENDING THE CONFIRMATION ORDER

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 24, 2015. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

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

The Motion to Amend Order Confirming Plan is granted.

DEBTOR'S AUGUST 24, 2015 MOTION TO AMEND ORDER CONFIRMING PLAN

Dora Carrion ("Debtor") filed the instant Motion to Amend Order Confirming Plan on August 24, 2015. Dckt. 51. The Debtor is seeking an order amending the order confirming the plan due to a mistake in the order confirming. The plan was intended to indicate a 36 month plan. However, the order confirming inadvertently listed the plan as a 60 month plan. The Debtor states that she and her counsel did not notice the mistake until July. The

Debtor further states that the Debtor's house payment has increased significantly such that any modification to the plan that exceed 36 months would be financially impracticable to Debtor. The Debtor states that when she originally filed her petition, her house payment of $1,195 per month. However, as of July 2015, Debtor's house payment increased to $1,710 per month and will increase again October 1, 2015 to $2,225.00 per month.

The Debtor argues that the confirmed plan payment of $73.00 for one month and $245.00 for 35 months has appropriately funded her Chapter 13 plan.

TRUSTEE'S SEPTEMBER 21, 2015 RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response to the instant Motion on September 21, 2015. Dckt. 56. The Trustee states that the plan filed on June 26, 2012 was filed as a 36 month plan, which the Trustee did not oppose as the Debtor is a below median income. Dckt. 6. The Debtor and Trustee agreed to increasing the plan payment in the order confirming, since it was determined that the Debtor had an additional $172.00 per month to pay toward her debt. The Debtor provided an order confirming which erroneously proposed a modified payment schedule of $73.00 for one month and $245.00 for 59 months. The order should have read $73.00 for one month and $245.00 for 36 months.

Currently, the Debtor is in her 39th month and has made 38 payments on her plan. The Trustee does not oppose the order confirming to be amended to provide that Debtor pay $73.00 for one month and $245.00 for 37 months for a total paid in of $9,138.00. The Trustee also requests that the Debtor make no future payments and that no refunds will be made by the Trustee for payments already made by the Debtor.

OCTOBER 6, 2015 HEARING

At the October 6, 2015 Hearing, the court granted a continuance to allow for further briefing. The court's civil minutes reflect the following concerns to be addressed:

> A review of the Motion shows substantial deficiencies and misunderstandings. The Motion is titled as a "Motion to Amend Order." Dckt. 51. The legal grounds stated in the Motion (no points and authorities was filed) states that the Motion is brought pursuant to 11 U.S.C. § 1328(b)(1), (2), and (3), and 11 U.S.C. § 1329(a)(1) and (2). Motion, Dckt. 51.
>
> None of these Code sections deal with modifying an order of the court. The Motion makes reference to 11 U.S.C. § 1328(b) allowing the court to grant a discharge even if a debtor does not complete a plan. That is not the relief which is sought by Debtor. 11 U.S.C. § 1329 provides for a debtor to confirm a modified Chapter 13 plan. That is not the relief sought by the Debtor.
>
> Debtor has not sought a hardship discharge or to modify the plan. Debtor has not stated grounds for a hardship discharge or to modify the plan. Debtor makes reference to there being an error in the order confirming which misstates the relief to be granted (a clerical error in which the order

makes reference to a sixty month plan rather than a thirty-six month plan).

Debtor is correct that the Chapter 13 Plan states that the term for the plan is "36 months." Dckt. 6. The order confirming the Plan states that payments will be made for sixty months. Debtor states that this sixty month statement was merely a typographical error. There was no hearing on this Motion, with no amendments were made to the Plan.

While the court could research the issue, identify the proper Federal Rule of Civil Procedure and Federal Rule of Bankruptcy Procedure addressing clerical errors in orders or amending orders, such would require the court to advocate for Debtor. The court declines the opportunity presented by Debtor.

Dckt. 59.

TRUSTEE'S OCTOBER 9, 2015 RESPONSE

On October 9, 2015, Trustee filed a supplemental response. Trustee's Response is essentially a nonopposition, with a Memorandum of Points and Authorities attached in support.

In support of the nonopposition, Trustee asserts the following:

A. Debtor's original Plan is in its 38th month. However, she seeks to amend the order confirming, which provides for 60 payments, to shorten the length to 36 payments. The motion was served on all parties. The motion cites to 11 U.S.C. §§ 1328(b) & 1329;

B. Trustee asserts that Federal Rules of Bankruptcy Procedure 9024, and Federal Rules of Civil Procedure 60(a), allow for the correction "of a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record;"

C. There is no dispute that the original plan did not provide for 60 months of payments, and neither Debtor nor Trustee dispute that the order should have been for 36 months.

D. The plan submitted was not defective, and was changed in the order confirming to avoid an objection to confirmation by the Trustee;

E. Trustee does not oppose the amendment of the order confirming to reflect that "the Debtor shall pay $73 for 1 month and $245 for 37 months for a total to be paid of $9,138.00, the amount paid to date by the Debtor."

Dckt. 60, 61.

DEBTOR'S NOVEMBER 10, 2015 MEMORANDUM OF POINTS AND AUTHORITIES

Debtor filed a supplemental Memorandum of Points and Authorities on

November 10, 2015. Dckt. 63. Debtor asserts the following:

A. The motion is brought pursuant to Federal Rules of Bankruptcy Procedure 9024, and Federal Rules of Civil Procedure 60(a), allow for the correction "of a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record;"

B. The original Plan was determined to be 36 months and was confirmed in the Order of the Court on July 27, 2012; however, the Order Confirming the Plan submitted on August 17, 2012, inadvertently listed the plan as a 60 month plan. Neither Debtor nor Debtor's attorney noticed the mistake until July 2015;

C. Debtor's house payment has increased significantly such that any modification to plan that exceeds 36 months would be financially impracticable to Debtor;

D. There are no disputed facts in this case, and Debtor notes that the Trustee agrees with the Debtor.

Dckt. 63, 64.

APPLICABLE LAW

Fed. R. Civ. P. 60, which is incorporated into bankruptcy proceedings pursuant to Fed. R. Bankr. P. 9024, states the following:

> (a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

DISCUSSION

The supplemental briefs of the Debtor and the Trustee provide a sound legal basis to amend the order confirming. Pursuant to Fed. R. Civ. P. 60(a), a court may issue an order correcting a "mistake arising from oversight or omission." Here, the Debtor has provided information and grounds evidencing that the listing of 60 months as the plan term was a scrivener's error. Instead, as evidenced by the Debtor's declaration and the Debtor's prior plan, the plan was meant to list a commitment period of 36 months.

Therefore, upon review of the case history and the papers filed by the Debtor and the Trustee, the Motion is granted. Debtor's counsel shall upload a proposed order amending the order confirming the plan, correcting the applicable commitment period to 36 months.

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 Amend Order Confirming Plan filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and the court's order filed on September 11, 2012, (Dckt. 28) is amended to correct the clerical error misstating the term of the Plan.

IT IS FURTHER ORDERED that the September 11, 2012 Order confirming the Plan, a copy of which is attached to this Order as Addendum A for the convenience of the parties in interest, is amended to correct the clerical error in paragraph 1 on page to, which is corrected to state as follows:

> 1. The debtor shall make 1 payment of $73 and then increase the payment in the amount of $172 to a total payment of $245 for 37 months, for total plan payments of $9,138.00.

No other amendments except as expressly provided in this order are made to the September 11, 2012 confirmation, which continues to remain in full force and effect.

25. 15-25732-E-13 PAUL/JULIANNE CLEM MOTION TO CONFIRM PLAN
MRL-2 Jeremy Heebner 9-18-15 [41]

Final Ruling: No appearance at the November 17, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 21, 2015. By the court's calculation, 57 days' notice was provided. 42 days' notice is required.

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

The Motion to Confirm the Amended Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Debtors have provided evidence in support of confirmation. No opposition to the Motion has been filed by the Chapter 13 Trustee or creditors. The amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on September 18, 2015 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed

order to the court.

26. 15-26735-E-13 JOSEPHINE VESTAL
DPC-1 Rick Morin

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
10-7-15 [15]

WITHDRAWN BY M.P.

Final Ruling: No appearance at the November 17, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on October 7, 2015. By the court's calculation, 41 days' notice was provided. 14 days' notice is required.

The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. Upon review of the Motion and supporting pleadings, no opposition having been filed, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

The court's decision is to overrule the Objection.

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

1. The Debtor failed to appear at the Meeting of Creditors.

2. The Debtor classified Sacramento Credit Union as a Class 4 Debt. The Trustee states that the Debtor would benefit from listing the vehicle and claim in Class 2.

DEBTOR'S RESPONSE

The Debtor filed a reply on October 29, 2015. Dckt. 19. The Debtor first states that the Debtor appeared at the continued Meeting of Creditors on October 29, 2015.

The Debtor then responds to the Trustee's second objection stating that the Debtor's car payment is automatically deducted from her wages. Furthermore, the Debtor states that the claim cannot be cramdown because it is less than 910-days.

TRUSTEE'S WITHDRAWAL

The Trustee filed a withdrawal of the instant Objection on November 3, 2015. Dckt. 22. The Trustee states that the Debtor appeared at the continued Meeting of Creditors, and the contract term for the vehicle will exceed the plan terms.

DISCUSSION

The Trustee's objections have since been resolved. The court's review of the proposed plan shows that it is both feasible and viable. With no objections remaining, the Plan does comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is overruled and the Plan is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is overruled, Debtor's Chapter 13 Plan filed on August 26, 2015 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

27. 13-34336-E-13 SERGEY/ZINOVIYA SHEMYAKIN MOTION TO MODIFY PLAN
MS-1 Mark Shmorgan 10-6-15 [38]

Final Ruling: No appearance at the November 17, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 6, 2015. By the court's calculation, 42 days' notice was provided. 35 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Modified Plan is granted.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtors have filed evidence in support of confirmation. No opposition to the Motion was filed by the Chapter 13 Trustee or creditors. The modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329, and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on October 6, 2015 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

28. 13-34336-E-13 MS-2 SERGEY/ZINOVIYA SHEMYAKIN Mark Shmorgan

MOTION FOR COMPENSATION FOR MARK SHMORGON, DEBTORS' ATTORNEY(S)
10-6-15 [44]

Final Ruling: No appearance at the November 17, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditors, parties requesting special notice, and Office of the United States Trustee on October 6, 2015. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

Mark Shmorgon, the Attorney ("Applicant") for Debtors Sergey and Zinoviya Shemyakin ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period September 30, 2015, through October 6, 2015. The order of the court approving employment of Applicant was entered on . Applicant requests fees in the amount of $1,000.00 and costs in the amount of $0.00.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

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

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

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

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

(b) To what extent will the estate suffer if the services are

not rendered?

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including general case administration and significant motions. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

General Case Administration: Applicant spent 1 hours in this category. Applicant communicated with Client about the case.

Significant Motions and Other Contested Matters: Applicant spent 3 hours in this category. Applicant filed a motion to modify plan, prepared the modified plan, and prepared the instant motion for compensation.

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**
Mark Shmorgon	4	$250.00	$1,000.00
	0	$0.00	$0.00
	0	$0.00	$0.00
Total Fees For Period of Application			$1,000.00

Dckt. 46, 47.

Costs and Expenses

Applicant does not seek costs or expenses.

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $1,000.00 pursuant to 11 U.S.C. § 330 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 13 case.

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

Fees $1,000.00

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Mark Shmorgon ("Applicant"), Attorney for the 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 Mark Shmorgon is allowed the following fees and expenses as a professional of the Estate:
>
> Mark Shmorgon, Professional Employed by Chapter 13 Debtor
>
> Fees in the amount of $1,000.00
>
> The Fees and Costs pursuant to this Applicant in the amount of $1,000.00 are approved pursuant as final fees pursuant to 11 U.S.C. § 330.
>
> **IT IS FURTHER ORDERED** that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 13 case.

29. 09-44339-E-13 PLC-16 GLEN PADAYACHEE Peter Cianchetta — CONTINUED MOTION FOR CONTEMPT 7-28-15 [213]

Final Ruling: No appearance at the November 17, 2015 hearing is required.

The court has by prior order continued the matter to December 8, 2015 at 3:00 p.m. (Dckt. 234).

30. 15-21839-E-13 PGM-2 ROBERT REED AND MARIA BARTLOW-REED Peter Macaluso — MOTION TO VALUE COLLATERAL OF AQUA FINANCE, INC. 10-14-15 [58]

Final Ruling: No appearance at the November 17, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditors, and Office of the United States Trustee on October 13, 2015. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The Motion to Value secured claim of Quantum3 Group, LLC, as agent for Aqua Finance, Inc. ("Creditor") is granted and the secured claim is determined to have a value of $0.00.

The Motion filed by Robert Reed and Maria Bartlow-Reed ("Debtor") to

value the secured claim of Quantum3 Group, LLC, as agent for Aqua Finance, Inc. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of "a water system" ("Asset") The Debtor seeks to value the Asset at a replacement value of $500.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

Debtor declares, under penalty of perjury, that a lien was placed on the Asset on February 18, 2014, to purchase the Asset, which is more than 365 days prior to the petition filing date of March 9, 2015. Dckt. 60. This lien secures a debt owed to Creditor with a balance of approximately $3,287.14. Therefore, the Creditor's claim secured by a lien on the asset's title is under-collateralized. The creditor's secured claim is determined to be in the amount of $500.00. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Robert Reed and Maria Bartlow-Reed ("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 [name of creditor] ("Creditor") secured by an asset described as "a water system" ("Asset") is determined to be a secured claim in the amount of $500.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Asset is $500.00 and is encumbered by liens securing claims which exceed the value of the asset.

31. 15-21839-E-13 PGM-3 | **ROBERT REED AND MARIA BARTLOW-REED** | **MOTION TO AVOID LIEN OF SPRINGLEAF FINANCIAL SERVICES**
Peter Macaluso | **10-14-15 [63]**

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditors, and Office of the United States Trustee on October 14, 2015. By the court's calculation, 34 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). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Avoid Judicial Lien is denied without prejudice.

This Motion requests an order avoiding the judicial lien of Springleaf Financial Services ("Creditor") against property of Robert Reed and Maria Bartlow-Reed ("Debtor") referred to as "a pool table and computer equipment" (collectively referred to as "Assets").

However, from the face of the Motion, it appears that the Debtor is attempting to value the Creditor's secured claim pursuant to 11 U.S.C. § 506(a) rather than to avoid the lien of a creditor.

The Motion states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013, upon which the request for relief is based:

A. That on March 9, 2015 Debtors filed a Chapter 13 to reorganize their debts.

B. That on December 31, 2013, Debtors entered into a non-purchase money loan agreement, using personal property as collateral,

i.e. a pool table and computer equipment.

C. The amount owed to creditor, Springleaf Financial Services, is approximately $3,421.15, pursuant to the claim filed with the Court on April 3, 2014, Claim 2-1.

D. The Debtors value the pool table at $300.00 and the computer equipment at $200.00. Refer to the Declaration of Debtors filed herewith, the points and authorities, and Schedules B and C attached hereto as Exhibits.

E. Therefore, the lien should be avoided as it impairs an exemption pursuant to 11 U.S.C. § 522(f).

The Motion does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not state with particularity the grounds upon which the requested relief is based. In fact, the Motion states the wrong Bankruptcy Code section and fails to identify any judgment lien that could be avoided pursuant to § 522(f). This is not sufficient.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the *United States Supreme Court in Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation

of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.,* 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

Not pleading with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities – buried between extensive citations, quotations, legal arguments and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try and float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic

postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

Therefore, because the Debtor has failed to file a Motion citing the correct grounds for the relief sought and failed to provide evidence otherwise, 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 Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) 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.

32. 14-25740-E-13 MARIO RILEY — CONTINUED MOTION TO MODIFY PLAN
PGM-1 Peter Macaluso — 8-26-15 [49]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 26, 2015. By the court's calculation, 41 days' notice was provided. 35 days' notice is required.

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

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

Mario J. Riley ("Debtor") filed the instant Motion to Confirm the Modified Plan on August 26, 2015. Dckt. 49.

TRUSTEE'S OBJECTION

David P. Cusick, the Chapter 13 Trustee, filed an objection to the instant Motion on September 22, 2015. Dckt. 63. The Trustee objects on the following grounds:

1. The Trustee is uncertain as to the Debtor's ability to pay. The Trustee notes that the modified plan cures an existing payment delinquency of $6,190.00 under the confirmed plan which requires monthly payments of $3,095.00 per month. However, the proposed modified plan increases monthly payments to $3,520.00. The Trustee is concerned that the Debtor will not be able to make payments, given that the Debtor does not address the changes in the debtor's income

and expenses. Debtor has failed to supply the Trustee with evidence (e.g., bank statements, pay stubs, and receipts) of the changes reflected in Schedule I and J, Dckt. 52, such as: the non-filing spouse's change in employment status, and an unaccounted for decrease of $5,000.00 in expenses, which may impact his ability to make plan payments.

DEBTOR'S REPLY

Debtor filed a Reply to the Trustee's Objection on September 29, 2015, Dckt. 66. The Debtor responds as follows:

1. That it is not customary to supply receipts for all expenses, bank statements, or pay stubs. Debtor's counsel requests additional time to provide the requested evidence so as to support the income and expenses, should the Court require such evidence.

OCTOBER 6, 2015 HEARING

At the hearing, to afford the Debtor the opportunity to provide evidence to justify the changes in income and expenses, the court continued the instant Motion to 3:00 p.m. on November 17, 2015. Dckt. 68. The Debtor was ordered to file and serve supplemental papers on or before October 27, 2015. Any replies or oppositions were to be filed and served on or before November 10, 2015.

DISCUSSION

To date, no supplemental papers have been filed.

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

The Trustees objections are well-taken.

The Debtor may not be able to make plan payments or comply with the plan under 11 U.S.C. § 1325(a)(6). The Trustee notes that Schedule I reflects a change in income, that may be insufficient to support the proposed plan payment. Additionally, the Debtor fails to adequately explain the sudden decrease in expenses. Without an accurate picture of the Debtor's financial reality, the court cannot determine whether the plan is confirmable. Therefore, the objection is sustained.

The Trustee argues that the plan is not feasible, *See* 11 U.S.C. § 1325(a)(6), because the Debtor's Schedule J lists monthly disposable income of $3,520.00, while the Plan proposes a $3,520.00 monthly payment. However, the Debtor filed amended Schedules I and J on August 26, 2015, which indicate a monthly net income of $5,745.58. Thus, on its face the plan appears feasible.

