

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

November 20, 2018 at 3:00 p.m.

1. [17-23911-E-13](#) CRAIG MASON CONTINUED MOTION TO CONFIRM
[LBG-4](#) Lucas Garcia PLAN
8-20-18 [114]

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

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

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

Sufficient Notice Provided. The court set the matter for hearing November 6, 2018 at 3:00 p.m.

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

The Motion to Confirm the Amended Plan is denied.

Craig Mason ("Debtor") seeks confirmation of the Fourth Amended Plan, no proposed plan to date having been confirmed. Dckt. 114. The Amended Plan provides for Debtor's mortgage as a Class 1 claim; estimates \$19,200.00 in Class 5 claims; calls for minimum 5 percent dividend on Class 7 claims totaling \$86,499.88; and provides for a \$5,750.00 payment, which increases to \$5,950.00 in Month 14 of the Plan. Dckt. 118. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick (“the Chapter 13 Trustee”) filed an Opposition on September 26, 2018. Dckt. 125.

The Trustee asserts that Debtor fails to indicate in Section 3.05 of the Plan whether he proposes to pay attorney fees in accordance with Local Bankruptcy Rule 2016-1(c) or will be filing a motion for fees in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017.

The Trustee further argues Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). The Trustee states that, because this case was filed on June 12, 2017, the Month 14 payment became due on August 25, 2018. Debtor’s projected disposable income listed on his Schedule J, and confirmed in his declaration in support of this Motion, is \$5,773.00, while the Amended Plan calls for payments in Month 14 to increase from \$5,750.00 to \$5,950.00.

OCTOBER 16, 2018 HEARING

At the October 16, 2018 hearing, the hearing on the Motion was continued to 3:00 p.m. on November 6, 2018 to allow the Debtor to file supplemental documents addressing attorney’s fees.

NOVEMBER 6, 2018 HEARING

At the November 6, 2018 hearing, the court continued the hearing on the Motion to November 20, 2018, allowing Debtor an opportunity to bring payments current under the proposed Amended Plan. Dckt. 129.

AMENDED SCHEDULE I

Debtor filed an Amended Schedule I on November 9, 2018. Dckt. 130. The Amended Schedule shows an increase in Debtor’s net income from \$9,198.00 to \$9,398.00. This increase results solely from an increase of \$200 in the “Fiancé Contribution.” The Amended Schedule includes an explanation that the fiancé contribution increase reflected extra income generated from AirBnb income.

While the Amendment Cover Sheet indicates that Debtor’s Schedule J was to be filed as well, no Amended Schedule J has been filed. Dckt. 130.

DISCUSSION

Debtor lists on his Schedules A/B property commonly known as 23526 Rosewood Drive, California. Schedule A/B, Dckt. 27 at p.1. That property is valued at \$579,000. The debt securing that property is \$723,269.15. *See* Proof of Claim, No. 1. The Deed of Trust indicates Debtor is the sole owner of the property. *Id.*

Debtor has a fiancé whom is contributing \$3,200 to the proposed plan. If Debtor and his fiancé are living as a family unit, residing at Debtor’s property and sharing expenses, the court is concerned that the bankruptcy case is being abused in a way where Debtor and his fiancé are merely choosing what income and

expenses they want to assign to the case (this seems likely where the fiancé is contributing such a significant amount to the plan). Debtor may assume it is clear that his fiancé's AirBnb income is from renting out her own property, but the court is not making the same presumption.

In reviewing Schedule J filed by Debtor, Dckt. 27 at 21-22, Debtor lists his fiancé, two teenage children, and his fiancé's teenage child as dependants. Though living in the same household, Debtor does not provide information as to the fiancé's income. It does appear that Debtor is including all of the expenses for the "dependants," but is excluding the fiancé's income from the household expenses—except such income as is provided to allow Debtor to proceed with a nominal (5%) dividend distribution to creditors holding general unsecured claims. Fourth Amended Plan ¶ 3.14, Dckt. 118.

Additionally, if Debtor's fiancé is in fact living separately (and not part of the household as a dependant), then the court has concerns about whether the proposed Amended Plan is really feasible, given its significant reliance on voluntary gifts/contributions from an individual not in the bankruptcy case. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable. 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 Amended Chapter 13 Plan filed by Craig Mason ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

2. [18-25322-E-13](#) **STEFAN POLANSKY**
[DPC-1](#) **Michael Hays**

**OBJECTION TO CONFIRMATION OF
PLAN BY DAVID P. CUSICK**
10-17-18 [23]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor’s Attorney on October 17, 2018. By the court’s calculation, 34 days’ notice was provided. 14 days’ notice is required.