The Debtor's amended Schedule I reflects a decrease in average monthly income of $2,529.59. The Debtor's amended Schedule J reflects a decrease in expenses, totaling $5,183.34. The amended Schedule J reflects a decrease from $300.00 to $175.00 for electricity, heat, and gas; $240.00 to $145.00 for water, sewage, garbage; $440.00 to $30.00 telephone, cell, internet; $1,250.00

to $400.00 for food and housekeeping supplies; $1,247.00 to $0.00 for childcare and educational costs; $115.00 to $25.00 for clothing, laundry, cleaning; $100.00 to $25.00 for personal care products; $130.00 to $44.00 for medical and dental; $2,066.45 to $700.00 for transportation; $103.97 to $29.00 for entertainment; $600.00 to $100.00 for charitable contributions; $151.00 to $80.00 for life insurance; and $175.50 to $172.58 for vehicle insurance. Absent explanation from the Debtor as to how the drastic decrease in expenses, the court does not believe the Debtor's projection is in good faith. This is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(3).

While the Debtor's counsel appears to believe that providing evidence of such changes in expenses and income is not necessary, the court will not confirm a plan in which it appears that the Debtor, who is already delinquent under the prior confirmed plan, may not be accurately reporting his financial reality.

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

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

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

33. 10-50941-E-13 JOEL/MAGGIE DAUGHERTY
RCW-5 Ryan Wood

MOTION TO VALUE COLLATERAL OF FLAGSTAR FSB
10-14-15 [56]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, Creditor, and Office of the United States Trustee on October 20, 2015. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

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

The Motion to Value secured claim of Flagstar Bank, FSB ("Creditor") is granted and Creditor's secured claim is determined to have a value of $0.00.

The Motion to Value filed by Joel and Maggie Daugherty ("Debtor") to value the secured claim of Flagstar Bank, FSB ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 1359 Keri Lane, Chico, California ("Property"). Debtor seeks to value the Property at a fair market value of $250,000.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the

asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

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

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

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

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

The court notes that neither Creditor nor Trustee filed opposition to this motion.

DISCUSSION

Creditor's first deed of trust secures a claim with a balance of approximately $296,338.00. Creditor's second, junior deed of trust secures a claim with a balance of approximately $93,601.00. FN.1. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's second, junior secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on that secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

FN.1. Debtor describes the assignment of deeds as follows:

A. The senior deed of trust is held by Flagstar FSB;
B. The junior deed of trust was originally held by Branifer Financial, Inc., was transferred or assigned to Flagstar Bank, FSB. This was recorded with Butte County on or around June 28 2007.

Dckt. 58 ¶ 2-4.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Joel and Maggie Daugherty (“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 Flagstar Bank, FSB secured by a junior, second deed of trust recorded against the real property commonly known as 1359 Keri Lane, Chico, 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 $250,000.00 and is encumbered by senior liens securing claims in the amount of $296,338.00, which exceeds the value of the Property which is subject to Creditor’s lien.

34. 15-25142-E-13 VICTOR IBARRA
ET-4 Matthew Eason

MOTION TO VALUE COLLATERAL OF JPMORGAN CHASE BANK, N.A.
10-2-15 [54]

Final Ruling: No appearance at the November 17, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, and Office of the United States Trustee on October 2, 2015. By the court's calculation, 46 days' notice was provided. 28 days' notice is required.

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

The Motion to Value secured claim of JPMorgan Chase Bank, N.A. ("Creditor") is granted and the secured claim is determined to have a value of $5,950.00.

The Motion filed by Victor Manuel Alvarez Ibarra ("Debtor") to value the secured claim of JPMorgan Chase Bank, N.A. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2007 Nissan Murano SL Sport Utility Vehicle, VIN ending in 3461 ("Vehicle"). Dckt. 56, Proof of Claim #6. The Debtor seeks to value the Vehicle at a replacement value of $5,950.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004). FN.1.

FN.1. The Ibarra Declaration also seeks to introduce evidence establishing the value of the asset. Though the *Kelley Blue Book* valuation is attached as an Exhibit, it is not properly authenticated. Fed. R. Evid. 901, 902.

Further, the Movant has not provided the court with a basis for determining that this out of court statement is admissible hearsay. Fed. R. Evid. 802, 803. The court will not presume to make evidentiary legal assertions for Movant, which may or may not be so intended. Some common

Hearsay Rule exceptions include records of regularly conducted activity, public records and reports setting forth the activities of the public agency or observed pursuant to a duty imposed by law, and market reports, commercial publications." Fed. R. Evid. 803(6), (8), and 803(17).

However, because Debtor's opinion of the Vehicle's value is presumptively valid, this evidentiary error is cured by asserting the value in the Ibarra Declaration. Dckt. 57.

The lien on the Vehicle's title secures a purchase-money loan incurred in December 2006, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $10,507.47. Dckt. 56 Exh. 1; Proof of Claim #6, p. 5. Therefore, the Creditor's claim secured by a lien on the asset's title is under-collateralized. The creditor's secured claim is determined to be in the amount of $5,950.00. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Victor Manuel Alvarez Ibarra ("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 JPMorgan Chase Bank, N.A. ("Creditor") secured by an asset described as 2007 Nissan Murano SL Sport Utility Vehicle, VIN ending in 3461 ("Vehicle") is determined to be a secured claim in the amount of $5,950.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is $5,950.00 and is encumbered by liens securing claims which exceed the value of the asset.

35. 15-25142-E-13 VICTOR IBARRA **MOTION TO CONFIRM PLAN**
ET-5 Matthew Eason **10-2-15 [59]**

Final Ruling: No appearance at the November 17, 2015 hearing is required.

The Debtor having filed a new proposed amended plan and Motion to Confirm on October 28, 2015, the court interpreting the subsequently filed proposed amended plan and Motion to be a de facto withdrawal of the instant Motion and plan, and the Withdrawal to be an ex parte motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rule of Bankruptcy Procedure 9014 and 7041 for the court to dismiss without prejudice the Motion, and good cause appearing, **the court dismisses without prejudice the Motion to Confirm the Amended Plan filed on October 2, 2015**.

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.
>
> A Motion to Confirm having been filed by the Debtor, Debtor having filed a new amended plan and Motion to Confirm and the court construing that as a de facto ex parte motion to dismiss the Motion without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, dismissal of the Motion being consistent with the opposition filed, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is dismissed without prejudice.

36. 15-27643-E-13 ET-1 PATRICIA PETERBURS Matthew Eason

MOTION TO VALUE COLLATERAL OF PNC BANK, N.A.
9-30-15 [8]

Final Ruling: No appearance at the November 17, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, and Office of the United States Trustee on September 30, 2015. By the court's calculation, 48 days' notice was provided. 28 days' notice is required.

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

The Motion to Value secured claim of PNC Bank, National Association ("Creditor") is granted and Creditor's secured claim is determined to have a value of $0.00.

The Motion to Value filed by Patricia Peterburs ("Debtor") to value the secured claim of PNC Bank, National Association ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 2743 64th Street, Sacramento, California ("Property"). Debtor seeks to value the Property at a fair market value of $266,772.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The valuation of property which 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.

Neither the Trustee nor Creditor has filed opposition to the motion.

DISCUSSION

The first deed of trust secures a claim with a balance of approximately $272,851.00. Dckt. 11 Exh. 1. Creditor's second deed of trust secures a claim with a balance of approximately $89,794.00. *Id.* Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Patricia Peterburs ("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 PNC Bank, National Association secured by a second in priority deed of trust recorded against the real property commonly known as 2743 64th Street, Sacramento, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $266,772.00 and is encumbered by senior liens securing claims in the amount of $272,851.00, which exceed the value of the Property which is subject to Creditor's lien.

37. 15-27943-E-13 JULIENE ALEXANDRE
SNM-1 Stephen Murphy

MOTION TO APPROVE LOAN MODIFICATION
10-19-15 [12]

Final Ruling: No appearance at the November 17, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 19, 2015. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The Motion to Approve Loan Modification is granted.

The Motion to Approve Loan Modification filed by Juliene Alexandre ("Debtor") seeks court approval for Debtor to incur post-petition credit. CitiMortgage, Inc. ("Creditor"), whose claim the plan provides for in Class 4, has agreed to a loan modification which will reduce the principal balance to $271,285.00. The modified interest rate will be 3.25%, the monthly payment will be $1,367.63 (a reduction of $1,009.14), and a balloon payment of $181,321.96 due on March 1, 2035.

The Motion is supported by the Declaration of Debtor. The Declaration affirms Debtor's desire to obtain the post-petition financing and provides evidence of Debtor's ability to pay this claim on the modified terms.

This post-petition financing is consistent with the Chapter 13 Plan in this case and Debtor's ability to fund that Plan. There being no objection from the Trustee or other parties in interest, and the motion complying with the provisions of 11 U.S.C. § 364(d), the Motion to Approve the Loan Modification is granted.

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

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

The Motion to Approve the Loan Modification filed by Juliene Alexandre having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the court authorizes Juliene Alexandre ("Debtor") to amend the terms of the loan with CitiMortgage, Inc., which is secured by the real property commonly known as 2548 Marquette court, Fairfield, California, on such terms as stated in the Modification Agreement filed as Exhibit 1 in support of the Motion, Dckt. 15.

38. 15-27943-E-13 SNM-2 **JULIENE ALEXANDRE** **Stephen Murphy** **MOTION TO APPROVE LOAN MODIFICATION** **10-19-15 [17]**

Final Ruling: No appearance at the November 17, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 19, 2015. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The Motion to Approve Loan Modification is granted.

The Motion to Approve Loan Modification filed by Juliene Alexandre ("Debtor") seeks court approval for Debtor to incur post-petition credit. CitiMortgage, Inc. ("Creditor"), whose claim the plan provides for in Class 4,

has agreed to a loan modification which will reduce the principal balance to $73,556.33.00. The modified interest rate will be 6.74% and the monthly payment will be $534.24 (a reduction of $38.33)

The Motion is supported by the Declaration of Debtor. The Declaration affirms Debtor's desire to obtain the post-petition financing and provides evidence of Debtor's ability to pay this claim on the modified terms.

This post-petition financing is consistent with the Chapter 13 Plan in this case and Debtor's ability to fund that Plan. There being no objection from the Trustee or other parties in interest, and the motion complying with the provisions of 11 U.S.C. § 364(d), the Motion to Approve the Loan Modification is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve the Loan Modification filed by Juliene Alexandre having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the court authorizes Juliene Alexandre ("Debtor") to amend the terms of the loan with CitiMortgage, Inc., which is secured by the real property commonly known as 2548 Marquette court, Fairfield, California, on such terms as stated in the Modification Agreement filed as Exhibit 1 in support of the Motion, Dckt. 20.

39. 10-33944-E-13 ALAN/JILL MORI
DPC-2 Peter Macaluso

CONTINUED OBJECTION TO NOTICE OF MORTGAGE PAYMENT CHANGE 7-16-15 [141]

No Tentative Ruling:

Local Rule 3007-1 Objection to Notice of Mortgage Payment Change - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Debtor, Debtor's Attorney, and Office of the United States Trustee on July 16, 2015. By the court's calculation, 47 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

The Objection to Notice of Mortgage Payment Change has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(b)(1)(A) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Objection to Mortgage Payment Change is xxxxx

David Cusick, the Chapter 13 Trustee, filed the instant Objection to Mortgage Payment Changes on July 16, 2015. Dckt. 141. The Trustee objects to Wells Fargo Bank, N.A. ("Creditor") Notice of Mortgage Payment Changes filed on April 9, 2015 and June 8, 2015.

Alan and Jill Mori ("Debtor") are in the 53rd month of their 60 month plan. The plan was filed on October 5, 2011 and the only creditor provided to receive further disbursements is the Creditor for the mortgage. Under the confirmed plan, Wells Fargo Home Mortgage is classified as a Class 1 claim with monthly contract installment payments of $1,900.00. The plan provides that if the loan modification is declined, the claim including any arrearages of Wells Fargo Home Mortgage shall be satisfied by the way of surrender of the property (which is Class 3 treatment under the confirmed Plan), with the qualification that entry of the order confirming the plan shall not modify the automatic stay (as it would normally for Class 3 claims).

The Trustee states that he has disbursed $85,500.00 in mortgage payments. The Trustee states that it is unclear if the Creditor has declined the loan modification. No Motion to Approve Loan Modification pursuant to the additional provisions of the plan has been filed. The Trustee objects to the

Notice of Mortgage payment Change to determine if the loan modification has been declined and the property is now surrendered.

The Trustee states that the Sacramento County Property Tax claim had been paid in full, as evidenced by the letter from the County of Sacramento and the returned disbursement of $3,513.99 sent by the Trustee. Dckt. 144, Exhibit 3.

The Trustee asserts, that in the alternative, that if the Creditor or Debtor assert that the first objection is not valid to the notice of Mortgage Payment change, the Trustee objects to the changes because they appear to be based on an unexplained entry in the first Notice of Change, filed on April 9, 2015 where the actual physical payments posted in one month to the escrow total $54,200.75 for October 2014. The Trustee's payments to the Creditor totaled $66,500.00 through the end of October and $64,600.00 through the beginning of October 2014.

Creditor's Claim

Creditor filed a Proof of Claim No. 8 asserting a secured claim of $550,000.00 and claimed no arrears. The attached papers to the Proof of Claim reflect an initial interest rate of 5.250% and interest only payments of $2,406.25 until August 1, 2012 when the first principal and interest payment were due.

Debtor filed Current Income and Expenditures (Dckt. 126) where the Debtor's expenses do not indicate whether taxes and insurance are included in their mortgage payment but budget $25.00 monthly for insurance and $0.00 for taxes.

Creditor filed a notice of Mortgage Payment change on April 9, 2015 reflecting a mortgage payment effective May 1, 2015 of $2,552.14 ($2,726.00 principal and/or interest, $74.53 escrow, and $51.61 escrow shortage). The Escrow Account Disclosure Statement attached to the Notice of Mortgage Payment Change reflects a $619.27 escrow shortage and states Debtor's current principal and/or interest payment is $2,406.25 and the escrow payment is $0.02.

The Trustee states that the account history from April 2014 to December 2014 indicates there was an escrow balance as of April 2014 in the amount of -<$48,148.08> and an actual payment to escrow in October 2014 in the amount of $54,200.75. The actual escrow balance as of December 2014 is depicted as $2,702.90.

Based on the April 2015 Notice, the Creditor either entered in a loan modification with the Debtor about October 2014 or failed to properly credit payments received from the Trustee prior to that date.

The Trustee objects to the Notice in an attempt to resolve the amount of the mortgage payment, where filed unsecured claims have been paid the minimum percentage called for by the plan and before the Trustee pays a higher dividend to general unsecured claims as allowed under the plan.

DEBTOR'S RESPONSE

The Debtor filed a response on August 18, 2015. Dckt. 147. The Debtor responds by stating that Debtor's counsel requires additional time to meet with the Debtor and determine the status of the mortgage and determine what is needed to ensure that the case can proceed to discharge.

CREDITOR'S OPPOSITION

The Creditor filed on opposition to the instant Objection on August 18, 2015. Dckt. 149. FN.1. First, the Creditor states that the Debtor's loan modification application was denied on June 3, 2013. The Creditor asserts that its reading of the Additional Provisions is that if the loan modification is denied, the Debtor will amend their plan to provide for a surrender of the property.

FN.1. The court notes that the Opposition states that the Creditor's attorneys are from the firm of Pite Duncan, LLP in the upper right hand corner of the pleading. However, Pite Duncan, LLP has merged with another firm to become "Aldridge Pite, LLP." While the correct firm name is listed at the signature page, pursuant to Local Bankr. R. 2017-1(b)(2)(B), the correct name must be present in the upper left hand corner.

Additionally, the Creditor states that the Trustee has disbursed a total of $85,500.00 to the Creditor. The Creditor states that the first post-petition payment was received on November 30, 2011. The Creditor argues that the payment was held in suspense as it was not sufficient to complete a full payment. Once sufficient funds were received by the Trustee, those funds were applied to first post-petition payment date of June 1, 2010. The Creditor asserts that the post petition payments due are as follows:

Number of Payments	From	To	Monthly Payment	Total Payments
59	6/1/2010	4/1/2015	$2,406.25	$141,968.75
3	5/1/2015	7/1/2015	$3,552.14	$10,656.42
1	8/1/2015	8/1/2015	$3,583.14	$3,583.14
			TOTAL	$152,208.31

The Creditor states that, after the Trustee's disbursement, the Debtor remains $70,708.31 in post-petition defaults.

The Creditor states that upon initial review of the escrow statement, it appears that Creditor has been maintaining post-petition payments on taxes and insurance. The Creditor asserts that its counsel is looking into this matter and plans to supplement its opposition to address what escrow payments were made and when they were made. The Creditor states that it plans to work with the Trustee to address the concerns.

The Creditor requests either that the Objection is overruled or continued to address the issues raised by the Trustee.

SEPTEMBER 1, 2015 HEARING

At the hearing, the court continued the hearing to 3:00 p.m. on October 6, 2015. Dckt. 153. Supplemental responses were ordered to be served and filed on or before September 22, 2015.

The Parties were ordered to specifically address the mandatory, "shall," surrender treatment of Creditor's claim upon the denial of loan modification. The Creditor, in its response, shall address the escrow analysis, as well as an accounting of the payments received by the Trustee in this case. Any replies shall be filed and served on or before September 29, 2015.

DEBTOR'S REPLY

The Debtor filed a reply on September 29, 2015. Dckt. 161.

The Debtor first addresses the Additional Provision 7.02, Number 4 and states that the language unequivocally states that if the loan modification is denied, the Debtor would surrender the home.

The Debtor next addresses the "mandatory, 'shall,' surrender treatment of Creditor's claim upon denial of loan modification." After reviewing case law as to 11 U.S.C. § 1325(a)(5)(c)'s use of "surrender," the Debtor states that "surrender" in the context of the instant case is that the Debtor agreed to make the collateral available to the secured creditor. Specifically, the Debtor states that he would "cede his possessory rights in the collateral-within 30 days of the filing of the notice of intention to surrender possession of the collateral." The Debtor asserts that § 521(a)(2) does not suggests that the secured creditor is required to accept possession of the vehicle at the end of the 30-day period.

As to the plan language view of "surrender," the Debtor argues that case law, specifically *Arsenault v. JPMorgan Chase Bank, N.A. (In re Arsenault*), 456 B.R. 627 (Bankr. SD Ga. 2011), states that, under state law, a mortgage lender cannot be compelled to initiate foreclosure. The Debtor points out that, as in this case, the mortgage holder is accepting adequate protection payments and the Debtor is in compliance with their confirmed plan.

The Debtor requests that the Objection be continued to allow the Debtor to process a new loan modification in light of the above arguments.