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

The Objection to Confirmation of Plan is sustained.

David Cusick (the “Chapter 13 Trustee”) opposes confirmation of the Plan on the bases that:

- A. Stefan Polansky (“Debtor”) has failed to commence plan payments and is delinquent \$1,061.00 in plan payments. An additional payment became due on October 25, 2018.

- B. Debtor failed to appear at the First Meeting of Creditors held on October 11, 2018, and continued to November 8, 2018.

DISCUSSION

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

Debtor is \$1,061.00 delinquent in plan payments, which represents one month of the \$1,061.00 plan payment. Another payment became due on October 25, 2018. According to the Chapter 13 Trustee, the Plan in § 2.01 calls for payments to be received by the Chapter 13 Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. Attempting to confirm a plan while failing to appear and be questioned by the Chapter 13 Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). Reviewing the docket shows that Debtor again failed to appear at the continued meeting held on November 8, 2018. That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

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

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

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

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

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

3. [18-25525-E-13](#) TRACY HASTINGS
[DPC-1](#) Kyle Schumacher

**OBJECTION TO CONFIRMATION OF
PLAN BY DAVID P. CUSICK
10-10-18 [23]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor’s Attorney on October 10, 2018. By the court’s calculation, 41 days’ notice was provided. 14 days’ notice is required.

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

The Objection to Confirmation of Plan is sustained.

David Cusick (the “Chapter 13 Trustee”) opposes confirmation of the Plan on the following grounds:

- A. Tracy Hastings (“Debtor”) cannot make plan payments and the Plan does not comply with applicable law. Debtor lists \$1,162.50 in rental income on her Schedule I; however, Debtor admitted at the Meeting of Creditors that she was only receiving \$950, and has not received any rental income since May 2018.
- B. Debtor lists Aqua Finance Inc., on Schedule D as secured against Debtor’s rental property; however, there is no listed expense on Schedule J providing payment for this claim and the debt is not provided for in the Plan.

DISCUSSION

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

Debtor appear unable to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor has inaccurately stated her rental income, which was \$950.00—not \$1,162.50 as listed. Furthermore, has not been received by Debtor since May 2018.

Despite listing Aqua Finance Inc. as a debt secured against Debtor's real property, the debt is not provided for in the Plan, or outside the plan directly. 11 U.S.C. § 1322(a) is the section of the Bankruptcy Code that specifies the mandatory provisions of a plan. It requires only that a debtor adequately fund a plan with future earnings or other future income that is paid over to Trustee (11 U.S.C. § 1322(a)(1)), provide for payment in full of priority claims (11 U.S.C. § 1322(a)(2) & (4)), and provide the same treatment for each claim in a particular class (11 U.S.C. § 1322(a)(3)). Nothing in § 1322(a) compels a debtor to propose a plan that provides for a secured claim, however.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 13 Trustee, creditors, and Office of the United States Trustee on November 6, 2018. By the court’s calculation, 14 days’ notice was provided. 14 days’ notice is required.

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

The Motion to Incur Debt is granted.

Peter Nelson (“Debtor”) seeks permission to refinance real property commonly known as 4055 Eastwood Village Lane, Carmichael, California (the “Property”), with a total loan of \$251,831.00 and monthly payments of \$2,096.00 to Finance of America Mortgage, LLC over 360 months with a 5.50 percent fixed interest rate.

TERMS OF THE AGREEMENT

The Motion states with particularity the following terms of the agreement:. The proposed modified terms are as follows:

- A. The loan amount is \$251,831.00 ;

- B. The modified mortgage term is 360 months;
- C. The modified interest rate is 5.50%;
- D. The modified principal, escrow, and interest payment is \$2,096.00;
- E. Payoff to Wells Fargo (1st mortgage) is \$108,415.16 and pay off to Bank of America Home Loans (2nd mortgage) is \$96,664.23.^{FN.1.}

FN.1. Debtor's Motion and supporting Declaration state certain agreement terms are "modified." Debtor is not seeking to modify the agreement terms, but is actually seeking an entirely new agreement.

TRUSTEE'S RESPONSE

David Cusick (the "Chapter 13 Trustee") filed a Response to Debtor's Motion on November 13, 2018. Dckt. 26. The Trustee asserts that it is unclear from the language of the Motion and the attached Buyer(s) Estimated Closing Statement whether the net proceeds will be paid into the Plan, thus paying all creditors 100 percent. The Debtor testifies in his declaration that the refinance will pay 100 percent to all creditors in the case; however, the Motion is silent on this point.

The Trustee states he is prepared to pay his check into the escrow at the same time as the escrow meets his demand as to Bank of America N.A. listed in Class 1.

CREDITOR'S STATEMENT OF NONOPPOSITION

Wells Fargo Bank N.A. ("Creditor") filed its Statement of Position on November 13, 2018 indicating nonopposition. Dckt. 28. Creditor does not oppose the Motion because its claim will be paid in full as a result of the refinance. Creditor requests, in the event of dispute as to its claim, the undisputed amount be paid at close into a segregated interest bearing account, with an additional \$10,000.00 in sale proceeds pending any further order by the court to allow Creditor's potential recovery of attorney's fees and costs to the extent Creditor successfully establishes its right to the disputed amount on its claim.

DISCUSSION

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

~~At the hearing, Debtor confirmed that directly from the loan escrow sufficient monies will be disbursed for the Chapter 13 Trustee to complete the plan payments.~~

This post-petition financing is consistent with the Chapter 13 Plan in this case and with Debtor's ability to fund that Plan. The Motion complying with the provisions of 11 U.S.C. § 364(d), the Motion to Refinance 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 Refinance filed by Peter Nelson ("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 Peter Nelson is authorized to incur debt pursuant to the terms of the agreement to refinance the real property commonly known as 4055 Eastwood Village Lane, Carmichael, California 95608 ("Property") Exhibits A, B, Dekt. 24.~~

~~IT IS FURTHER ORDERED the after payment of the loan fees and expenses listed under the "New Loans", the Title Charges section of said Estimated Closing Statement, any of the Government Recording, and Taxes or additional charges provided in the Estimated Closing Statement filed as Exhibit A, Dekt. 24), and the secured claims of Wells Fargo Bank, N.A. and Bank of America, N.A. on their secured claims, the loan proceeds shall next be disbursed to the Chapter 13 Trustee in this case in the amount that he makes in written demand. The demand shall be for the amount necessary to pay all remaining claims in full through the Chapter 13 Plan.~~

~~After disbursement of the above amounts, the remaining loan proceeds may be disbursed directly to the Debtor.~~

5. [18-20738-E-13](#) **TAUJAI CAREY**
[RJ-3](#) **Richard Jare**

MOTION TO MODIFY PLAN
10-2-18 [77]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 13 Trustee, creditors, and Office of the United States Trustee on October 2, 2018. By the court’s calculation, 49 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days’ notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days’ notice for written opposition).

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

The Motion to Confirm the Modified Plan is denied.

Taujai Carey (“Debtor”) seeks confirmation of the Modified Plan to cure delinquency in payments that resulted from medical expenses relating to pregnancy complications. Dckt. 79. The Modified Plan seeks to retain the stepped-up plan payments with 8 months of \$222.00 payments as opposed to 4 months as previously provided. Dckt. 80. Commencing with month 9 payments will increase to \$440.00, and then will increase to \$590.00 beginning month 18. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

CHAPTER 13 TRUSTEE’S OPPOSITION

David Cusick (the “Chapter 13 Trustee”) filed an Opposition on November 2, 2018. Dckt. 86. The Trustee asserts the Plan is not feasible because it will complete in more than the 60 months proposed. The

Trustee contends the Plan as proposed will take up to 65 months to complete and in order to complete the Plan in the 60 months required, Debtor would need to make payments of approximately \$590.00 for the 53 months remaining.

DEBTOR'S REPLY

Debtor filed a Reply to the Trustee's Opposition on November 14, 2018. Dekt. 89. Debtor states "there are some calculations submitted by the trustee, but this is very mathematical and confusing." Debtor argues only a \$15.00 increase in the proposed payments is required and will contact the Trustee to further discuss this issue.

DISCUSSION

Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to the Chapter 13 Trustee, the Plan will complete in 65 months due to Debtor's Plan proposes to pay \$29,038.09 to creditors. Debtor's proposal to pay \$28,898.00 over the remaining 53 months of the Plan, less estimated Trustee fees totaling \$2,051.76, pays creditors only \$26,846.24. The Plan therefore would need to exceed the maximum sixty months allowed under 11 U.S.C. § 1322(d).