OCTOBER 6, 2015 HEARING

At the October 6, 2015 hearing, the court continued the matter for the following reasons:

> A review of the confirmed plan states in the additional provisions:
>
> > "The claim including any arrearages of WELLS FARGO HOME MORTGAGE shall be satisfied by way of a loan modification. **Should the loan modification be declined**, **the claim** including any arrearages of WELLS FARGO HOME MORTGAGE

> **shall be satisfied by way of surrender of the property**. Entry of the order confirming the plan shall not modify the automatic stay."

Dckt. 127 [emphasis added]. The term "surrender" is a term of art defined by the confirmed Chapter 13 Plan itself – the Class 3 treatment. This additional provision recognizes that treatment, and adds the modification of that to the Class 3 treatment deleting the termination of the automatic stay.

Under the terms of the confirmed plan, the Debtor was making a plan payment of $2,200.00 per month, with $1,900.00 going to Wells Fargo Home Mortgage as the "monthly contract installment" even though the amount was less than the actual contractual payment amount.

The court's reading of the Additional Provision concerning the Creditor's lien is that when the loan modification is denied, the claim shall automatically become a Class 3 claim and Creditor limited to obtaining payment from foreclosing on its collateral. The required Class 3 surrender treatment does not provide for any further payments to be made by the Trustee to Creditor.

The additional provision appears to be one that pre-dates the "Ensminger Additional Provisions" which was worked out between creditors and debtors attorneys. Here, the plan language of the Additional Provision provides that upon the June 3, 2013 rejection of the loan modification, the Plan provides that the property is "surrendered" as a Class 3 claim. Thus, no further payments are provided to be paid to Wells Fargo Bank, N.A. since June 3, 2013.

However, neither Wells Fargo Bank, N.A. nor Debtor notified Trustee of the loan modification rejection and that no further payments were to be made to Wells Fargo Bank, N.A.

The Plan as confirmed, and allowed to be confirmed by Wells Fargo Bank, N.A., expressly provides that though it is a Class 3 claim, the automatic stay is not terminated. Wells Fargo Bank, N.A. has failed to seek relief from the automatic stay, instead electing to collect monthly payments from the Trustee which are not provided for in the confirmed Plan.

Considering the potential significant litigation which might ensure [sic] concerning the post-denial of the loan modification conduct of Debtor and Wells Fargo Bank, N.A., the court continues the hearing to 3:00 p.m. on November 17, 2015. Any supplemental papers shall be filed and served on or before November 3, 2015. Any replies or oppositions shall be filed and served on or before November 17, 2015.

The court continues the hearing to allow the parties to determine whether there is a proper, non-litigation resolution of this situation which may be agreed to by the Debtor,

Trustee, and Wells Fargo Bank, N.A. Possibly, Debtor and Wells Fargo Bank, N.A. might work out a modification which can be approved as part of the existing plan or a modified plan. Wells Fargo Bank, N.A. and the Trustee may make arrangements to disgorge the monies received by Wells Fargo Bank, N.A. since June 3, 2013. Possibly Wells Fargo Bank, N.A. may present an argument that under the confirmed Plan that after the rejection of the loan modification the plain language of the confirmed Plan does not provide for Class 3 surrender treatment (without the automatic modification of the automatic say), but some post-June 3, 2013 payments are provided for in the confirmed Plan. Debtor may show the court some good faith grounds for why they did not notify the Trustee of the modification direction to avoid having monies diverted to a creditor who was not entitled to receive them under the confirmed Plan.

Dckt. 163, 165.

CREDITOR'S OCTOBER 7, 2015 NOTICE OF MORTGAGE PAYMENT CHANGE

On October 7, 2015, Creditor filed a Notice of Mortgage Payment Change with several attached documents. The attached documents include a Certificate of Service and a redacted copy of the Trial Period Plan Agreement.

The Notice indicates that the change is due to "proposed modification agreement-trial payments." The current mortgage payment is listed as $3,583.14 and the new mortgage payment is listed as $3,443.53.

TRUSTEE'S NOVEMBER 3, 2015 RESPONSE

Trustee filed a supplemental response on November 3, 2015. Dckt. 166. Trustee asserts the following:

A. Assuming that Debtor's first payment of $99,515.93 due December 1, 2015, as stated in the Trial payment Plan Agreement Terms and Conditions, is the compilation of all disbursements made to date by the Trustee, Trustee calculates that only $98,846.90 will have been disbursed to this creditor by December 1, 2015. Thus, under the Trial Period Plan Agreement, Debtor will be delinquent $856.83.

B. Trustee recommends that, for Debtor's Trial Agreement to work, Debtor will need to provide additional funds of approximately $905.00, which consists of the $856.83, Trustee's Fee of 5.10%, and a slight cushion, by November 25, 2015 to give Trustee sufficient time to process and disburse the funds to Creditor.

C. Additionally, since Debtor's confirmed plan does not call for payments to the creditor above the $1,900.00 per month, the order on this motion will presumably provide for the Trustee to disburse any balance on hand to the creditor.

Dckt. 166, 167.

DEBTOR'S NOVEMBER 3, 2015 RESPONSE

Debtor filed a supplemental response on November 3, 2015. Dckt. 169. The response consists of the following:

A. The Trustee has received $1,900.00 per month for approximately (_55__) for a total of $104,500.00, which should be enough to cover the $99,515.93 payment, with payments of $3,443.53, due in January and February.

B. "The Debtor has many concerns as to this latest Notice of Payment Change, as this "Notice" was filed the day after the Court continued the motion at the request of the parties, the loan modification has note [sic] been openly noticed, but instead what appears to be an attempt to identify where the $104,500.00 is being held, i.e. a suspense account?"

Dckt. 169.

The Debtor requests that the Motion be continued in light of the Creditor's subsequent Notice of Mortgage Payment Change filed.

DISCUSSION

The court's concerns have been allayed in some respects and heightened in another. It appears that Wells Fargo Bank, N.A., realizing that it could well be required to pay back all of the monies paid through the Trustee shall the denial of the loan modification, appears to what to enter into a loan modification with Debtor. The Notice of Mortgage Payment Change filed on October 7, 2015, provides for payments on the loan to be $3,443.53 commencing in December 2015. Attached to the Notice is a copy of an October 2, 2015 proposed loan modification.

While the court is heartened to see some productive loan modification steps, the court is concerned that nobody has come to the court to obtain authorization for the Debtor to enter into the modification. The attachment states only the first three months of a trial loan modification, not an actual modification. It could well be that after pocketing the years of payments not authorized under the plan under the "trial" modification, the Bank could just summarily deny the modification, seeking to foreclose on the property which it says has a value of $490,000.00. By keeping the unauthorized payments, the Bank would be improperly enhancing its recovery by almost $100,000.

xxxxxx

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 Notice of Mortgage Payment Change filed in this case by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** xxxx.

40. 10-50148-E-13 LAURA HALL
RHM-3 Robert Hale McConnell

MOTION TO SET ASIDE DISMISSAL OF CASE
10-8-15 [81]

DEBTOR DISMISSED: 09/17/2015

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 8, 2015. By the court's calculation, 40 days' notice was provided. 28 days' notice is required.

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

The Motion to Set Aside an Order of Dismissal is granted.

Laura Hall ("Debtor") filed the instant Motion to Set Aside an Order of Dismissal on October 8, 2015. Dckt. 81.

The Debtor states that the instant case was dismissed on September 17, 2015 based on the Trustee's Motion to Dismiss due to the Debtor's delinquency in plan payments. Dckt. 78.

The Debtor states that the Debtor made all payments on or before the hearing and understood that the Trustee would represent that to the court and withdraw the Motion.

The Debtor requests that the court vacate the order dismissing this case as a mistake, inadvertence, surprise, or excusable neglect. Fed. R. Civ. P. 60(b)(1) and (6).

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response to the instant Motion on November 2, 2015. Dckt. 87.

The Trustee states tat the Debtor's Motion was filed on August 11, 2015. Dckt. 72. The Motion to Dismiss was set for hearing on September 9, 2015.

The Debtor and Debtor's attorney failed to file a response to the Trustee's Motion which was required pursuant to Local Bankr. R. 9014-1(f)(1).

The Trustee's office posted two TFS payments of $125.00 and $910.00 on September 9, 2015 and $1,000.00 on September 10, 2015.

The Debtor came into the Trustee's office on September 8, 2015 and spoke to an employee at the Trustee's office. The Debtor provided a copy of a $1,000.00 TFS payment that was pending. The employee spoke to one of Trustee's counsel on September 8, 2015 regarding the pending payment and was advised to make the Debtor aware to be present at the hearing as there may have already been a final ruling.

The Trustee does not oppose Debtor's Motion to Vacate.

APPLICABLE LAW

Federal Rule of Civil Procedure Rule 60(b), as made applicable by Bankruptcy Rule 9024, governs the reconsideration of a judgment or order. Grounds for relief from a final judgment, order, or other proceeding are limited to:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Red. R. Civ. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199 (5th Cir. La. 1993). The court uses equitable principals when applying Rule 60(b). *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §2857 (3rd ed. 1998). The so-

called catch-all provision, Fed. R. Civ. P. 60(b)(6), is "a grand reservoir of equitable power to do justice in a particular case." *Compton v. Alton S.S. Co.*, 608 F.2d 96, 106 (4th Cir. 1979) (citations omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847, 863 (1988), relief under Rule 60(b)(6) may be granted in extraordinary circumstances, *id.* at 863 n.11.

A condition of granting relief under Rule 60(b) is that the requesting party show that there is a meritorious claim or defense. This does not require a showing that the moving party will or is likely to prevail in the underlying action. Rather, the party seeking the relief must allege enough facts, which if taken as true, allows the court to determine if it appears that such defense or claim could be meritorious. 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶¶ 60.24[1]-[2] (3d ed. 2010); *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984).

Additionally, when reviewing a motion under Civil Rule 60(b), courts consider three factors: "(1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default" *Falk*, 739 F.2d at 463.

DISCUSSION

The court first notes that the Debtor and Debtor's counsel failed to respond to the Trustee's Motion to Dismiss. The Local Bankruptcy Rules and the notice requirements are quite clear and give ample notice to parties that, if a Motion is set pursuant to Local Bankr. R. 9014-1(f)(1), any opposition must be in writing and filed 14-days prior to the hearing. Here, the Debtor and Debtor's counsel blatantly ignored such rules and instead attempted to circumvent them to place the burden on the Trustee.

This court has consistently and repeatedly emphasized the importance of responding parties to file responses or oppositions if required. Otherwise, as permitted by the rules, the court can and will issue final rulings. The court did such in the instant case.

In reviewing the Motion, it conspicuously omits any statement as to what Debtor and her counsel did to respond to the Trustee's motion to dismiss, other than the Debtor being sent to the Trustee's office. The conduct of Debtor and Debtor's counsel is built on the following contention in the present Motion,

> "As set forth in the declaration of Debtor she had factually made all payments to the Chapter 13 Trustee on or before the date of hearing, and understood that the Chapter 13 Trustee not 11 only agreed with that, but would so represent to the court that 12 factual reality, and request that the court withdraw the motion. Accordingly, Debtor seeks relief from mistake, inadvertence, surprise, or excusable neglect...."

Motion, p. 2:8-14; Dckt. 81. The Motion is devoid of the efforts of counsel for Debtor in responding to the Motion - other then apparently telling Debtor to deal with it.

It is clear that counsel for Debtor understands the consequences of the failure to represent the Debtor or respond to the motion to dismiss. In the declaration prepared by her counsel, Debtor states under penalty of perjury:

> "Between the impact of the fire and the car repair I was not able to handle all charges as they came due. **When I was notified** of the trustee delinquency I had to suspend some other ongoing payments in order to provide to the trustee the reinstatement figure of $2,035.00 which I provide to the trustee prior to the hearing date. This was in a period of time less than 14 days prior to the hearing. **Until then I** did not know whether I could catch up.
>
> Before the date of the hearing **I further spoke** with the Trustee's office to determine that they had received those funds. They acknowledged that they had a notation that those funds were "pending" and that I was in good standing with the payments. **I learned that the "pending" status** was due to the Labor Day holiday and that the report would shortly be updated. **I was informed** that at the hearing the trustee would inform the judge of my curing of the arrears and that they intended to withdraw the motion.
>
> On the morning of September 9, 2015 **I drove to Sacramento to attend** the hearing scheduled for 10:00 A.M. **I arrived inside** the court room before the court had begun it's calendar. **I spoke with the clerks** in the courtroom where **I learned** that the matter had been resolved prior to my arrival. **I spoke with the Trustee** who acknowledged that the funds were showing as received but that there was nothing further the trustee could do, and that **I would need to** seek: reinstatement of my case. **I have accordingly** done so.
> ...
> **I understand** the additional work that the Trustee has been placed to because of the irregularity of my payments over this long five year journey. **I do apologize** to the court and to the Trustee for any added inconvenience or expense **I have put them** to. If there is a charge for that **I am willing** pay that charge."

Declaration, pp. , 2:14-28, 3:9-12.

Devoid from both the Motion and Declaration are statements concerning any action taken undertaken or representation provided by Debtor's counsel. In light of the circumstance to which Debtor has testified, a response by counsel to the Trustee's motion consisting of a short statement of the events of the Debtor and a short declaration of those asserted facts would have prevented the case from being dismissed. But no action was taken by counsel.

Debtor's counsel has been allowed $3,500.00 in attorneys' fees in this case. Order confirming plan, Dckt. 23. Debtor's counsel elected to accept a $3,500.00 fee pursuant to Local Bankruptcy Rule 2016-1(c). Order, Dckt. 23.

The court notes that a modified plan was filed and confirmed in this bankruptcy case. Debtor's counsel filed the motion and obtained confirmation of the modified plan. Though the motion to confirm the modified plan did not state with particularity the grounds upon which the modification was requested, the Declaration in support states that due to the State of California furloughing employees due to a budget "crisis," Debtor's income had been reduced. Dckt. 37.

Surprisingly, Debtor's counsel has not sought an award of additional fees for what appears to be substantial and unanticipated work. L.B.R. 2016-1(c)(3). Neither in connection with that motion or in connection with the present motion does counsel provide any information that he has chosen to provide pro bono services for the additional legal work.

Counsel for Debtor has not withdrawn, and the court has not authorized the withdrawal, as Debtor's attorney in this bankruptcy case.

From the post hoc information provided, it is clear that Debtor was facing some extraordinary, real life events which explain her inability to make the payments. If disclosed to the court, at a minimum additional time would have been given Debtor **and her counsel** to either cure the default or otherwise address the defaults occurring in the fifth year of this bankruptcy case.

But counsel for Debtor is absent from any discussion concerning the response to the default and motion to dismiss. The declaration is filed with "I" did this and "I" did that, the Debtor left to navigate the legal maze of bankruptcy defaults.

In light of the otherwise simple manner in which the motion to dismiss could, and should, have been addressed by counsel for Debtor, and such failure to act, the court conditions the dismissal on counsel reimbursing the Chapter 13 Trustee for $975.00 in otherwise unnecessary legal fees and costs caused by the failure of Debtor's counsel to file a response. The court computes the attorney fee expense as follows:

Chapter 13 Trustee reasonable attorney fee hourly rate.....$250.00

Legal Services Post-Dismissal (not for services related to dismissal motion), including Motion to Vacate.....3.5 hours

The $975.00 is ordered to be paid as an expense reimbursement, and shall be paid on or before November 30, 2015. Upon the payment of the $975.00 by counsel for Debtor, the court shall issue the order vacating the order dismissing the case and an order denying without prejudice the motion to dismiss.

Alternatively, if counsel objects to paying the $975.00 in reimbursement of legal expenses, on or before November 30, 2015, counsel shall filed a pleading titled "Objection to Payment of Reimbursement of Legal Expenses" and the court shall issue an order to show cause why counsel or Debtor, or both, should not pay the reimbursement of legal fees relating to the motion to dismiss and the order to show cause. If such objection is filed, counsel shall notify Janet Larson, courtroom deputy for Department E of this court, and the court shall issue the Order to Show Cause and the orders vacating the dismissal and denying without prejudice the motion to dismiss.

Therefore, given these facts, the Motion is conditionally 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 Set Aside an Order of Dismissal 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 conditionally granted on the completion of the following alternative events.
>
> Robert Hale McConnell ("Counsel for Debtor") shall pay $975.00 to the Chapter 13 Trustee as the reimbursement for otherwise unnecessary legal expenses relating to the post-dismissal legal work required due to counsel's failure to file an opposition to the Motion to Dismiss. Upon timely payment of the $975.00 by counsel for Debtor, the counsel for the Chapter 13 Trustee shall prepare and lodge with the court an order granting the present Motion and vacating the dismissal and a separate order denying without prejudice the motion to dismiss.
>
> Alternatively, if Counsel for Debtor objects to paying the $975.00 in reimbursement of legal expenses, on or before November 30, 2015, Counsel for Debtor shall filed a pleading titled "Objection to Payment of Reimbursement of Legal Expenses" and the court shall issue an order to show cause why counsel or Debtor, or both, should not pay the reimbursement of legal fees relating to the motion to dismiss and the order to show cause. If such objection is filed, counsel shall notify Janet Larson, courtroom deputy for Department E of this court, and the court shall issue the Order to Show Cause and the orders vacating the dismissal and denying without prejudice the motion to dismiss.
>
> **IT IS FURTHER ORDERED** that if the $975.00 in legal expense reimbursement is not timely paid by Counsel for Debtor or the Objection to payment of the legal expense reimbursement by Counsel for Debtor or Debtor is not timely filed, counsel for the Chapter 13 Trustee shall prepare and lodge with the court an order denying this Motion to Dismiss.

41. 15-26252-E-13 DPC-1 **RALPH/CHRISTINA CONCHAS** **Julius Engel** **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **9-30-15 [21]**

WITHDRAWN BY M.P.

Final Ruling: No appearance at the November 17, 2015 hearing is required.

The court having previously issued an order confirming the plan of Debtor on November 2, 2015 (Dckt. 33) and the Trustee having filed a Withdrawal of the instant Objection, **the matter is removed from the calendar.**

42. 15-26656-E-13 **GARY STEPHAN** **Dale Orthner** **OBJECTION TO CONFIRMATION OF PLAN BY LAURIE STEPHEN** **10-7-15 [28]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on October 6, 2015. By the court's calculation, 42 days' notice was provided. 14 days' notice is required.

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

U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The court's decision is to overrule the Objection.

Laurie Stephen ("Creditor") opposes confirmation of the Plan on the basis that:

1. The Debtor fails to include Creditor for pre-petition claims in excess of $170,397.00 on priority nondischargeable claims for domestic support obligations.

2. Debtor does not live at the address listed on the petition.

3. Debtor has erroneously listed a debt of $1,500.00 as a loan from C. Trucker Cheadle. Mr. Cheadle is actually Creditor's and Debtor's trust attorney and the fees are a yearly maintenance fee to maintain and update the trust.