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

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

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

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

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

6. [18-22041-E-13](#) KRISTY NEAL
[RJ-5](#) Richard Jare

MOTION TO MODIFY PLAN
10-15-18 [76]

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 13 Trustee, creditors, and Office of the United States Trustee on October 15, 2018. By the court’s calculation, 36 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days’ notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days’ notice for written opposition).

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

The Motion to Confirm the Modified Plan is ~~XXXXXXXXXX~~.

Kristy Neal (“Debtor”) seeks confirmation of the Modified Plan to cure delinquency caused by unemployment and provide for her vehicle to be surrendered so she can obtain a new vehicle Dckt. 77. The Modified Plan proposes a 36 month term paying unsecured creditors not less than 13 percent and decreasing plan payments from \$400.00 to \$300.00 beginning in Month 7. Dckt. 78. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

CHAPTER 13 TRUSTEE’S OPPOSITION

David Cusick (the “Chapter 13 Trustee”) filed an Opposition on November 6, 2018. Dckt. 84. The bases for Trustee’s Opposition are:

- A. Debtor appears to not have properly served all parties in interest for this Motion because a Proof of Service did not appear on the docket when the other documents for this Motion were filed on October 15, 2018.
- B. The Plan does not appear to be Debtor's best effort because the supplemental Schedule J supporting the Plan accounts for a \$510.00 car payment, which Debtor does not have because her Motion to Incur Debt was denied on October 23, 2018 (Dckt. 81).

DEBTOR'S REPLY

Debtor filed a Reply on November 13, 2018. Dckt. 88. Debtor argues proper service was given to interested parties, and the issue raised by the Trustee was limited only to what Debtor filed to the docket. Debtor further contends the Trustee disregards her most recent Schedule J filed on October 31, 2018, which no longer includes the \$510.00 car payment.

AMENDED SCHEDULE J

Debtor filed Amended Schedules I and J on October 31, 2018. Dckt. 82. The Amended Schedule J removes a proposes car payment of \$510 and adds in a car rental expense of \$680.

DISCUSSION

Debtor filed a Proof of Service on November 6, 2018. While the proof of service is belated, Debtor's counsel states under penalty of perjury that service was provided October 15, 2018. Therefore, the court finds service was made on interested parties.

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

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

The Trustee premises his Opposition on the Schedule J filed on October 15, 2018, Dckt. 74. Debtor Amended Schedule J on October 31, 2018, to remove a car payment expense which formed the grounds for Trustee's Opposition.

However, Debtor's new Amended Schedule raises a new concern. Debtor states she is "making efforts to reduce [car rental expenses] from \$820 to \$680. Amended Schedule J, Dckt. 82. If Debtor is not

able to reduce this cost, her disposable income will be reduced by \$140 and she will not be able to comply with plan payments.

Furthermore, Debtor’s Amended Schedules continue to list a monthly expense of \$340 for “bus&train.” It is unclear why this cost is so high if debtor is commuting with a personal vehicle. Debtor also includes a transportation expense of \$330 (which on Amended Schedule J is stated to include bus and train fare, but which appears covers only costs of the vehicle).

In looking at Amended Schedule J Debtor’s various “transportation expenses” that she asserts are reasonable and necessary consist of:

Transportation (gas, maintenance, bus or train)	\$330.00
Vehicle Insurance	\$168.00
Car Rental	\$680.00
Bus & Train	\$340.00
Debtor’s Total Monthly Transportation Expense	\$1,518.00

This amount appears to be less than reasonable and less than necessary. Rather, it may appear to be a construct to support why Debtor purchasing new vehicle with a 22% interest is “reasonable” and in the better interests of creditors. If so presented, it shows the opposite.

At the hearing, **XXXXXXXXXXXXXXXXXX**

The Modified Plan **xxxxxxx** with 11 U.S.C. §§ 1322, 1325(a), and 1329 and **xxxxxxxxxx**.

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by Kristy Neal (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Motion to Confirm the Modified Plan is **XXXXXX**.

7. [18-26945-E-13](#) **ARACELY RIVAS**
[PGM-1](#) **Peter Macaluso**

**MOTION TO IMPOSE AUTOMATIC
STAY
11-6-18 [9]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee and Office of the United States Trustee on November 6, 2018. By the court’s calculation, 14 days’ notice was provided. 14 days’ notice is required.