4. The Debtor listed a debt of $12,500.00 to Michael Brennan as purchases. The Creditor asserts that this is Debtor's divorce attorney and that the debt is his fees.

5. The Debtor lists 6 people residing in his residence when the Creditor states that it is unclear how many people are in the household.

6. Debtor failed to list his income for the years 2013 and 2014 under Income and employment or operations of business.

7. Debtor failed to list several unsecured creditors.

First, the court notes that the Creditor failed to comply with Local Bankr. R. 9014-1(d). The Creditor failed to provide a Docket Control Number for the instant Motion and failed to file separately the Objection from the Proof of Service from the Declaration. Additionally, the Creditor fails to cite the legal authority relied upon for the Creditor's objection.

Creditor is attempting to represent herself in this federal court proceeding, and appears to be adopting state court practices (possibly family law court) in this case. If Creditor intends to so proceed without counsel, it behooves her to review the pleadings and practice rules, as the court cannot, and will not, be put in the position of revising pleadings for either party.

In a declaration tacked on the back of the Objection to Confirmation, Creditor states under penalty of perjury:

a. Debtor and creditor are currently married, with a divorce proceeding pending in the Orange County Superior Court (which was filed in 2013).

b. Creditor states that the divorce is very acrimonious, with a restraining order having been issued for Debtor to stay away from Creditor. However, on the Statement of Financial Affairs Debtor states under penalty of perjury that no such legal proceedings are pending. Statement of Financial Affairs Question 4, Dckt. 1. at 33.

c. Debtor has not provided any support for Creditor and their four children which are in Debtor's custody. No testimony is provided as to the issuance of any interim support order in the state court proceeding.

Most of the Creditor's objections are not supported by evidence. The Creditor has not filed a claim in the instant case. The Creditor does not provide testimony as to Debtor's current living situation. What the Debtor does provide evidence for is not sufficient to sustain an objection. Rather, it reads somewhat like merely a spill over from the family court battle which, after several years, the parties have not been able to obtain even a interim support order.

The court overrules Creditor's objection without prejudice.

However, the court has sustained the Trustee's separate objection to the instant plan and this plan has been denied confirmation.

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

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

43. 15-26656-E-13 GARY STEPHAN
DPC-1 Dale Orthner

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
10-7-15 [20]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on October 7, 2015. By the court's calculation, 41 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

1. The Debtor failed to attend the First Meeting of Creditors on October 29, 2015.

2. The Debtor is $148.89 delinquent in plan payments and has paid $0.00 into the plan to date.

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

4. The Debtor has failed to provide the Trustee with proof of income for the 60 days preceding filing of their bankruptcy.

5. The Debtor has failed to provide copy of Debtor's revocable trust.

6. The plan will complete in 674 months as opposed to 60 months. This is due to the Debtor's proposal to pay $148.89 per month to pay $86,639.00 in unsecured claims, and $4,666.00 in priority claims in 60 months.

7. The Trustee objects to Section 1.02 where the Debtor proposes to "pay total non-exempt, liquidation value, equity in the Hearthside Road property with the 60th plan payment of this plan." The Trustee would request that any lump sum payments be maid within 12 months. Furthermore, the Debtor fails to indicate what the source of the lump sum payment will be.

8. The Debtor's plan fails the Chapter 7 liquidation analysis. The Debtor's non-exempt equity totals $227,677.00 and the Debtor is proposing a 35% dividend to unsecured creditors. The Trustee is concerned there may be more equity in the real property. The Trustee is also concerned there may be business assets not listed and any assets in the revocable trust which the Trustee has not reviewed.

The Trustee's objections are well-taken.

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

The continued meeting of creditors was held on October 29, 2015, and the Trustee's Report indicates the Debtor appeared. The Trustee has filed nothing further, and the court therefore determines the Debtor's appearance has resolved his objection.

However, the remaining objections are troublesome.

The basis for the Trustee's second objection is that the Debtor is $148.89 delinquent in plan payments. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

The Debtor has not provided the Trustee with employer payment advices for the 60-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv). Also, the Trustee argues that the Debtor did not provide either a tax transcript or a federal income tax return with attachments

for the most recent pre-petition tax year for which a return was required. See 11 U.S.C. § 521(e)(2)(A); 11 U.S.C. § 1325(a)(9); Fed. R. Bankr. P. 4002(b)(3). The Debtor has failed to provide all necessary pay stubs and has failed to provide the tax transcript. These are independent grounds to deny confirmation. 11 U.S.C. § 1325(a)(1).

The Debtor has failed to timely provide the Trustee with information concerning the revocable trust. Without the Debtor submitting these documents, the court and the Trustee are unable to determine if the plan is feasible, viable, or complies with 11 U.S.C. § 1325.

Debtor is in material default under the plan because the plan will complete in more than the permitted 60 months. According to the Trustee, the plan will complete in 674 months due to the proposed dividend to unsecured creditors and the priority claims.. This exceeds the maximum 60 months allowed under 11 U.S.C. § 1322(d). Therefore, the objection is sustained.

The Trustee opposes confirmation of the Plan on the basis that the Debtor's plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. §1325(a)(4). While Debtor has reported non-exempt equity/assets in the amount of $227,677.00 and the Debtor is proposing a 35% dividend to unsecured creditors, additional equity and assets may exist. The Debtor does not provide explanation on the valuation of the property and there may be additional business assets not disclosed.

Lastly, the Debtor's proposal of a lump sum at the end of the plan is not in good faith. The Debtor does not state how, when, or why the Debtor will suddenly be able to have a large sum of liquid funds to make a payment to the Trustee. The Debtor in neither the Motion nor Declaration provides any explanation as to the Debtor's ability to make such.

In substance, the "Plan" is little more than a five year reprieve in addressing Debtor's claims. The "Plan Payments" are merely disguised payments to Debtor's counsel for obtaining the five year delay. If the plan were to actually go fifty-nine months, some monies would also be paid on non-discharge taxes which Debtor has failed to pay.

This Plan demonstrates that it has not been filed, and is not being prosecuted in good faith.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

44. 15-23668-E-13 DPC-1 | **JUAN/GENEVA GOMEZ** Mary Ellen Terranella | **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** 6-10-15 [21]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on June 10, 2015. By the court's calculation, 41 days' notice was provided. 14 days' notice is required.

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

The court's decision is sustain the Objection to Confirmation.

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that the plan exceeds the maximum 60 months allowed. According to

the Trustee's calculations, the Plan will complete in 69 months. The Trustee argues that the cause is Proof of Claim No. 4, filed by the Internal Revenue Service, in the amount of $134,565.45. The secured portion of the claim is $15,630.00 and the unsecured priority portion of the claim is $90,702.19. The Debtor scheduled the Internal Revenue Service in Class 3A in the amount of $1.00 and scheduled the creditor in Class 5 in the amount of $88,154.00. The secured portion of the claim is $15,629.00 higher than the amount scheduled. The priority portion of the claim is $2,548.19 higher than the amount scheduled by the Debtor.

JULY 21, 2015 HEARING

At the hearing, the court continued the hearing to 3:00 p.m. on September 1, 2015 to be heard in conjunction with the Debtor's Objection to Claim of Internal Revenue Service, Proof of Claim No. 4. Dckt. 35.

SEPTEMBER 1, 2015 HEARING

At the hearing, the court continued the hearing to 3:00 p.m. on October 6, 2015 to be heard in conjunction with the Debtor's Objection to Claim of Internal Revenue Service, Proof of Claim No. 4. Dckt. 39.

OCTOBER 6, 2015 HEARING

At the hearing, the court continued the hearing to 3:00 p.m. on November 17, 2015. Dckt. 61.

DISCUSSION

On October 27, 2015, the court issued an order dismissing the Objection to Claim No. 4-1. Dckt. 68.

With Proof of Claim No. 4-1 filed by the Internal Revenue Service valid, the proposed plan does not provide for the full priority amount of the Internal Revenue Service's claim. Debtor is in material default under the plan because the plan will complete in more than the permitted 60 months. According to the Trustee, the plan will complete in 69 months due to fully pay the Internal Revenue Service priority claim. This exceeds the maximum 60 months allowed under 11 U.S.C. § 1322(d). Therefore, the objection is sustained.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

45. 15-23769-E-13 CORY LEE COLEMAN **MOTION TO CONFIRM PLAN**
PLC-2 Peter Cianchetta **9-24-15 [38]**

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 24, 2015. By the court's calculation, 54 days' notice was provided. 42 days' notice is required.

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

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

Cory Coleman ("Debtor") filed the instant Motion to Confirm the Amended Plan on September 24, 2015. Dckt. 38.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on November 3, 2015. Dckt. 47. The Trustee objects on the following grounds:

1. Debtor is $2,480.22 delinquent in plan payments.

2. The Debtor has paid in a total of $10,307.00 into the plan as of September 25, 2015. The additional provision incorrectly states that the Debtor has paid in a total of $9,668.00 and commencing October 1, 2015, plan payments shall be $2,630.22. The Trustee asserts that the Debtor accidently omitted the September 25, 2015 payment.

DISCUSSION

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

The Trustee's objections are well-taken. While the Trustee's second objection appears to be a scrivener's error, the Debtor's delinquency is concerning.

The basis for the Trustee's objection is that the Debtor is $2,480.00 delinquent in plan payments. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

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

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

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

46. 15-26969-E-13 JESUS AVILA
DPC-1 Douglas Jacobs

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
10-13-15 [20]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on October 13, 2015. By the court's calculation, 35 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

1. Debtor may not be able to make the plan payments. Section 2.10 of Debtor's plan indicates the real property at 2599 Esplanade Ave, Chico, California shall be surrendered. Debtor's Statement of Financial Affairs indicates Debtor operates a restaurant from that location. Debtor's Schedule I lists net business income from the restaurant at $7,436.00. No other source of income is disclosed. The plan fails to provide for the payments

on the business property. If the property is to be surrendered, Debtor will have no source of income to fund the plan.

DEBTOR'S RESPONSE

The Debtor filed a response on October 28, 2015. Dckt. 24. The Debtor states that Debtor is still occupying the current location and the restaurant is providing sufficient income to enable the Debtor to continue to make the payments. The Debtor states that he is seeking a new, less expensive facility for the restaurant. The Debtor has hired a realtor to look for such a location. While the cost of the move and rent will remain an unknown until the Debtor signs a new lease, the Debtor is current in plan payments and should not cause the plan to be denied.

TRUSTEE'S REPLY

The Trustee filed a reply on November 4, 2015. Dckt. 27. The Trustee replies as follows:

1. The Debtor is $2,187.00 delinquent in plan payments and has paid $0.00 into the plan to date.

2. The Debtor is not and has not been making payments on the restaurant property. There are no payments listed on the Debtor's Statement of Financial Affairs. Debtor's Profit and Loss does not list any rent or lease payments. Debtor does not have enough disposable income to project any rent of lease expense for any business.

3. The Debtor does not have the funds to afford to move the business to another location. The Debtor's Schedule B indicates that the Debtor's checking account has a $0.00 balance.

DISCUSSION

The Trustee's objections are well-taken.

The basis for the Trustee's objection is that the Debtor is $2,187.00 delinquent in plan payments. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

As to the Trustee's remaining objections, the Debtor does not seem to have the means to actually move the restaurant nor does the plan or schedules provide sufficient information as to the rent of the current property and any possible expenses. The proposed plan is premised on this eventual move without providing for any continued payment of expenses of the restaurant. The restaurant is the Debtor's sole source of income. The plan is facially insufficient because it does not provide for any rent for the current property nor indicates how or where the Debtor will get the funds to move. The Debtor's response does not provide any clarification.

The court concurs that, based on the Debtor's schedules and proposed plan, the Debtor will not be able to make plan payments. 11 U.S.C. § 1325(a)(6)

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

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

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

47. 14-28170-E-13 SNM-3 BARBARA WALTERS Stephen Murphy
MOTION TO MODIFY PLAN 9-25-15 [37]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 25, 2015. By the court's calculation, 53 days' notice was provided. 35 days' notice is required.

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

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

Barbara Walters ("Debtor"), filed a Chapter 13 Plan on August 11, 2015, which was confirmed by the court on October 8, 2015. Dckt. 5, 16. Debtor filed a Motion to Confirm and accompanying Modified Plan on September 25, 2015. Dckt. 37, 40.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition on November 3, 2015. Dckt. 45.

Trustee asserts that the motion should be denied because the most recent Schedule I and J were filed August 11, 2014, and reflect an ability to pay $260.00 per month. Debtor is delinquent $1,210.00 under the confirmed plan, and the new plan does not address how Debtor will cure the $1,210.00 delinquency.

DISCUSSION

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

A review of Debtor's proposed September 15, 2015 Modified Plan shows an increase in payments from $260.00 per month to $270.00 per month, but accounts for 4 months of payments of $0.00 per month. *Compare* Dckt. 5 § 1.01, *and* Dckt. 40 § 6.01. Also, Debtor seeks to eliminate an Internal Revenue Service claim of $1,000.00 from Class 5 because the claim "is nonexistent" and instead correct the Class 5 to include a claim from the Franchise Tax Board for $360.16. Dckt. 5 § 2.13; Dckt. 40 § 2.13. Finally, Debtor is decreasing the Class 7 general unsecured claims from $34,527.00 to 32,047.36, while increasing the dividend to Class 7 from 0% to 2%. Dckt. 5 § 2.15; Dckt 40 § 2.15. FN.1.

FN.1. The court also notes that in Class 2, the 2003 Honda Element EX have changed from a claim for $6,500.00 to a claim by Portfolio Recovery Associate, LLC for $5,951.55. Dckt. 5 § 2.09(d); Dckt. 40 § 2.09(d).

Unfortunately, the Trustee's objection is well-taken. The Debtor's Motion nor declaration indicates how the Debtor can afford $270.00 a month in plan payments when the Debtor's most recent Schedule I and J indicate a monthly disposable income of $260.00. Furthermore, the Debtor's Motion nor Declaration address the Debtor's $1,200.00 delinquency in plan payments under the confirmed plan. While the proposed plan provides for 4 months of $0.00 payments, this does not cover the full amount of the delinquency.

Without the court having all the information as to the current income of the Debtor and the Debtor's ability to make plan payments that are higher than the disposable income disclosed by the Debtor, the court nor any parties in interest can determine the feasibility and viability of the plan.

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

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

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

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

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

48. 15-26372-E-13 DPC-1 HUBERT/SIOBHAN EVANS David Ritzinger

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
9-23-15 [26]

Final Ruling: No appearance at the November 17, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on September 23, 2015. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The court's decision is to overrule the Objection.

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that the proposed plan relies on a Motion to Value Collateral of Ocwen Loan Servicing and Motion to Value Collateral of Chase.

DEBTOR'S RESPONSE

The Debtor filed a response to the instant Objection on October 6, 2015. Dckt. 30. The Debtor states that the Motion to Value Collateral of Chase was granted on October 6, 2015. The Debtor's Motion to Value of Collateral of Ocwen was denied due to the Debtor's failure to provide evidence of the actual creditor holding the claim. The Debtor filed a new Motion to Value set for hearing at 3:00 p.m. on November 17, 2015.

ORDER CONTINUING OBJECTION

On October 9, 2015, the court issued an order continuing the Objection to 3:00 p.m. on November 17, 2015. Dckt. 37

OCTOBER 20, 2015 HEARING

In light of the prior order, the hearing was continued to 3:00 p.m. on November 17, 2015. Dckt. 48.

DISCUSSION

On November 17, 2015, the court granted the Debtor's Motion to Value Collateral of Wells Fargo Bank, N.A. This resolves the Trustee's objection

Upon review of the Motion and plan, the court determines that the Plan does comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is overruled and the Plan is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is overruled, Debtor's Chapter 13 Plan filed on August 11, 2015 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

49. 15-26372-E-13 HUBERT/SIOBHAN EVANS
DPR-3 David Ritzinger

MOTION TO VALUE COLLATERAL OF WELLS FARGO BANK, N.A.
10-19-15 [41]

Final Ruling: No appearance at the November 17, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on October 19, 2015. By the court's calculation, 29days' notice was provided. 28 days' notice is required.

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

The Motion to Value secured claim of Wells Fargo Bank, N.A., as Trustee for the Pooling and Servicing Agreement Dated as of June 1, 2006 Securitized Asset Backed Receivables LLC Trust 2006-FR2 Mortgage Pass-Through Certificates, Series 2006-FR2("Creditor") is granted and Creditor's secured claim is determined to have a value of $00.00.

The Motion to Value filed by Hubert Evans and Siobhan M. Evans ("Debtors") to value the secured claim of Wells Fargo Bank, N.A., as Trustee for the Pooling and Servicing Agreement dated as of June 1, 2006 Securitized Asset Backed Receivables LLC Trust 2006-FR2 Mortgage Pass-Through Certificates, Series 2006-FR2("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 184 Greenwich Circle, Vacaville, California ("Property"). Debtor seeks to value the Property at a fair market value of $365,000.00 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).

FN.1. The court notes that Debtor's counsel requested a letter inquiring as to the entity that currently owns the loan and holds the Note. OCWEN sent Debtor's counsel a timely response as to the owner of the loan. Such transparency enables the court to avoid issuing maybe effective orders.

The valuation of property which 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 which appears to be for the claim to be valued.

OPPOSITION

Creditor has not filed an opposition.

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $388,418.14. Creditor's second deed of trust secures a claim with a balance of approximately $85,222.53. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments in the secured amount of the claim shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Hubert Evans and Siobhan M. Evans ("Debtors") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Wells Fargo Bank, N.A., as Trustee for the Pooling and Servicing Agreement dated as of June 1, 2006 Securitized Asset Backed Receivables LLC Trust 2006-FR2 Mortgage Pass-Through Certificates, Series 2006-FR2 secured by a second in priority deed of trust recorded against the real property commonly known as 184 Greenwich Circle, Vacaville, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $365,000.00 and is encumbered by senior liens securing claims in the amount of $388,418.14, which exceed the value of the Property which is subject to Creditor's lien.

50. 14-30278-E-13 WW-6 GARY SHREVES AND KAREN BAYSINGER- SHREVES Mark Wolff

MOTION TO MODIFY PLAN 10-1-15 [105]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 1, 2015. By the court's calculation, 47 days' notice was provided. 35 days' notice is required.

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

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

Gary Shreves and Karen Baysinger-Shreves ("Debtor") filed a Motion to Confirm Modified Plan and accompanying Plan on October 1, 2015. Dckt. 105, 106.

TRUSTEE'S OPPOSITION

Trustee filed an opposition on November 3, 2015. Dckt. 116. Trustee asserts two grounds for denying confirmation of Debtor's October 1, 2015 Modified Plan:

A. The proposed plan does not authorize the monthly contract installment amount for January 30, 2015. To date, Trustee has disbursed $2,280.84 to the creditor;

B. The signatures of the Plan and Declaration do not comply with LBR 9004-1(B) because the signatures for Debtor Karen Baysinger-Shreves is signed and initialed by Gary Shreves.

Dckt. 116, 117.

DISCUSSION

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

The Trustee's objections are well-taken.

First, the Debtor's plan does not authorize the January 30, 2015 monthly contract installment payment to Nationstar Mortgage. The terms of the proposed plan does not contain a provision that authorized the January 30, 2015 payment. Instead, the plan specifically states that the "Trustee shall cease making payments effective January 18, 2015 - 1 payment made is authorized."

While the first objection could possibly be fixed in the order confirming, the court is concerned over the signatures on the plan and declaration.

At first review, the signatures seem different, with Debtor Gary Wayne Shreves provided his initials under the Joint Debtor Karen Lee Baysinger-Shreves "signature." Upon further review, it looks that part of the signature of both debtors are similar. The initials of Debtor Gary Wayne Shreves underneath the Joint Debtor's signature indicates that Debtor Gary Wayne Shreves was signing on behalf of Joint Debtor which is not permissible. Local Bankr. R. 9004-1(B) requires that each Debtor signs.

The court notes that the declaration (Dckt. 108), in which each of the two debtors made statements under penalty of perjury suffers from the same inaccuracy. The "signature" for debtor Karen Baysinger-Shreves has the same GWS initial's under it. The "G," "W," and "S" appear to be the same as in the signature of Gary Shreves just above Ms. Baysinger-Shreves "signature."

When compared to the signature for Karen Baysinger-Shreves on the Petition (Dckt. 1) it is clear that Ms. Baysinger-Shreves did not sign the current plan or the declaration. The presentation of these documents which have clearly been signed by only one debtor causes the court grave concerns relating to the good faith conduct of the two Debtors in 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 Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

51. 15-26180-E-13 APN-1 | **MYRNA MCDONALD** | **Pro Se** | **OBJECTION TO CONFIRMATION OF PLAN BY SANTANDER CONSUMER USA, INC.** | **9-23-15 [25]**

DEBTOR DISMISSED: 10/19/2015

Final Ruling: No appearance at the November 17, 2015 hearing is required.

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

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

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

52. 15-26082-E-13 NICHOLAS RIGHTER
FF-2 Brian Turner

CONTINUED MOTION FOR ORDER AVOIDING WAGE GARNISHMENT AND/OR MOTION FOR ORDER PERMITTING TURNOVER OF GARNISHED FUNDS
9-15-15 [19]

Final Ruling: No appearance at the October 20, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 15, 2015. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The Motion for Order Avoiding Wage Garnishment, with the Stipulation of Creditor Golden 1 Credit Union thereto filed, is granted and the transfer is avoided. All other relief is denied without prejudice.

Nicholas Righter ("Debtor") filed the instant Motion for Order Avoiding Wage Garnishment and Motion for Order Permitting Turnover of Garnished Funds on September 15, 2015. Dckt. 19. FN.1.

FN.1. The Motion requests two forms of relief, which is improper. Federal Rule of Civil Procedure 18, which permits requesting multiple forms of relief in a single motion, is not incorporated into bankruptcy law and motion practice. As such, the court will *sua sponte* treat the instant Motion as a Motion for Order Avoiding Wage Garnishment, rather than denying the motion and making the parties start over.

The Debtor seeks avoidance of the a "garnishment" pursuant to 11 U.S.C. § 522(f)(1)(A). The Debtor states that Golden 1 Credit Union ("Creditor") has a pre-petition judgment which the Creditor delivered an "Order for a Garnishment" to the Los Angeles County Sheriff's Office who served Bank of

America the Order. On June 16, 2015, Bank of America debited $19,242.16 our of Debtor's checking account. Debtor filed for bankruptcy on July 31, 2015.

The actual order was the issuance of a writ of execution. Cal. C.C.P. § 699.510. That writ is then directed to the levying officer, in the case the Sheriff of Los Angeles County. Accompanying the writ of execution, a notice of levy is also served on the person holding the asset of or owing an obligation to the judgment debtor. Cal. C.C.P. 700.010 and § 699.540.

While using the term "Garnishment," that is not an enforcement of judgment levy on an asset of a judgement debtor. Rather, that term is used in Chapter 5 of the California Code of Civil Procedure for "Wage Garnishments." Cal. C.C.P. §§ 706.010 et seq. Specifically, the California Legislature has specified that Chapter 5 be knows and cited as the "Wage Garnishment Law." Cal. C.C.P. § 706.010.

In addition to be a pedantic discussion of the nuances of California enforcement of judgment law, this loose use of terms is symptomatic of the larger sloppiness of legal principles demonstrated by counsel for Debtor and counsel for Golden 1 Credit Union. Accurate and precise use of words are the tools of the trade for attorneys. Properly seeking relief, providing competent evidence, and following the basic rules are essential for a party prevailing. It is not sufficient to just through legal sounding words in a pleading and then leave it to the court to figure out the real law. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 1381 n.14, 176 L. Ed. 2d 158, 173 n.14 (2010); *see also Varela v. Dynamic Brokers, Inc. (In re Dynamic Brokers, Inc.)*, 293 B.R. 489, 499 (B.A.P. 9th Cir. 2003) (citing *Everett v. Perez (In re Perez)*, 30 F.3d 1209, 1213 (9th Cir. 1994)), discussing the obligations of the federal judge to issue the legally correct ruling, not merely what the party puts on paper in front of the judge.

AMENDED NOTICE OF HEARING

On October 2, 2015, the Debtor filed an Amended Notice of Hearing on the Motion which states that the Debtor and the Creditor stipulate to continue the hearing to 3:00 p.m. on November 17, 2015. Dckt. 29.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on October 6, 2015. Dckt. 30. The Trustee states that the Debtor is requesting turnover of funds that the Trustee argues may not be exempt. The Trustee filed Objection to Exemptions which is scheduled for hearing on November 17, 2015.

Additionally, the Trustee argues that the Debtor fails to specifically state what the funds would be used for. While the Motion states the Debtor would use the funds to purchase a vehicle for commuting to work, the Debtor does not provide any specifics as to what type of vehicle or that the current vehicles listed on Schedule B are unsuitable.

OCTOBER 20, 2015 HEARING

At the hearing, and in light of the Debtor and Creditor stipulating to continuing the Motion to November 17, 2015, the court continued the instant

Motion to 3:00 p.m. on November 17, 2015 to be heard in conjunction with the Objection to Exemptions.

APPLICABLE LAW

The Bankruptcy Code provides for the avoidance of certain preferential payments. For purposes of the instant Motion, 11 U.S.C. § 547(b) provides:

> (b) Except as provided in subsections (c) and (I) of this section, the trustee may avoid any transfer of an interest of the debtor in property--
>
> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made--
>
> (A) on or within 90 days before the date of the filing of the petition; or
>
> (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
>
> (5) that enables such creditor to receive more than such creditor would receive if--
>
> (A) the case were a case under chapter 7 of this title;
>
> (B) the transfer had not been made; and
>
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

DISCUSSION

Debtor has filed a Motion for Order Avoiding Wage Garnishment and Motion for Order Permitting Turnover of Garnished Funds ("Avoiding Motion"). Dckt. 19. On its face, the Avoiding Motion would appear to violate Federal Rule of Bankruptcy Procedure 9014 which does not permit the combining of multiple claims for relief in one motion. (Fed. R. Bank. P. 9014 not incorporating the provisions of Fed. R. Civ. P. 18 and Fed. R Bankr. P. 7018 into contested matter practice.)

The Avoiding Motion states with particularity the following grounds upon which the relief is based:

A. Dana R. Wares, acting on behalf of the Debtor, moves the court for an order "Avoiding Garnishment." (The Motion does not state who "Dana R. Wares" is or her capacity for acting in the name of the Debtor. However, the banner at the top of the pleading indicates that Ms. Wares is the attorney for Debtor and not a real party in interest.)

B. Debtor (the actual movant, not Ms. Wares) seeks relief pursuant to 11 U.S.C. § 522(f)(1)(A).

C. Golden 1 has a pre-petition judgment.

D. An order for garnishment was obtained by Golden 1 and was "delivered" to the Los Angeles County Sheriff's Office.

E. On June 15, 2015, the Los Angeles County Sheriff's Office served the order for garnishment on Bank of America.

F. Pursuant to the order of garnishment, Bank of America "debited $19,242.16 out of the Debtor's checking account on June 16, 2015.

G. On July 31, 2015, Debtor commenced this bankruptcy case.

H. The $19,242.16 constitutes property of the estate under 11 U.S.C. § 547 (avoidable preferences), asserting that this payment to Golden 1 was within 90 days, for an antecedent debt, made while insolvent, and (though not stated) would allow Golden 1 to receive more through the transfer than if the transfer had not been made and the creditor asserted the claim in the bankruptcy case.

I. It is asserted that the failure to turn over an asserted voidable preference is a violation of the automatic stay. (Rather than presented in a points and authorities, Debtor places extensive citations and quotations for this contention in the motion itself. Given that counsel and her firm regularly appear in this court and know that the local rules require the points and authorities be in a separate pleading, the citations appear questionable.)

J. Debtor seeks to use the avoided transfer funds to purchase a vehicle, to replace his 2000 Jaguar S Type.

K. Debtor has claimed an exemption in the monies.

Motion, Dckt. 19. No points and authorities are provided by Debtor.

Debtor, and Debtor's counsel not following the Local Bankruptcy Rule and short-cutting the avoidance and exemption process, as well as packing multiple claims for relief in one contested matter has made this and the related proceeding unduly difficult. In addition, the counsel for Debtor and counsel for Golden 1 have filed a stipulation, untethered to any motion, and lodged an order with the court seeking the court grant ancillary relief. See Fed. R. Bank. P. 9014 requiring relief seeking an order of the court, when an

adversary proceeding is not required, to be by motion or, if expressly provided, by "application."

With respect to avoiding a transfer pursuant to 11 U.S.C. § 547, that must be done by an adversary proceeding. Parties may stipulate to avoiding such a transfer, and avoid the cost and expense of an adversary proceeding, but the order embodying that avoidance must be properly requested from the court. Possibly, the "Motion to Avoid Wage Garnishment" could be construed as a motion to approve settlement resolving the § 547 avoidance claims.

The Trustee's opposition is not as to the avoiding of the transfer pursuant to 11 U.S.C. § 547, but as to the additional relief which is that the monies should be "turned over" to the Debtor and used to purchase a third vehicle (the Trustee pointing out that this one Debtor currently owns three vehicles).

RULING

Though not expressly tied to this Motion by the use of a Docket Control Number, the court reads the Stipulation filed on November 3, 2015, and signed by the Debtor, Golden 1, and the Chapter 13 Trustee to provide:

A. Golden 1 and the Debtor stipulate to waive the requirement for an adversary proceeding as provided in Federal Rule of Bankruptcy Procedure 7001(1) for an action to avoid a transfer pursuant to 11 U.S.C. § 547, and consent to resolution of such claims and rights in this Contested Matter. FN.1.

B. Golden 1 stipulates to the entry of an order avoiding the transfer of the $19,242.16 it received pursuant to the pre-petition judgment levy against the Debtor's checking account at Bank of America, N.A.

C. Golden 1 shall turnover the $19,242.16 within ten days of the entry of the court's order avoiding the transfer.

Pursuant to the Stipulation of the Parties and the waiving of the requirement for an adversary proceeding, the court grants the above relief and shall issue an order consistent therewith.

The court denies without prejudice the additional claims for relief appended to the Motion. The court makes no determination in this Motion that the avoided transfer monies should be turned over to the Debtor. The court makes no determination that the Debtor may properly use the monies to purchase a vehicle.

The court orders that the monies be turned over to the Chapter 13 Trustee, with all rights and interests of the Debtor therein, including the right to claim any or all of the monies as exempt, continuing in full force and effect in said monies notwithstanding deliver of the monies to the Chapter 13 Trustee. Said monies shall not be disbursed by the Chapter 13 Trustee except upon further order of the court.

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

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

The Motion for Order Avoiding Wage Garnishment and Motion for Order Permitting Turnover of Garnished Funds filed by the Debtor having been presented to the court, Golden 1 Credit Union (“Golden 1") and Nicholas Righter, the Debtor) having stipulated to a resolution of the avoidance of the transfer, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Motion is granted and the transfer of $19,242.16 to Golden 1 pursuant to the pre-petition levy by the Los Angeles County Sheriff on Debtor’s checking account at Bank of America, N.A. is avoided in its entirety pursuant to 11 U.S.C. § 547.

IT IS FURTHER ORDERED that on or before November 30, 2015, Golden 1 shall deliver to David Cusick, the Chapter 13 Trustee, the $19,242.16. all rights and interests of the Debtor therein, including the right to claim any or all of the monies as exempt, continuing in full force and effect in said monies notwithstanding deliver of the monies to the Chapter 13 Trustee. Said monies shall not be disbursed by the Chapter 13 Trustee except upon further order of the court.

53. 15-26082-E-13 NICHOLAS RIGHTER
DPC-2 Brian Turner

OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
10-2-15 [25]

Tentative Ruling: The Objection to Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4003(b). The failure of the Debtor and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and parties requesting special notice on October 2, 2015. By the court's calculation, 46 days' notice was provided. 28 days' notice is required.

The Objection to Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4003(b). The failure of the Debtor and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The hearing on the objection to claimed exemptions is continued to 3:00 p.m. on December 8, 2015.

The Trustee objects to the Debtor's use of the California Code of Civil Procedure §703.140(b)(5) for a "Bank Levy Return Location Levying Officer Sheriff's Department Los Angeles County 110 N Grand Ave, Rm 525 Los Angeles CA 90012" asset in the amount of $19,242.16. The Trustee basis his objection on the ground that 11 U.S.C. § 551 provides for the automatic preservation of an avoided transfer under various code sections, including 11 U.S.C. § 547, for the benefit of the estate but only with respect to estate property. The Trustee is not certain that the funds are not held by the Sheriff's Department based on the date of the levy, June 15, 2015, where the case was filed on July 31, 2015.

DEBTOR'S REPLY

The Debtor filed a reply on November 3, 2015. Dckt. 41. The Debtor asserts that the Debtor held a legal or equitable interest when his petition was filed in the funds levied by Golden West. The Debtor argues that returning the funds to the Debtor so that he may purchase a new vehicle will benefit the estate because his vehicle is barely operational and that he would lose his job if he is unable to find suitable transportation.

The court first notes that Debtor offers no testimony or other evidence to support the arguments made by counsel in the opposition. The court is left to go with mere argument as the only "defense."

TRUSTEE'S RESPONSE

The Trustee filed a response on November 6, 2015. Dckt. 43. The Trustee states that the Debtor fails to explain how he has a legal and equitable interest in the funds. Furthermore, while the Debtor claims to need a new vehicle, the Trustee argues that the Debtor has not proven the need for a new vehicle. The Trustee points out that on Schedule B, the Debtor lists a 2000 Jaguar S type in fair condition and needs a new windshield, A/C and replacement of the bumped and inside lining of the roof.

The Debtor has failed to bring a motion to seek authorization to purchase a new vehicle or provide any details about the purchase of a new vehicle.

DISCUSSION

On Schedule B in this case Debtor listed as a "debt owed to debtor" the following asset:

> Bank Levy Return
> Location Levying Officer
> Sheriff's Department Los Angeles County
> 110 N. Grand Ave, Rm 525
> Los Angeles, CA 90012

Dckt. 1 at 11. The amount of this debt owed to Debtor is listed at $19,242.16. No explanation is provided as to how the Los Angeles County Sheriff's Department owes a debt to Debtor.

On Schedule C Debtor claims an exemption in the debt owed by the Los Angeles County Sheriff's Department pursuant to California Code of Civil Procedure § 703.140(b) for the full $19,242.16 amount of the debt. *Id.* at 14.

Though Schedule B lists the Los Angeles County Sheriff's Department owing a debt to Debtor, it appears that the real "asset" is intended to be the $19,242.16 which was levied upon by the pre-petition state court judgment creditor, Golden 1 Credit Union. The state court suit, judgment, and bank levy by Golden 1 Credit Union are listed on the Statement of Financial Affairs, Question NO. 4. *Id.* at 29.

Stipulation to Avoid Transfer to Golden 1 Credit Union

Debtor filed a "motion" to avoid a transfer from the Debtor to Golden 1 Credit Union in the amount of $19,242.16. Dckt. 19. Debtor states (subject

to the certifications of Fed. R. Bankr. P. 9011) that Golden 1 Credit Union levied on Debtor's bank account as part of enforcing a pre-bankruptcy state court judgment. (That motion does not identify the state court action, court, or case number.) The Motion affirmatively states that the monies were transferred to Golden 1 Credit Union.

On November 3, 2015, Debtor and Golden 1 Credit Union filed a Stipulation which resolved the "motion" to avoid transfer. The court inferred from the Motion that both Debtor and Golden 1 Credit Union waived the requirements of Federal Rule of Bankruptcy Procedure 7001(1) that an action to avoid a transfer pursuant to 11 U.S.C. § 547 must be commenced as an adversary proceeding, and that the parties contested to the Contested Matter proceeding. Dckt. 39.

In the Stipulation, both the Debtor and Golden 1 Credit Union affirmatively state that the Debtor's bank account was levied upon pursuant to the writ of execution in the state court action (a copy of the state court judgment is attached as Exhibit 1 to the Stipulation) and that the monies levied upon have been paid to Golden 1 Credit Union. Stipulation, ¶ 2; *Id.* In the Stipulation, Golden 1 Credit Union agrees to turn over the $19,242.16 to either the Debtor or Trustee, as ordered by the court. While the Stipulation uses imprecise terms, the court construed the language to the parties stipulating to the relief requested in the motion to avoid transfer, and has avoided the transfer of the $19,242.16 to Golden 1 Credit Union. See court's findings of fact and conclusions of law stated in the Civil Minutes for the November 17, 2015 hearing on the Motion to Avoid Transfer (DCN: FF-2).

Objection to Claim of Exemption

A hyper-technical reading of Schedule C could be that the Los Angeles County Sheriff's Department owes a debt of $19,242.16 to Debtor, and Debtor claims an exemption in it. Debtor has listed the asset as a debt owed to Debtor, not as an asset of the Debtor in the possession of a levying officer and subject to the execution lien of a judgment creditor. However, while such a hyper-technical reading would further address the imprecise pleading practices and failure to follow basic pleading rules by counsel for Debtor, that point has been sufficiently made by the court.