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

-----.

The Motion to Impose the Automatic Stay is denied.

Aracely Rivas (“Debtor”) seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(a) imposed in this case. This is Debtor’s third bankruptcy petition pending in the past year with the prior two cases having been dismissed. Debtor’s prior bankruptcy cases (Nos. 18-20502 and 18-24425) were dismissed on April 26, 2018 and October 10, 2018, respectively. *See* Order, Bankr. E.D. Cal. No. 18-20502, Dckt. 33, April 26, 2018; Order, Bankr. E.D. Cal. No. 18-24425, Dckt. 34, October 10, 2018. Therefore, pursuant to 11 U.S.C. § 362(c)(4)(A)(I), the provisions of the automatic stay did not go into effect upon Debtor filing the instant case.

APPLICABLE LAW

Imposition of Stay

When stay has not gone into effect pursuant to 11 U.S.C. § 362(c)(4), a party in interest may request within 30 days of filing that the stay take effect as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed. 11 U.S.C. § 362(c)(4)(B).

For purposes of subparagraph (B), a case is presumptively filed not in good faith as to all creditors if:

(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;

(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7, with a discharge, and if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; . . .

11 U.S.C. § 362(c)(4)(D).

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); *see also* Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209–10 (2008). An important indicator of good faith is a realistic prospect of success in the second case, contrary to the failure of the first case. *See, e.g., In re Jackola*, No. 11-01278, 2011 Bankr. LEXIS 2443, at *6 (Bankr. D. Haw. June 22, 2011) (citing *In re Elliott-Cook*, 357 B.R. 811, 815–16 (Bankr. N.D. Cal. 2006)). Courts consider many factors—including those used to determine good faith under §§ 1307(c) and 1325(a)—but the two basic issues to determine good faith under § 362(c)(3) are:

- A. Why was the previous plan filed?
- B. What has changed so that the present plan is likely to succeed?

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

Review of Minimum Pleading Requirements for a Motion

The Supreme Court requires that the motion itself state with particularity the grounds upon which the relief is requested. FED. R. BANKR. P. 9013. The Rule does not allow the motion to merely be a direction to the court to “read every document in the file and glean from that what the grounds should be for the motion.” That “state with particularity” requirement is not unique to the Bankruptcy Rules and is also found in Federal Rule of Civil Procedure 7(b).

Consistent with this court’s repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, applied the general pleading requirements enunciated by the United States Supreme Court to the pleading with particularity requirement of Bankruptcy Rule 9013. *See* 434 B.R. 644, 646 (N.D. Ala. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007)). The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal* to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court. *See* 556 U.S. 662 (2009).

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 of Civil Procedure and of Bankruptcy Procedure, the Supreme Court endorsed 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 the automatic stay, 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 to other parties in a bankruptcy case and to 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.

434 B.R. at 649–50; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ind. 2009) (holding that a proper motion must contain factual allegations concerning requirements of the relief sought, not conclusory allegations or mechanical recitations of the elements).

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 pleading with particularity 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.” The standard for “particularity” has been determined to mean “reasonable specification.”

Martinez v. Trainor, 556 F.2d 818, 819–20 (7th Cir. 1977) (citing 2-A JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 7.05 (3d ed. 1975)).

Not stating with particularity the grounds in a motion can be used as a tool to abuse other parties to a proceeding, hiding from those parties grounds upon which a motion is based in densely drafted points and authorities—buried between extensive citations, quotations, legal arguments, and factual arguments. Noncompliance with Federal Rule of Bankruptcy Procedure 9013 may be a further abusive practice in an attempt to circumvent Bankruptcy Rule 9011 by floating baseless contentions to mislead other parties and the court. By hiding possible grounds in 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 any actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such “postulations.”

Grounds Stated With Particularity in Motion

Movant has not provided grounds, merely unsupported conclusions of law and some facts about the filing of the bankruptcy case. The personal conclusions of law dictated to the court by Movant are:

- A. “This motion is made pursuant to 11 U.S.C. 362(c)(4)(B) and Local Bankruptcy Rule 9014-1(f)(2) and based on these moving papers, the Debtor’s declaration, the records and pleadings on file herein, and upon such other oral and documentary evidence as may be presented at the hearing on this motion.”

Motion, p. 1:21-25; Dckt. 9. On its face, it appears that Debtor is directing the court to review any and all documents in the file, whatever is subsequently orally said and the hearing, and then whatever other documentary evidence Debtor chooses to file at any time. Such is not “stating grounds with particularity in the motion.”

B. Debtor filed a prior bankruptcy case on January 31, 2018, which was dismissed on April 26, 2018.

Id. ¶ 1.

C. Debtor filed a second prior bankruptcy case on July 16, 2018, which was dismissed on October 10, 2018.

Id. ¶ 2.

D. Debtor filed the current third bankruptcy case on November 2, 2018.

Id. ¶ 3.

E. Debtor's plan is confirmable and very likely to succeed.

Id. ¶ 4.

F. Debtor's plan provides for paying two claims secured by vehicles in Class 2 of the Plan.

Id. ¶ 5. The motion portion of Debtor's pleading concludes with paragraph 5. The balance is the Points and Authorities presented by Debtor.

In the Points and Authorities Debtor makes the following statements of law and draws the legal conclusions from the above stated grounds:

G. Good cause exists for the granting of the Motion to Impose Automatic Stay as to all creditors in this case. The imposition is necessary to protect the Debtor's assets, absent the instant filing as the Debtor's current case overcomes any presumption of bad faith.

In the Points and Authorities Debtor makes reference to the following factual assertions (to which reference for an evidentiary basis is stated as the Debtor's Declaration): (1) Debtor's net monthly income as a "Fulfillment Associate" is \$1,452; (2) Debtor also generates \$500 a month net income as a part time medical transcriber; and (3) Debtor's daughter contributes \$360 a month to Debtor. *Id.*, p. 3:22-26, 4:1-3. On Schedule J Debtor lists the contributing daughter as a dependant. No evidence of the daughter's ability to provide the contributions in this third bankruptcy case is provided.

H. Based on the aforementioned elements, the instant case was filed in order to protect Debtor's vehicles from repossession action and to reorganize debts.

Id., p. 3:20-21.

I. Debtor's Schedule I and B22C reflect that she is earning enough wages and money to cover all her necessary obligations in addition to the proposed Chapter 13 plan.

Id., p. 4:5-7.

- J. There is no indication that the Debtors engaged in any type of scheme or other operation to abuse the bankruptcy process. Refer to Declaration of Debtors filed herewith.

Id., p. 4:13-15.

Those “grounds” are merely a conclusion of law by Movant. Presumably, Movant believed that the court would make those conclusions, but the “grounds” cannot merely state the anticipated conclusions.

Movant is reminded that “[f]ailure of counsel or of a party to comply with these [Local Bankruptcy] Rules . . . may be grounds for imposition of any and all sanctions authorized by statute or rule within the inherent power of the Court, including without limitation, **dismissal of any action**, entry of default, finding of contempt, imposition of monetary sanctions or attorneys’ fees and costs, and other lesser sanctions.” LOCAL BANKR. R. 1001-1(g) (emphasis added).

The Motion is supported by the Declaration of Debtor. Dckt. 12. The court is not required to review the supporting pleadings to piece together what grounds may exist which could have been stated with particularity in the Motion. Notwithstanding that, the court has reviewed the Declaration.

Debtor states in her Declaration that she is filing bankruptcy due to financial hardship and to save her multiple vehicles from repossession.

Debtor further states she is refiling for bankruptcy because during the prior case she was studying for her agent’s license and did not have sufficient income to fund the Chapter 13 Plan as she committed to in the prior case. Debtor asserts she started to work for American Income Life Insurance since her last case and her circumstances have therefore changed.

A review of Debtor’s most recent filing shows Debtor then had an income of \$1,794.65. Schedule I, Bankr. E.D. Cal. No. 18-24425, Dckt. 13. A review of Debtor’s Schedules in this case show the same income. Schedule I, Dckt. 1. Debtor’s Declaration made under penalty of perjury seems to conflict with her Schedule filed under penalty of perjury.