It is not unreasonable to read the asset being claimed as exempt is the $19,242.16 which was levied upon and paid to Golden 1 Credit Union. However, it appears that as of the commencement of the bankruptcy case they were not property of the Debtor, but had been paid to Golden 1 Credit Union in partial or full satisfaction of the pre-petition state court judgment. If the levy was made on June 16, 2015 and the Debtor commenced this Chapter 13 case on July 31, 2015, it would not be unexpected that during the intervening forty-five days the levied upon monies would be paid to Golden 1 Credit Union as payment on the judgment. Thus, it appears that the bulk of Debtor's opposition, about the Debtor retaining an interest in levied upon property while it is still in the custody of the levying officer is not applicable to this avoided transfer which was made to Golden 1 Credit Union.

Having been paid to Golden 1 Credit Union, then there was a pre-petition transfer (as if the Debtor himself had personally delivered the monies to Golden 1 Credit Union) which occurred within ninety-days of the commencement of the bankruptcy case. Therefore, Debtor then requested and has obtained an

order avoiding the transfer pursuant to 11 U.S.C. § 547. As raised by the Chapter 13 Trustee, which such a transfer is avoided, the property or dollar value is recovered from the transferee and the property or dollar value is returned to the bankruptcy estate. While "avoided," the transfer is preserved for the benefit of the bankruptcy estate. 11 U.S.C. § 551. The avoidance of a transfer is not a novation of the transfer, but gives the bankruptcy estate all of the rights and interests of the transferee.

> "The preservation for the benefit of the estate under section 551 is automatic, even though the preserved lien could have been avoided by creditors in prepetition state court actions. However, the estate succeeds only to the priority that the avoided and preserved lien had with respect to competing interests. Defects in the lien under state law, such as failure properly to perfect (or to continue perfection of) a personal property security interest or properly to record a real property lien, are not cured. Avoidance and preservation of the lien do not remove the defect or enhance the avoided lien's priority under state law in comparison to competing liens on the same property. The trustee, however, inherits the position of the entity whose lien was avoided and may assert any defenses that party may have had against junior lienholders."

COLLIER ON BANKRUPTCY ¶ 551.02.

As of avoiding the transfer, the $19,242.16 is part of the bankruptcy estate, with the estate with all of the rights, title and interest in the judgment creditor.

Claim of Exemption in Monies Recovered by Avoiding Transfers

Debtor's opposition cuts the corner and assumes facts contrary to evidence – that the Debtor personally retained an interest in the monies which were levied upon and then paid to Golden 1 Credit Union in satisfaction (partial or full) of the pre-petition state court judgment. No legal authority has been provided to show that the Debtor retains an interest in property which is paid to the judgment creditor by the levying officer.

What Debtor has failed, or intentionally avoided, to address is when and how a Debtor may claim an exemption in property which has been recovered by the estate and is subject to the transfer being preserved for the estate (not the Debtor) pursuant to 11 U.S.C. § 551.

Though the court believes that there is a possible way for Debtor to assert an exemption and address the 11 U.S.C. § 551 preservation of the transfer for benefit of the estate rights granted by Congress, it is not the court's place to advocate for Debtor. To avoid further otherwise unnecessary costs and expenses in the court granting the present motion, granting leave to file a new claim of exemption, and then possibly addressing a new objection to claim of exemption, the court continues this matter for further briefing as follows:

A. On or before November 24, 2015, Debtor will file and serve on the Chapter 13 Trustee and U.S. Trustee a supplemental

opposition stating the legal and evidentiary basis for asserting an exemption in property recovered by the estate and the preservation of the transfer provided in 11 U.S.C. § 551.

B. Replies by the Trustee, if any, shall be filed and served on or before December 3, 2015.

C. The continued hearing will be conducted at 3:00 p.m. on December 8, 2015. The court expedites the hearing to provide the Trustee and Debtor a prompt resolution to this issue.

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

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

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

IT IS ORDERED that the hearing on the Objection is continued to 3:00 p.m. on December 8, 2015.

IT IS FURTHER ORDERED that:

A. On or before November 24, 2015, Debtor will file and serve on the Chapter 13 Trustee and U.S. Trustee a supplemental opposition stating the legal and evidentiary basis for asserting an exemption in property recovered by the estate and the preservation of the transfer provided in 11 U.S.C. § 551.

B. Replies by the Trustee, if any, shall be filed and served on or before December 3, 2015.

C. If the Trustee determines that no Reply will be filed or that in light of the supplemental opposition that he no longer intends to proceed with the objection to claim of exemption, the Trustee may file an ex parte motion to dismiss the objection to claim of exemption (Fed. R. Civ. P. 41(a)(2); Fed. R. Bankr. P. 7041, 9014) or a notice of waiver of oral argument, and notify the courtroom deputy for Department E that such ex parte motion or waiver has been filed. If so filed, the court will consider the ex parte motion or waiver and consider whether the matter may be resolved without oral argument in favor of the Debtor. If the court cannot so determine, then the hearing will be conducted and the Debtor afforded the opportunity to address any issues with the court.

D. Separate motions seeking further orders relating to the use of monies in which the Debtor is asserting the exemption may be filed and set for hearing at 3:00 on December 8, 2015, the court shortening the notice period. Such motions, separate points and authorities, separate declarations, and exhibits shall be filed and served on or before November 25, 2015, and oppositions, if any, may be presented orally at the hearing.

54. 11-22884-E-13 WENDEL/MARY APPERT — MOTION TO MODIFY PLAN
WSS-5 W. Steven Shumway — 10-5-15 [109]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 5, 2015. By the court's calculation, 43 days' notice was provided. 35 days' notice is required.

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

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

Endel and Mary Appert ("Debtor") filed the instant Motion to Confirm the Modified Plan on October 5, 2015. Dckt. 109.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response to the instant Motion on November 3, 2015. Dckt. 118. The Trustee states that the originally confirmed plan was changed in the order confirming due to the retirement loans being paid off. The order called for the plan payment to increase to $630.00 on August 25, 2014, and then to $698.00 on January 25, 2015. These payments would have increased the total to be paid into the plan by $7,982.00 to a total of $23,582.00.

The Debtor under the instant modified plan proposes to make payments of $600.48 for the remainder of the plan and has already make the October payment, meaning the Debtor proposes to pay an additional $3,002.30 into the plan for a total of $20,660.22, a difference of $2,921.78.

The court has previously denied the Debtor's Motion to Incur Debt on the retirement loans. Dckt. 70. The Debtor has significantly detailed the expenses in their motion, including $3,200.00 of schooling expenses.

The Trustee is not certain whether the Debtor has provided sufficient detail to convince the court that the plan is proposed in good faith under 11 U.S.C. § 1325(a)(3), where the Debtor did not seek approval of the retirement loans after the fact.

If the modification is denied, the Debtor can complete their plan paying the $600.48 per month, but it will take the Debtor until August 2016 to do so. In the even that the payments are timely made, the Trustee does not believe the Trustee will seek to dismiss the case.

DEBTOR'S REPLY

The Debtor filed a reply on November 9, 2015. Dckt. 121. The Debtor states that the $2,921.78 difference in total plan payments actually results in a larger dividend to unsecured creditors from 6.55% to 8.00%.

DISCUSSION

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

The Trustee's objection is well-taken. The Debtor once again explains that they took out the retirement loan for home repairs, auto repairs, schooling expenses and property taxes. Dckt. 109. The Debtor, however, fails to explain how the Debtor's increase in income from $10,054.96 to $10,834.58 per month resulted in withholding taxes and social security to increase from $970.00 to $2,094.74 (an increase of $1,124.78). The Debtor does not attach any recent pay stubs to evidence this dramatic increase in withholdings.

The Debtor's failure to comply with the Bankruptcy Code and get authorization for the retirement loans does not excuse the Debtor for accurately and fully providing explanation to the court and parties in interest on the reason for the modification.

The fundamental problem with Debtor's contentions is that Debtor has chosen money to pay for things, instead of paying creditors. It may well be that what Debtor though was a reasonable expense to pay with money which was otherwise available to pay creditors is that such borrowing may not have been approved. Borrowing $21,400.00 to replace a roof on a house in which there is no equity is not a "slam dunk" order. On Schedule A, Debtor states under penalty of perjury that their house in Auburn, California had a value of only $325,000 and is subject to $487,874.75 in liens. Dckt. 1 at 21. On Schedule D Debtor states under penalty of perjury that the Auburn home is subject to the following liens:

A. First Deed of Trust.....($359,297.80)

B. Second Deed of Trust.....($128,576.95).

Id. at 26. On April 5, 2011, the court entered its order valuing the claim secured by the second deed of trust at $0.00. This still left the senior secured claim exceeding the value of the Auburn Home (assuming it was in good condition) by more than $30,000.00.

On Schedule I Debtor stated under penalty of perjury that Debtor's Monthly Income (after taxes and withholding) was $7,312.50. *Id.* at 33-34. To get to this Monthly Net Income, Debtor stated under penalty of perjury that the proper payroll and Social Security withholding was $970.00, and the additional withholding included $876.64 in payments back to the Debtor to repay a pre-petition 401K loan, as well as an additional $402.20 a month for future 401K contributions. In effect, from the $10,054.96 a month in gross monthly income, Debtor was paying to Debtor $1,276.84 a month ahead of creditors.

After expenses, including: (1) $2,340.00 mortgage payment, (2) $400 property tax, (3) $400 electricity and heating expense, (4) $300 home maintenance, (5) $1,300 food (for family of 7, including two adult daughters), (6) $725 for transportation, and (7) $130 for auto insurance; Debtor had only $259.00 a month to fund the Chapter 13 Plan. *Id.* at 35-36.

The court confirmed the Chapter 13 Plan based upon this financial information provided under penalty of perjury. Confirmation Order, Dckt. 32.

Now, Debtor states that the prior financial information was not accurate, and in reality, Debtor has had an additional $500 a month during this case. Comparing Original Schedule J under penalty of perjury, Dckt. 1, and Exhibit B, copy of Supplemental Schedule J, Dckt. 112. Since the filing of this case on February 4, 2015, that would equal $28,000.00 ($500.00 x 56 plan payment months since filing this case) of projected disposable income available to fund the plan.

As noted by the court in denying the prior attempted modification of the plan,

> "The Debtors may have to review their budget and pay for the additional borrowing from the discretionary funds in their budget. Saying oops, did I do that, now well just let the creditors pay me back for taking money out of my 401k without authorization is not a sign of good faith - either in the proposing of a plan so providing or prosecuting the case. It

> could well manifest a scheme to defraud creditors, the Chapter 13 Trustee, and the court, attempting to jam the court into confirming a modified plan that does not comply with the Bankruptcy Code. The Debtors may well find themselves on the wrong end of a motion to dismiss (possibly with prejudice)."

Civil Minutes, Dckt. 72.

The current plan offers too little, too late. Debtor now proposes to limp in with a final six payments of $600.48 to atone for the earlier extra money not funded into the plan, and for diverting monies to make the unauthorized loan payments. Under the prior plan which was denied, Debtor was proposing to pay only $15,769.00 through the plan. Under the current plan, it has increased, with Debtor proposing to pay a total of $20,660.22. While more, it does not tie to any rational, financially explainable economic reality. It's just more.

Further, the dramatic increase in tax withholding and Social Security payments demonstrates that the information provided on Original Schedule I was inaccurate, quite possibly done to intentionally create a false Schedule I and J to: (1) create the false appearance of feasibility and (2) present the court with knowingly false information on Schedule J to mislead the court and Chapter 13 Trustee at the time into confirming the plan without a hearing (L.B.R. 3015-1 so allows for such confirmation when a plan is timely filed and no objection to confirmation is filed by any party in interest). No credible explanation has been provided for how or why the proper tax and Social Security withholding has increased by 216%. No explanation is provided how Debtor's counsel thought that $970.00 for federal and state income tax withholding and Social Security payments on gross income of $10,000 a month was reasonable and in good faith.

Debtor testifies that because the roof has been replaced, the home repair expenses have been reduced $100 a month. Declaration, p.3:16-17. No explanation is provided how the non-repaired roof was costing Debtor $1,200 a year (or $6,000 over the life of the plan). Debtor provides no explanation as to why how the food expense can be reduced $100 a month, another $6,000 over the life of the plan. Finally Debtor states that for the last couple of months of the plan they will do away with entertainment expenses, rather than the $100 a month previously required. With five children, it seems incomprehensible that there are no entertainment expenses for six months. Rather, as with the Original Schedules I and J, it appears to be a MAI (made as instructed by the attorney) expense budget.

The credibility of Debtor is further impaired by the demonstration that the information on the Original Schedules I and J, and most likely the current Supplemental versions was grossly inaccurate. Even though purporting to provide accurate income and expense information, Debtor now testifies under penalty of perjury that Schedule J expenses were inaccurate and:

A. In June 2013 Debtor borrowed:

1. $1,000.00 from the 401K to pay property taxes, even though the budget provided for $4,800 annually to pay property taxes.

2. $500.00 to pay homeowner's insurance, even though the budget provided $2,004 annual to pay the homeowner's insurance.

3. $1,850.00 to pay car repairs, even though the budget provided $9,420 for transportation expense (excluding car payment).

B. In April 2014 Debtor borrowed:

1. $1,000.00 from the 401K to pay property taxes, even though the budget provided for $4,800 annually to pay property taxes.

2. $500.00 to pay homeowner's insurance, even though the budget provided $2,004 annual to pay the homeowner's insurance.

3. $1,800 to pay federal income taxes.

Declaration, ¶¶ 9 and 10; Dckt. 111.

In the Declaration Debtor makes another admission under penalty of perjury,

> "13. Since filing their Chapter 13 case, I have suspended any voluntary contributions to Mr. Appert's 401K plan."

Id., ¶ 13. However, Debtor's projected disposable income to fund the plan was computed on Debtor making a $402.20 monthly 401K contribution. Schedule I, Dckt. 1 at 34. While the court believes that prudently planning for the future and merely because someone is prosecuting a Chapter 13 case they should not reasonably save for the future, misrepresenting that a 401K contribution is being made to divert $402.20 a month of monies otherwise available to pay creditors is improper. Here, there is an additional $24,132.00 of projected disposable income that has just "disappeared." Even with this extra $24,132.00 of monies diverted from 401K contributions and creditors, Debtor still testifies that Debtor had to borrow even more money from the 401K.

While Debtor may have faced severe financial circumstances and has a large family to support, that is not an excuse for lying on the Schedules and making false statements under penalty of perjury. People in desperate circumstances will often make dumb mistakes and even dishonest decisions. However, one of the most important jobs of an attorney to make their client be honest and own up to the actual finances in a bankruptcy case. Otherwise, a debtor may stumble through years of a bankruptcy case, only to have it dismissed, wasting the years of money, effort, and relief which Congress has provided under the Bankruptcy Code.

The Debtor has not provided sufficient information to show that the instant proposed plan is, in fact, proposed in good faith as required by 11 U.S.C. § 1325(a)(3). The Debtor has not provided any evidence why the delinquency should not be cured rather than a modification to the plan, when the delinquency is directly due to the Debtor's *sua sponte* decision to take an unauthorized loan. To the contrary, the evidence presented by Debtor

demonstrates that this case has not been prosecuted in good faith. The information provided under penalty of perjury has not been accurate. The original plan and the current modified plan have not been proposed in good faith. Further, neither the original and current proposed plan are not feasible.

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

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

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

55. 14-32084-E-13 STEVEN/SHARON COLLINS
FF-3 Brian Turner

OBJECTION TO CLAIM OF WELLS FARGO BANK, N.A., CLAIM NUMBER 8
9-21-15 [63]

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

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

Below is the court's tentative ruling.

Local Rule 3007-1 Objection to Claim - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Debtor, Debtor's Attorney, Chapter 13 Trustee, Creditors, parties requesting special notice, and Office of the United States Trustee on September 21, 2015. By the court's calculation, 57 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(b)(1)(A) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Objection to Proof of Claim Number 8-1 of Wells Fargo Bank, N.A. ("Creditor") is sustained and the pre-petition arrearage claim is disallowed in the amount of $19,062.08 for the specified pre-petition advances.

DEBTOR'S OBJECTION TO CLAIM #8

Steven and Sharon Collins ("Objector") requests that the court disallow the claim of Wells Fargo Bank, N.A. ("Creditor"), Proof of Claim No. 8 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be secured in the amount of $304,496.31. Objector asserts that the escrow

account documentation is inaccurate and that the claim should be a total of $72,723.88.

The Objector asserts that the following inaccuracies:

1. The property taxes allegedly paid by Creditor were inflated by at least $4,100.00 per year. The Objector asserts that the Sacramento County property tax bill reflects a lower payment.

2. Creditor was charging $8,000.00 to $10,000.00 a year in property insurance. The Objector asserts that they tried to obtain a lower insurance rate through Creditor but were unsuccessful. The Objector states that in February 2014, the Objector obtained a policy through Farmers Insurance for $89.00 a month. However, the Creditor's claim indicates that they paid $8,498.00 for insurance in 2014.

The Objector asserts that the escrow shortage in the amount of $125,190.80 should not be included in the claim because the Creditor failed to show how the deficiency was determined.

WELLS FARGO OPPOSITION

Creditor filed an opposition on September 3, 2015. Dckt. 87. The following grounds were provided to oppose Debtor's Objection to Claim #8:

County of Sacramento Property Tax Advances

A. The Escrow Advance Statement for payments between February 2010 through January 2012 show total payments of $24,350.67 for "Payment of County Taxes;"

B. The Escrow Advance Statement for payments between February 2012 through May 2014 asserts total payments of $20,629.79 for "Payment of County Taxes;"

C. The Escrow Advance Statement for payments between June 2014 through November 2014 asserts total payments of $3,496.02 for "Payment of County Taxes;" Creditor asserts that $3,396.02 was received by the County, which the court notes is a discrepancy of $100.00;

Dckt. 87; Dckt. 89 Exh. 2 p. 45-46.

Hazard Insurance

D. The Escrow Advance Statement for payments between February 2010 through January 2012 show total payments of $14,962.26 for "Payment of Hazard Insurance;"

E. The Escrow Advance Statement for payments between February 2012 through May 2014 asserts total payments of $18,023.00 for "Payment of Hazard Insurance;" Creditor argues that Debtor's Objection on the Hazard Insurance relates to the July 2014 payment, where Debtor states this amount was $8,497.00 while Creditor alleges the amount paid was $1,204.42;

F. The Escrow Advance Statement for payments between June 2014 through November 2014 asserts total payments of $1,262.54 for "Payment of Hazard Insurance;"

Dckt. 87; Dckt. 89 Exh. 2 p. 14. FN.1.

FN.1. Creditor requests that the court take judicial notice of Exhibits 1 and 2, filed with Creditor's Opposition. Under Federal Rules of Evidence 201, Facts subject to judicial notice are those which are either:

> (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). The party requesting judicial notice bears the burden of persuading the court that the particular fact is not reasonably subject to dispute and is capable of immediate and accurate determination by resort to a source "whose accuracy cannot reasonably be questioned." *In re Tyrone F. Conner Corp.*, Inc., 140 B.R. 771, 781 (Bankr. E.D. Cal.1992).

Newman v. San Joaquin Delta Community College Dist., 272 F.R.D.505, 515-16 (E.D. Cal. 2011). Here, Creditor provides no evidence to the court on how the amounts are dates of the payments are "not reasonably subject to dispute and [are] capable of immediate and accurate determination by resort to a source whose accuracy cannot reasonably be questioned." However, because these documents were provided as a part of the original Proof of Claim #8-1, the court will waive this error.

The payments in Exhibit 2 for Hazard Insurance are reflected in Section 6, which extends from June 2014 through May 2015. Dckt. 89 Exh. 2 p. 14. The court cannot find, and Creditor does not cite to, any evidence to support the Opposition's allegations that during the February 2010 through May 2014 period any payments were made for Hazard Insurance. Dckt. 87 p. 9. In addition, there is no evidence provided for who $1,262.54 was paid to for the June 2014 through November 2014 period. In short, Creditor's assertions on the payments for Hazard Insurance between February 2010 through May 2014 are not supported by evidence. Dckt. 88.

On these grounds, Creditor argues that Debtor's Objection should be denied. Dckt. 87.

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).

Address Objections and Determining Amount of Claim

Debtor first objects to the asserted advances for taxes were inflated "by at least $4,100.00 per year." However, the Objection does not state what the correct amounts are for each year, the amounts asserted to have been included in the proof of claim, and the actual amount for the taxes advanced by Wells Fargo Bank, N.A.

Next, Debtor objects that Wells Fargo Bank, N.A. was charging $8,000 to $10,000 a year for property insurance. Debtor asserts that the premium for insurance obtain "by Debtor" (as opposed to forced place insurance) was $1,100.00 for 2014. Therefore, Debtor asserts that the insurance should be $1,100.00. Additional, amount for prior years "are excessive" and therefore "must be in error."

Debtor asserts that Wells Fargo Bank, N.A. has failed or refused to provide an explanation of the taxes or insurance advanced by the Bank.

For its "Opposition," Wells Fargo Bank, N.A. has been unable to present any witness who is able, or possibly willing, to provide any testimony to support its claim in this case. Instead, the best the Bank can do is have its attorney argue and then rely on the prima facie evidentiary effect of a Proof of Claim. While having such prima facie validity, the objecting debtor or other party in interest need only present a substantial factual basis 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).

Further, the computer screen shot from the County Tax Collector's webpage contains the following statement:

> "This service has been provided to allow easy access and a visual display of County Property Tax information. All reasonable efforts have been made to ensure the accuracy of the data provided; **nevertheless, some information may be out of date or may not be accurate. The County of Sacramento assumes no liability arising from the use of this information.** [California Revenue and Taxation Code Section 408.3, subdivision (d).] **ASSOCIATED DATA ARE PROVIDED WITHOUT WARRANTY OF ANY KIND**, either expressed or implied, **including** but not limited to, the **accuracy**, adequacy, **completeness**, **legality**, **reliability**, merchantability, fitness for a particular purpose, or usefulness of any information provided. The County of Sacramento reserves the right to make changes and updates to the information at any time without notice. **Do not make any business decisions based on this data before validating the data with the Sacramento County Department of Finance, Tax Collector-Auditor-Treasurer Division.**"

Exhibit 2, Dckt. 89 [emphasis added]. The very screen shot which Wells Fargo Bank, N.A. relies expressly states " **Do not make any business decisions based on this data before validating the data with the Sacramento County Department of Finance, Tax Collector-Auditor-Treasurer Division.**" Yet its is the best evidence that Wells Fargo Bank, N.A. presents to this court to make the necessary factual and legal findings. This further undercuts the value of the Proof of Claim No. 8.

While the Proof of Claim asserts there being $9,526.00 insurance payments and annual property taxes of approximately $8,000 to $9,000 a year, there is no evidence that such payments are for the actual property taxes, or that such insurance is the reasonable and necessary insurance for this property. Wells Fargo Bank, N.A.'s response is so ephemeral that it tries to present unauthenticated printouts of the Tax Collectors webpage instead of copies of properly authenticated tax statements and cancelled checks or other payment documentation.

Proof of Claim No. 8-1 has attached to it a projected future yearly disbursement of $9,011.58 for property taxes and $8,497.00 for Property Taxes. Proof of Claim No. 8-1 pg. 7. The Attachment also provides the following information (which is stated under penalty of perjury by Melissa G. Young, a "Vice President Loan Documentation" for Wells Fargo Bank, N.A.) that in the 12 month period which preceded the filing of the proof of claim Wells Fargo Bank, N.A. actually paid:

A. $3,295.53 in March 2012 for the County Property Taxes.

B. $8,321.68 for property taxes (comprised of payments on November 2012 and March 2013, which appear to be for the 2012-2013 tax year).

C. $9,011.58 for property taxes (comprised of payments on November 2013 and March 2013 [which appears to be a typo as being out of chronological order in the chart] that appear to be for the 2013-2014 property tax year.

D. $9,526.00 for hazard insurance in October 2012.

E. $8,497.00 for hazard insurance in October 2013.

To counter the prima facie evidentiary value of the Proof of Claim, Debtor provides a copy of the actual annual property tax statement sent by the County Tax Collector. For 2014 the total annual tax bill was $6,992.04. Because of Proposition 13, the California Constitution limits the ability of counties to increase taxes, rendering the $6,992.04 figure a relatively stable amount for purposes of this objection.

The Debtor also provides testimony and evidence that for the homeowner, the appropriate insurance for the property would cost a premium $1,237.54. The evidence is that this is with Farmers Insurance Company. The insurance is not only for the dwelling and $100,000 personal liability coverage, but also $396,000 of personal property and contents replacement coverage, $211,200 loss of use coverage, and $30,000 identity fraud coverage. These additional coverage items are not insurance that a lender would obtain to provide reasonable coverage for its $304,496.31 secured claim. In addition to the

value of the structure, the Bank's deed of trust includes the real property itself, which has a value beyond the insured structure. Finally, the deductible on the Debtor's policy is $5,000.

Wells Fargo Bank, N.A. has failed to provide the court with any evidence that the taxes should exceed $6,662.04 for the 2012, 2013, or 2014 property tax years. It appears that the March 2012 payment was for second property tax payment for the 2011-2012 tax year.

2012-2013 Property Taxes

The purported property tax advance for the 2012-2013 in the amount of $8,321.68 has been rebutted by Debtor and is disallowed in the amount of $1,659.64.

2013-2014 Property Taxes

The purported property tax advance for what is identified above for the 2013-2014 tax year in the amount of $9,011.58 has been rebutted by Debtor and is disallowed in the amount of $2,349.54.

Hazzard Insurance

The purported forced place hazard insurance to reasonably insure Wells Fargo Bank, N.A. for its $304,496.31 as the lender in the amount of $9,526.00 paid in October 2012 has been rebutted by Debtor. In Proof of Claim No. 8, Wells Fargo Bank, N.A. admits that its claim is fully secured (there being no unsecured claim). This is consistent with Debtor stating a value of $450,000 for this property on Schedule A (Dckt. 1).

Wells Fargo Bank, N.A. offers no evidence to show that the purported $9,526.00 insurance charge is reasonable or bona fide. The insurance presented by Debtor goes well beyond insuring the value of the structure for the amount of the Wells Fargo Bank, N.A. secured claim. The court deducts 20% for the non-structure coverage and then increases that reduced amount by 50% to the owner's premium amount for forced place insurance. The computation of the reasonable forced place insurance amount, (based on the evidence presented by the parties) is as follows:

A.	Owner's Premium.....	$1,237.54
B.	20% Reduction for Non-Structure Insurance.....	($ 247.51)
	Subtotal.....	$ 990.03
C.	50% Addition to Subtotal for Forced Place Ins..	$ 495.02

Total Reasonable Forced Place Insurance
(Based on Evidence Presented).....$1,485.05

The claim of $9,526.00 for hazard insurance paid in October 2012 has been rebutted by Debtor and is disallowed in the amount of $8,040.95.

The claim of $8,497.00 for hazard insurance paid in October 2013, has been rebutted by Debtor and is disallowed in the amount of $7,011.95.

The above items are the only objections which the court can identify in the present objection to be adjudicated. There, the court makes the following adjustments to the $125,190.89 arrearage amount asserted by Wells Fargo Bank, N.A. in Proof of Claim No. 8:

Arrearage Amount Stated in Proof of Claim No. 8	$125,190.89
Reduction for $8,321.68 for purported property taxes (comprised of payments on November 2012 and March 2013, which appear to be for the 2012-2013 tax year) which has been rebutted by evidence presented by Debtor Evidence.	($1,659.64)
Reduction for purported property tax advance for what is identified above for the 2013-2014 tax year in the amount of $9,011.58 which has been rebutted by evidence presented by Debtor.	($2,349.54)
Reduction for the purported hazard insurance in the amount of $9,526.00 purported to have been paid in October 2012, which has been rebutted by evidence presented by Debtor.	($8,040.95)
Reduction for the purported hazard insurance in the amount of $8,497.00 purported to have been paid in October 2013, which has been rebutted by evidence presented by Debtor.	($7,011.95)
	==========
Reduced Amount of Arrearage Asserted by Wells Fargo Bank, N.A.	$106,128.81

Based on the evidence before the court, the creditor's secured claim is disallowed in the amount of $19,062.08. 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 Wells Fargo Bank, Proof of Claim No. 8, Creditor filed in this case by Steve Ray Collins and Sharon Lavette Collins, the Chapter 13 Debtors ("Debtor) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to the arrearage amount claimed and identified in Proof of Claim Number 8 by Wells Fargo Bank, N.A. for the following amounts:
>
> A. $3,296.53 Property Tax Payment, March 2012
> B. $9,526.00 Hazard Insurance Payment, October 2012

C. $4,160.84 Property Tax Payment, November 2012
D. $4,160.84 Property Tax Payment, March 2013
E. $8,497.00 Hazard Insurance Payment, October 2013
F. $4,505.79 Property Tax Payment, November 2013
G. $4,505.79 Property Tax Payment, March 2013

are disallowed in the amount of $19,062.08, reducing the arrearage included in Proof of Claim No. 8 to $106,128.81. The determination of the objections to these portions of Proof of Claim No. 8 is without prejudice to any other portions of the Claim which were not the subject of this Objection.

56. 14-32084-E-13 STEVEN/SHARON COLLINS MOTION TO CONFIRM PLAN
FF-5 Brian Turner 9-30-15 [71]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 1, 2015. By the court's calculation, 47 days' notice was provided. 42 days' notice is required.

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

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

Steven and Sharon Collins ("Debtor") filed for Chapter 13 relief on December 12, 2014. Dckt. 1. Debtor filed a plan December 23, 2014 and and Amended Plan on June 10, 2015; the June 10, 2015 Plan was denied by this court on July 31, 2015. Dckt. 56.

Debtor filed the instant Amended Plan on September 30, 2015, with an accompanying Motion to Confirm. Dckt. 71, 74.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition on November 3, 2015. Dckt. 81. Trustee asserts the following grounds for denying confirmation of the September 30, 2015 Plan:

A. Debtor is delinquent $7,454.00, which represents multiple months of the $3,559.00 monthly payments;

B. The Amended Plan relies on an Objection to Claim #8-1 of Wells Fargo Bank, N.A., which is scheduled for hearing on November 17, 2015. If the objection to claim is not sustained, Debtor cannot afford the payments under 11 U.S.C. § 1325(a)(6);

C. Debtor's Schedule J shows net disposable income of $3,560.75, while the plan proposes payments of $3,895.00; in addition, Debtor's Declaration states income of $6,352.00 and expenses of $2,671.56, which leaves net disposable income of $3,680.44;

D. There is no Business Budget filed by Debtor to confirm the business income and expenses. Debtor's Schedule I reports $4,278.00 in business income, but does not include the required Business Budget attachment;

E. This Amended Plan relies on a Motion to Value secured claim of the Internal Revenue Service, which is not sustained means Debtor cannot afford the payments under 11 U.S.C. § 1325(a)(6);

F. Trustee has not received Business Documents from Debtor, including: Questionnaire, 2 years of tax returns, profit and loss statement, bank account statements, proof of license and insurance or written statement that no such documentation exists. These documents were required 7 days before the First Meeting of Creditors, pursuant to 11 U.S.C. § 521 and Fed. R. Bankr. P. 4002;

G. Debtor requested 4 years of tax returns from Debtors at the Meeting of Creditors held on January 22, 2015. To date, Debtors have only provided their 2012 return. While Debtor states that the returns will be provided after a tax audit, Trustee is "uncertain why they are unable to provide the Trustee with copies of their filed returns or why the audit would inhibit them from provided [sic] requested tax documents;"

H. Debtor failed to list prior bankruptcy cases, specifically Case Nos. 11-46417 and 11-39208.

Dckt. 82.

WELLS FARGO BANK, N.A.'s

Wells Fargo Bank, N.A. ("Creditor") filed opposition on November 3, 2015. Dckt. 84. In sum, Creditor reaffirms Trustee's objections that Debtor relies on the Objection of Claim against Wells Fargo Bank, N.A., and that if the Objection is not successful that Debtor cannot afford the plan under 11 U.S.C. § 1325(a)(6). Dckt. 85. Exh. 1 § 2.08.

DISCUSSION

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

As to the Trustee's objections, they are well-taken.

The basis for the Trustee's first objection is that the Debtor is $7,454.00 delinquent in plan payments, which represents multiple months of the $3,559.00 plan payment. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

The Debtor may not be able to make plan payments or comply with the plan under 11 U.S.C. § 1325(a)(6). The Debtor has provided conflicting information as to the Debtor's income. The There is conflicting information as to the Debtor's expenses. Namely, on Debtors Schedule J, the expenses is listed as $2,791.25 while in the Motion states the expense are $2,671.56. There has been no supplemental Schedules to confirm this. Either way, however, the proposed plan payment of $3,895.00 is more than either disposable income listed in the Debtor's schedules or the Motion and declaration. Without an accurate picture of the Debtor's financial reality, the court cannot determine whether the plan is confirmable. Therefore, the objection is sustained.

The Debtor has failed to timely provide the Trustee with business income/expense budget and the Debtor failed to report all prior cases. Without the Debtor submitting these documents, the court and the Trustee are unable to determine if the plan is feasible, viable, or complies with 11 U.S.C. § 1325.

A review of the Debtor's plan shows that it relies on the court valuing the secured claim of Internal Revenue Service. However, the Debtor has failed to file a Motion to Value the Collateral of Internal Revenue Service. Without the court valuing the claim, the plan is not feasible. 11 U.S.C. § 1325(a)(6). Therefore, the Trustee's objection is sustained.

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

As to the Creditor's objection, the Plan does not sufficiently provide for the pre-petition arrearage of $106,128.81 even though the court has reduced that amount pursuant to the objection of Debtor.

Therefore, in light of the Trustee and Creditor's objection and the court's independent review of the plan, the amended Plan does not comply with 11 U.S.C. §§ 1322, 1323 and 1325(a) and is not confirmed.

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

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

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

57. 15-27786-E-13 RAJESH KAPOOR
FAI-1 Fred Ihejirika

MOTION TO AVOID LIEN OF RASHMI KAPOOR
11-2-15 [16]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on November 2, 2015. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Rashmi Kapoor ("Creditor") against property of Rajesh K. Kapoor("Debtor") commonly known as 3724 Saintsbury Drive, Sacramento, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $375,101.00. An abstract of judgment was recorded with **Yolo** County on May 23, 2013, which encumbers the Property.

FN.1. The court notes that the Debtor's instant Motion states the amount of the judgment to be in the amount of $455,705.00. The attached abstract of judgment states that the original judgment is in the amount of $375,101.00.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $280,000.00 as of the date of the petition. The unavoidable consensual liens total $157,046.00 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.730(a)(2) in the amount of $100,000.00 on Schedule C.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided in excess of $22,954.00 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 the Debtor(s) 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 Rashmi Kapoor, California Superior Court for Yolo County Case No. FL 10-546, recorded on May 23, 2013, with the Yolo County Recorder, against the real property commonly known as 3724 Saintsbury Drive, Sacramento, California, is avoided in its entirety for all amounts in excess of $22,954.00 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.

58. 12-30588-E-13 DIANE/OSVALDO MALDONADO MOTION TO MODIFY PLAN
ET-9 Matthew Eason 9-24-15 [192]

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

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

Below is the court's tentative ruling.

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

Correct Notice Not Provided. The Proof of Service failed to attach the list of parties noticed. The Proof of Service states that the undisclosed parties served were served on September 24, 2015. By the court's calculation, 54 days' notice was provided. 35 days' notice is required.

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

The court's decision is to deny without prejudice the Motion to Confirm the Modified Plan.

Diane and Osvaldo Maldonado ("Debtor") filed a plan on August 6, 2012, which was confirmed by the court on September 27, 2012. Dckt. 46.

Since then, Debtor has filed Motions to confirm a Modified Plan on March 18, 2014, May 28, 2015, and August 24, 2015; these were all denied. Dckt. 89, 163, and 200.

Debtor filed the instant Motion to Modify on September 24, 2015. Dckt. 192.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed opposition on November 3, 2015. Dckt. 201. Trustee asserts the following grounds objecting to the proposed plan:

1. Section 6 of Debtor's proposed plan reduces the payment from $508.00 with 0% dividend to general unsecured creditors to $313.03 per month for the remaining 20 months with 0% dividend to unsecured creditors. The Debtor's declaration states that the Debtor has disposable income of $338.89, which is also reflected in the Debtor's Schedule J. Dckt. 195;

2. While the proposed plan relies on the fact that Debtor paid $16,160.03 into the plan from July 2012 through July 2015, Trustee's records indicate Debtor actually paid $15,847.90 through that period; this reduction means that Debtor's proposed plan currently leaves Debtor delinquent by $312.13 ($16,786.09 - 16,473.96). Trustee asserts that Debtor may cure this delinquency by increasing the monthly payments to $328.63 per month, which is $10.20 less than Debtor's declared disposable income of $338.83.

Dckt. 201, 202; Dckt. 194 ¶ 4.

DISCUSSION

Insufficient Service to Parties in Interest

LBR 7005-1(d)(3) requires "[t]he certificate of service shall include all parties served, whether by electronic or conventional means." Debtor's Certificate of Service does not attach a list of served parties. Dckt. 197. Thus, this court cannot determine whether the interested parties have been given notice of this motion.

Trustee's Objections

However, even in light of the failure to provide the proof of service list, the Trustee's objections are well-taken.