In her declaration Debtor states that she has “now” hired counsel. However, that same counsel has represented the Debtor in the following prior cases:

Case	Outcome
Chapter 13 Case 18-24425	<p data-bbox="657 310 1404 380">Case dismissed due to failure to pay filing fee installment. 18-24425, Dckt. 32.</p> <p data-bbox="657 426 1404 527">The Chapter 13 Trustee’s Final Report Discloses that Debtor made no plan payments in the prior case. <i>Id.</i>, Dckt. 37.</p> <p data-bbox="657 573 1404 749">The Chapter 13 Trustee further reported that Debtor failed to attend the September 20, 2018 Continued First Meeting of Creditors. <i>Id.</i>, September 20, 2018 Trustee Docket Entry Report. (Trustee reports that Debtor appeared at the earlier First Meeting which was continued.)</p>

DISCUSSION

Debtor has not sufficiently rebutted the presumption of bad faith under the facts of this case and the prior cases for the court to impose the automatic stay.

The Motion is denied without prejudice.

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

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

The Motion to Impose the Automatic Stay filed by Aracely Rivas (“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.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 5, 2018. By the court’s calculation, 46 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days’ notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days’ notice for written opposition).

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

The Motion to Confirm the Modified Plan is denied.

Kenneth Roger Tabor (“Debtor”) seeks confirmation of the Modified Plan to cure delinquency resulting from Debtor having to travel to Texas to help his girlfriend repair the roof of her 5th Wheel; and Debtor also spent roughly two months removing equipment stored on his mother’s property in Orangevale, CA because her property is going to be listed for sale. Dckt. 129. The Modified Plan provides that Debtor shall be considered current with \$16,330 paid in through September, 2018 (Month 10); Debtor shall pay \$7,960 for October (Month 11), then beginning in November, 2018 and continuing through Month 60, Plan payments shall be \$1,990 per month. Dckt. 131. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

CHAPTER 13 TRUSTEE’S OPPOSITION

David Cusick (“the Chapter 13 Trustee”) filed an Opposition on November 6, 2018. Dckt. 135. The Trustee Opposes confirmation on the grounds that Debtor is delinquent \$3,290 under the proposed Modified Plan.

DISCUSSION

Debtor is \$3,290 delinquent in plan payments under the proposed Modified Plan which calls generally for Debtor to have paid 7,960 for October 2018. Delinquency indicates that 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 Modified Chapter 13 Plan filed by Kenneth Roger Tabor (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

No Appearance is Required if Parties Concur in the Denial of the Motion

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on September 18, 2018. By the court’s calculation, 63 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is denied.

Steven Claude Smith (“Debtor”) seeks confirmation of the Amended Plan, which would constitute Debtor’s first confirmed plan. The Amended Plan provides for monthly payments of \$275 for 2 months, \$485 for 22 months, and \$500 for 36 months. Dckt. Dckt. 33. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE’S OPPOSITION

David Cusick (“the Chapter 13 Trustee”) filed an Opposition on November 1, 2018. Dckt. 39. Trustee Opposes confirmation on the following grounds:

1. Debtor is delinquent \$485 in plan payments.

2. Debtor appears to have mistakenly listed OneMain Financial as both a Class 2 and Class 4 claim.
3. Debtor's Schedule I fails to list any tax, medicare, or social security deductions. Trustee's review of Debtor's pay advices shows a withholding rate of approximately 17 percent. Therefore, Debtor has not properly listed expenses and may not be able to make the plan payments.
4. Debtor's plan relies on a Motion to Avoid Lien. Debtor cannot make the plan payments if the Motion is not granted.

DISCUSSION

The Trustee's Opposition is well-taken.

The Chapter 13 Trustee asserts that Debtor is \$485 delinquent in plan payments. Before the hearing, another plan payment will be due. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Debtor's proposed plan provides for OneMain Financial's claim as both a Class 2 and Class 4. This creditor being provided for twice suggests the plan is not feasible. 11 U.S.C. § 1325(a)(6).

Trustee argues that Debtor's withholding rate is 17 percent. Dckt. 40. Debtor fails to list any tax, medicare, or social security deductions on Schedule I. Dckt. 1. Failure to properly list the expenses also indicates plan is not feasible. 11 U.S.C. § 1325(a)(6).

Finally, the proposed plan relies on a Motion to Avoid Judicial Lien (which is actually a motion to value secured claim pursuant to 11 U.S.C. § 506(a)). Dckt. 22. If that Motion is denied, Debtor will not be able to comply with the current proposed plan payments.

The court, at the request of Debtor, has dismissed the motion. Debtor's plan does not provide for the claim and curing the arrearage.