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

First, Trustee argues that the Debtor has not provided sufficient information as to why the Debtor is not proposing to pay all off the Debtor's disposable income. 11 U.S.C. § 1325(b)(1) provides:

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

The Plan proposes to pay a 0% dividend to unsecured claims, which total $0.00, though the Debtor's projected disposable income under 11 U.S.C. § 1325(b)(2) totals $338.19. Thus, the court may not approve the plan.

Second, Trustee alleges that the Plan is not feasible, *See* 11 U.S.C. § 1325(a)(6). The proposed plan assumes a higher value has been paid to Trustee than Trustee's records reflect. Also, Debtor's proposed plan will create a delinquency of $312.13, which the proposed plan does not cure by increasing the payments to $328.63. Thus, the plan may not be confirmed.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Confirm the Plan is denied without prejudice and the proposed Chapter 13 Plan is not confirmed.

59. 15-26491-E-13 ROGER SINER — **OBJECTION TO DISCHARGE BY DAVID P. CUSICK**
DPC-1 Bruce Charles Dwiggins — **10-13-15 [19]**

Final Ruling: No appearance at the November 17, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on October 13, 2015. By the court's calculation, 35 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 4003(b). The failure of the Debtor and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the Debtor and the other parties in interest are entered, the matter will be resolved without oral argument and the court shall 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 Debtor's Discharge on October 13, 2015. Dckt. 19.

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

The Debtor filed a Chapter 7 bankruptcy case on August 29, 2014. Case No. 14-28832. The Debtor received a discharge on December 29, 2014. Case No. 14-28832, Dckt. 16.

The instant case was filed under Chapter 13 on August 15, 2015.

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

Here, the Debtor received a discharge under 11 U.S.C. § 727 on December 29, 2014, which is less than four-years preceding the date of the filing of the instant case. Case No. 14-28832, Dckt. 16. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), the Debtor is not eligible for a discharge in the instant case.

Therefore, the objection is sustained. Upon successful completion of the instant case (Case No. 15-26491), 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 the 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.
>
> **IT IS ORDERED** that, upon successful completion of the instant case, Case No. 15-26491, the case shall be closed without the entry of a discharge.

60. 14-30994-E-13 JOHN MONROE — MOTION TO MODIFY PLAN
HLG-2 Kristy Hernandez — 9-29-15 [58]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 29, 2015. By the court's calculation, 49 days' notice was provided. 35 days' notice is required.

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

The court's decision is to deny without prejudice the Motion to Confirm the Modified Plan.

DEBTOR'S MOTION TO CONFIRM MODIFIED PLAN

John Monroe ("Debtor") filed a plan on November 6, 2014, which was confirmed by this court on May 13, 2015. Dckt. 50. Debtor filed this Motion to Confirm Modified Plan on September 29, 2015. Dckt. 58.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed opposition on November 3, 2015. Dckt. 71. Trustee objects on four grounds:

A. The plan is not feasible because the plan will be complete in 69 months, which is longer than the 60 months proposed; this is due to Debtor increasing the percentage to unsecured creditors from 0% to 5%;

B. Debtor is delinquent $500.00 under the proposed modified plan; §§ 6.03 and 6.04 propose plan payments of $36,420.00 paid through August 31,

2015, then $3,500.00 beginning October 25, 2015, for 2 months, $6,000.00 for December 2015, then $4,500.00 beginning January 1, 2016 for the balance of the plan; Debtor will need to have paid a total of $29,920.00 into a proposed plan;

C. Debtor's Declaration fails to comply with 28 U.S.C. § 1746 as it limits testimony to "the best of my knowledge and belief;"

D. Section 2.07 of Debtor's proposed plan does not provide a monthly dividend for administrative expenses; under the confirmed November 6, 2014 Plan, $2,000.00 in attorney's fees are paid through the plan with a monthly dividend of $34.00; to date, Trustee has disbursed $272.00 with a balance of $1,728.00 remaining.

Dckt. 71, 72.

DISCUSSION

Trustee's objections are well-taken.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. However, the plan must still comport with the requirements of 11 U.S.C. §§ 1322 and 1325.

First, Debtor is in material default under the plan because the plan will complete in more than the permitted 60 months. According to the Trustee, the plan will complete in 69 months due to increasing the percentage to unsecured creditors from 0% to 5%. This exceeds the maximum 60 months allowed under 11 U.S.C. § 1322(d). Therefore, the objection is sustained.

Second, Debtor is $500.00 delinquent under the modified plan. This is further evidence that the plan is not feasible. 11 U.S.C. § 1325(a)(1).

Third, § 2.07 of Debtor's proposed modified plan does not provide for the attorney's fees to be paid through the plan. The Trustee states that there is a remaining balance of $1,728.00 to be paid in administrative expenses. Section 2.07 of proposed plan states that $0.00 shall be paid for administrative expenses. Without the plan actually reflecting the remaining costs and fees due in the case, the plan is not feasible. 11 U.S.C. § 1325(a)(1).

Finally, the declaration offered by the Debtor states that it is under penalty of perjury and that "the contents thereof are true and correct **to the best of my knowledge and belief**." This could be read two ways. The first is that "whatever I have said is true, to the extent that I have any knowledge about what I am talking about." The second interpretation is that "I am telling you the truth to the best of my ability to testify in this proceeding."

The requirements for what constitutes an adequate declaration are set out in 28 U.S.C. § 1746, which provides:

§ 1746. Unsworn declarations under penalty of perjury

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law,

> any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:
>
> (1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).
>
> (Signature)".
>
> (2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).
>
> (Signature)".

This does not provide for any qualification on stating that the information is true and correct, or let the witness provide a declaration based on information and belief.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Confirm the Plan is denied without prejudice and the proposed Chapter 13 Plan is not confirmed.

61. 11-30298-E-13 BONIFACIO/ALICIA LOYOLA MOTION TO MODIFY PLAN
WW-3 Mark A. Wolff 10-1-15 [57]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 1, 2015. By the court's calculation, 47 days' notice was provided. 35 days' notice is required.

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

The court's decision is to deny without prejudice the Motion to Confirm the Modified Plan.

Bonifacio Loyola and Alicia Loyola ("Debtors") filed the instant Motion to Confirm the Second Modified Plan on October 1, 2015. Dckt. 57.

TRUSTEE'S OBJECTION

David P. Cusick, the Chapter 13 Trustee, filed an objection to the instant Motion on November 3, 2015. Dckt. 65. The Trustee objects on the following grounds:

1. Trustee asserts that the Debtor's Proof of Service does not indicate that Debtor's Declaration was among one of the documents served. The Trustee asserts that the copies served by mail on the Trustee did not include Debtor's Declaration. Trustee notes that such concern has been raised before. Trustee alleges that Debtor's failure to serve the evidence demonstrates that the plan is not proposed in good faith.

2. The Trustee asserts that Debtor's Declaration states that they filed Exhibits A and B, which provide information as to their current income and expenses. However, the Trustee is unable to find such documentation.

DISCUSSION

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

The Trustee's objections are well-taken.

First, the Debtor's notice was insufficient to Trustee because a material document, the Declaration was not provided to Trustee. Federal Rule of Bankruptcy Procedure 2002 and Local Bankruptcy Rule 9014-1(e) require that service of all documents filed in support of a motion shall be made on or before the date they are filed with the Court. Debtor failed to give Trustee the Declaration supporting Debtor's Motion to Confirm Modified Plan before filing it with the court. This is the second time the Debtor has failed to provide all necessary documents to the Trustee. See Dckt. 62. The court is inclined to agree that the failure to comply with the rules for a second time indicates that the instant filing was not in good faith.

As to the Trustee's second objection, the court agrees with the Trustee that the failure of the Debtor to provide supplemental Schedule I and J make it impossible for the court to confirm the plan. The Debtor's declaration indicates changes in income and expenses and explicitly states that a supplemental current income and expenses are attached as Exhibits A and B. Unfortunately, no such exhibits have been attached. In fact, the Debtor did not file any exhibits in support.

The court will not "rubber stamp" plans if the Debtor does not provide the necessary information and evidence to prove that the plan is feasible, viable, and in the best interest of the creditors and estate.

The modified Plan complies 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 Second Modified Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Confirm the Second Modified Plan is denied and the proposed Chapter 13 Plan is not confirmed.

62. 15-22798-E-13 PARKER/DONNA PUGH — MOTION TO MODIFY PLAN
PGM-1 Peter Macaluso — 10-8-15 [96]

Final Ruling: No appearance at the November 17, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 8, 2015. By the court's calculation, 40 days' notice was provided. 35 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Modified Plan is granted.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtors have filed evidence in support of confirmation. No opposition to the Motion was filed by the Chapter 13 Trustee or creditors. The modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329, and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on October 8, 2015 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

63. 15-22998-E-13 TSION GETACHEW **MOTION TO CONFIRM PLAN**
DRE-2 Randall Ensminger **9-16-15 [36]**

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 15, 2015. By the court's calculation, 53 days' notice was provided. 42 days' notice is required.

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

The court's decision is to deny without prejudice the Motion to Confirm the Amended Plan.

Tsion Getachew ("Debtor") filed a petition with accompanying plan on April 14, 2015. Dckt. 1, 5. Debtor filed the instant Motion to Confirm First Amended Plan on September 16, 2015. Dckt. 35, 37.

WELLS FARGO BANK, N.A.'S OPPOSITION

Wells Fargo Bank, N.A. dba Wells Fargo Dealer Services ("Creditor") filed an opposition on September 30, 2015. Dckt. 44. The Creditor objects on two grounds:

1. The Debtor failed to acknowledge that the Creditor has a purchase money security interest and that the plan does not provide for adequate protection payments.

2. The proposed interest rate on the Creditor's claim of 0.00% is less than the guidelines provided in *Till*.

STIPULATION

On October 29, 2015, the Debtor and Creditor filed a stipulation. Dckt. 48. The stipulation provides the following:

1. The parties hereto agree that Creditor shall be paid its secured claim of $7,990.52 with interest thereon accruing at the rate of 4.75% per annum, for the 2009 Lexus RX350, VIN XXXX0598, which is owned by Creditor and which remains in the possession of Debtor. The parties hereto further agree that the amount of Creditor's actual secured claim shall be the amount used by the Chapter 13 Trustee for purposes of computation hereunder and/or of the feasibility hereof.

2. The parties hereto agree that Creditor hold a purchase money security interest and that Creditor shall be entitled to receive pre- and post-confirmation monthly adequate protection payments of no less than $255.00 per month for the first four months and no less than $395.00 thereafter under and pursuant to Debtor's Chapter 13 Plan.

3. Debtor hereby agrees to amend the Chapter 13 Plan and/or accompanying schedules, as and if necessary, to ensure that the same conform with the terms set forth herein.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition on November 3, 2015. Dckt. 49.

Trustee objects on the grounds that Debtor is in material default because the plan exceeds the maximum 60 months allowed under 11 U.S.C. § 1322(d). The proposed September 16, 2015 First Amended Plan asserts a 100% dividend to general unsecured creditors, but only accounts for $15,244.55 of the general unsecured claims. On review, Trustee believes the Debtor's proposed September 16, 2015 Plan does not account for Debtor's Motion to Value Collateral of Bank of America (DRE-1), which determined that Bank of America's claim for $98,442.77 was unsecured. Because this $98,442.77 is not provided for in the plan, adding this additional amount at a 100% dividend cannot be completed within the statutorily required 60 months using the September 16, 2015 Plan proposed payments.

DISCUSSION

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

Trustee's objection is well-taken. Debtor is in material default under the plan because the plan will complete in more than the permitted 60 months. According to the Trustee, the plan will complete in 312 months due to not accounting for the recent Motion to Value Collateral of Bank of America, which adds 98,442.77 to the general unsecured category. This exceeds the maximum 60 months allowed under 11 U.S.C. § 1322(d). Therefore, the objection is sustained.

As to the Creditor's objection, the stipulation between the Debtor and the Creditor appears to rectify the Creditor's objection by providing sufficient adequate protection payments as well as a viable interest rate. However, in light of the Trustee's objection that the plan does not consider the Motion to Value and the stipulation material changes the terms of the plan, the Debtor's plan, as presented, is not feasible nor viable. Additionally, given the substantive changes to the terms of the plan, namely the treatment of Creditor and the likely reduction of dividend to unsecured, the plan cannot be confirmed.

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

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

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

64. 15-24698-E-13 WALLEN YEP **MOTION TO RECONSIDER DISMISSAL OF CASE**
Jonathan Matthews **10-9-15 [66]**

DEBTOR DISMISSED: 09/17/2015

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

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

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

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

Correct Notice Not Provided. The Debtor failed to file a Proof of Service. 14 days' notice is required.

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

The Motion to Reconsider is denied.

DEBTOR'S MOTION TO RECONSIDER DISMISSAL

Wallen Yep ("Debtor") seeks an Order to reconsider the Order to Dismiss the Case entered on September 17, 2015. Dckt. 66. The case was dismissed for failure to filed a completed plan, failure to commence plan payments, failure to provide a tax transcript or a federal tax return, and for the 4 prior bankruptcy filings which indicate bad faith filing. Dckt. 56.

Debtor asserts the following grounds for reconsideration:

A. Debtor had his attorney contact Trustee on or about August 25, 2015 to attempt to keep the bankruptcy from being dismissed.

B. Debtor submitted and filed a Chapter 13 plan in early September ahead of the scheduled hearing to dismiss the case.

C. Debtor has filed with this motion the necessary documents required by the Court, and as a result has resolved many of the issues the U.S. Trustee had with the bankruptcy.

D. Debtor has the ability to afford the Chapter 13 plan if ordered by the Court.

E. Debtor is currently working out a modification of his family home, and is waiting a final word from the bank on what relief it will grant. Reopening the bankruptcy will make it more likely the Debtor is treated fairly by the bank during the process.

Dckt. 66. The court notes that the only accompanying documents are an "Authorization to Release Information to the Trustee Regarding Secured Claims Being Paid by the Trustee" and a document titled "Notice of Hearing."

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition on October 14, 2015, asserting the following grounds to deny the motion:

A. Debtor's Notice of Hearing is set for November 2, 2015 at 9:00 a.m., which appears to be an improper date;

B. Debtor failed to file a proof of service with the court;

C. Debtor failed to file an opposition to Trustee's Motion to Dismiss on August 12, 2015, DCN #35, and does not provide an explanation in this Motion for Reconsideration;

D. The Motion for Reconsideration does not address the Trustee's original objections, including failure to commence plan payments, failure to file a complete plan that complies with § 1325, failure to provide tax returns, and the 4 prior filings in bankruptcy;

E. Debtor's motion does not provide a citation to legal authority, as required by LBR 9014-1(d)(6);

F. Debtor's motion is not filed with a docket control number, as required by LBR 9014-1(c);

G. The Notice of Hearing does not provide the content required under LBR 9014-1(d)(4).

Dckt. 68, 69.

DISCUSSION

Trustee's objections are well-taken.

ERRORS WITH THE MOTION AND SUPPORTING DOCUMENTS

First, LBR 9014-1(d)(4) requires the "notice of hearing shall advise potential respondents whether and when written opposition must be filed, the deadline for filing and serving it, and the names and addresses of the persons who must be served with any opposition." Debtor's Notice of Hearing provides none of this information, and does not provide sufficient notice to all interested parties.

Second, LBR 9014-1(c) states "[e]very motion shall be accompanied by a separate notice of hearing stating the Docket Control Number, the date and time of the hearing, the location of the courthouse, the name of the judge hearing the motion, and the courtroom in which the hearing will be held." The Motion does not have a docket control number.

Third, the Motion for Reconsideration does not provide legal authority for reconsideration, as required by LBR 9014-1(d)(6). Without legal authority cited, the court cannot rule on the merits of this motion.

Fourth, the court notes that the Debtor refers to supporting documents in the Motion which were not filed with the court. LBR 9014-1(d)(7) requires "[e]very motion shall be accompanied by evidence establishing its factual allegations and demonstrating that the movant is entitled to the relief requested." The Debtor does not attach a declaration of the Debtor nor any other admissible evidence as to Without supporting evidence, this court cannot weigh the merits of this motion.

FAILURE TO STATE WITH PARTICULARITY

Furthermore, even looking past the multitude of failures to comply with the Local Bankruptcy Rules, the Debtor fails to comply with Federal Rule of Bankruptcy Procedure 9013.

The Motion states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013, upon which the request for relief is based:

A. Debtor had his attorney contact Trustee on or about August 25, 2015 to attempt to keep the bankruptcy from being dismissed.

B. Debtor submitted and filed a Chapter 13 plan in early September ahead of the scheduled hearing to dismiss the case.

C. Debtor has filed with this motion the necessary documents required by the Court, and as a result has resolved many of the issues the U.S. Trustee had with the bankruptcy.

D. Debtor has the ability to afford the Chapter 13 plan if ordered by the Court.

E. Debtor is currently working out a modification of his family home, and is waiting a final word from the bank on what relief it will grant. Reopening the bankruptcy will make it more likely the Debtor is treated fairly by the bank during the process.

Dckt. 66.

The Motion does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not state with particularity the grounds upon which the requested relief is based. The motion merely states the current status of the Debtor without stating with particularity how and why, under Fed. R. Civ. P. 60, the order dismissing the case should be vacated. This is not sufficient.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the *United States Supreme Court in Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations

> supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.,* 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

Not pleading with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities – buried between extensive citations, quotations, legal arguments and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try and float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

Therefore, because of the Debtor's failure to comply with the Local Bankruptcy Rules and failure to state with particularity the grounds for relief, the Motion is denied without prejudice.

Additionally, the court has looked at the "Plan" filed by Debtor which purported shows that Debtor is feasibly prosecution this case in good faith. The Plan demonstrates the opposite. Dckt. 41. The Plan requires monthly payments of $1,300.00, which the Debtor has not made. However, the latest financial information provided under penalty of perjury indicates that Debtor's

projected disposable income is $1,801.00 per month. Schedules I and J filed June 24, 2015; Dckt. 12.

The Chapter 13 Plan provides for no claims to be paid in Class 1. For Class 2, the Plan states that the $207,000 claim of Wells Fargo Bank, N.A. shall continue to be secured and receive a monthly dividend of $5. No claims are provided for in Class 3. No claims are provided in Class 4. For Class 5, a "property tax" in the amount of $13,500 owed to "California Controller" and deposits of $16,000 owed to "Martin Eng" are to be paid. No claims are provided for in Class 6. No provision is made for general unsecured claims for Class 7 (that section being left blank). The Plan is singed by both the Debtor and his counsel, subject to the certifications of Federal Rule of Bankruptcy Procedure 9011.

The Plan, as drafted, in legally nonsensical. It does not demonstrate a debtor prosecuting this case in good faith.

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 Reconsideration of the Order to Dismiss filed by Wallen Yep ("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.