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

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

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

The Motion to Confirm the Amended Chapter 13 Plan filed by Steven Claude Smith ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

10. [18-25952-E-13](#) **SIMON PARDEDE AND ULIROMA OBJECTION TO DEBTORS 11 U.S.C. SEC. 1328 CERTIFICATION BY DAVID P. CUSICK**
[DPC-1](#) **SILAEN**
Gary Fraley **10-10-18 [12]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on October 10, 2018. By the court's calculation, 41 days' notice was provided. 14 days' notice is required.

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

The Objection to Discharge is sustained.

David Cusick, the Chapter 13 Trustee (“Objector”) objects to Simon Pardede and Uliroma Novarina Silaen’s (“Debtor”) discharge in this case. Objector argues that Debtor is not entitled to a discharge in the instant bankruptcy case because Debtor previously received a discharge in a Chapter 7 case.

Debtor filed a Chapter 7 bankruptcy case on March 12, 2018. Case No. 18-21448. Debtor received a discharge on June 25, 2018. Case No.18-21448, Dckt. 17.

The instant case was filed under Chapter 13 on September 20, 2018.

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

Here, Debtor received a discharge under 11 U.S.C. § 727 on June 25, 2018, which is less than four years preceding the date of the filing of the instant case. Case No.18-21448, Dckt. 17. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), Debtor is not eligible for a discharge in the instant case.

Therefore, the Objection is sustained. Upon successful completion of the instant case (Case No. 18-25952), 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, (“Objector”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Objection to Discharge is sustained, and upon successful completion of the instant case, Case No. 18-25952, the case shall be closed without the entry of a discharge.

11. [18-23365-E-13](#) TENA ROBINSON
[JB-1](#) Jason Borg

CONTINUED MOTION TO VALUE
COLLATERAL OF BOSCO CREDIT, LLC
7-19-18 [29]

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, creditors, and Office of the United States Trustee on July 19, 2018.

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

The Motion to Value Collateral is ~~XXXXXXXXXXXX~~.

The Motion to Value filed by Tena Robinson (“Debtor”) to value the secured claim of Bosco Credit LLC (“Creditor”) is accompanied by Debtor’s declaration. Debtor is the owner of the subject real property commonly known as 5611 34th Avenue, California (“Property”). Debtor seeks to value the Property at a fair market value of \$237,000.00 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).

Debtor offers her own Declaration, stating that after personal research she determined the value of her home to be \$237,000.00.

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

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

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

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

TRUSTEE'S RESPONSE

Chapter 13 Trustee, David Cusick ("Trustee") filed a Response to the Motion on August 3, 2018. Dckt. 51. Trustee states the Property is included on Debtor's Schedule A/B with a value of \$237,000.00; Debtor has claimed an exemption of \$1.00 on Schedule C on the Property; Creditor is included in Debtor's Schedule D with a secured claim of \$153,184.89; and the Creditor is listed in Section 2C item 2 of the proposed Plan to be valued at \$0.00.

CREDITOR'S OPPOSITION

Bosco Credit LLC ("Creditor") filed an Opposition to Debtor's Motion on August 7, 2018. Dckt. 60. Creditor asserts that Debtor has improperly based her valuation on her own research. *Id.* at 2:17-21. Creditor also argues that the Senior mortgage holder entered into a loan modification with Debtor that prejudicially added to the principal of the senior lien in the amount of \$51,000.00, the amount of which should therefore be treated as junior to Creditor's Second Deed of Trust. *Id.* at 3:28-4:13. After the prejudicial amount is treated as a junior lien, there is sufficient equity in the Property such that Creditor's claim should not be wholly unsecured. *Id.* at 4:13-16.

Creditor concludes that Debtor's Motion should be denied in its entirety as the existence of equity prevents valuation or avoidance in any way. *Id.* at 5:13-15. Creditor requests in the alternative that an appraisal should be obtained to ensure an accurate valuation. *Id.* at 5:17-18. ^{FN. 1}

FN. 1. As discussed below, Creditor advances the argument that a dispute exists as to the validity, extent, and priority as between itself and the creditor who is the beneficiary under the senior deed of trust. As Creditor and its counsel are well aware, such determinations must be made through an adversary proceeding. Fed. R. Bankr. P. 7001(2). In light of Creditor asserting its rights to have a portion of the claim of the senior lien creditor subordinated to its junior lien, it is for Creditor to commence that necessary adversary proceeding (if it intends to prosecute any such asserted subordination rights). As of the court's November 3, 2018 review of this court's files, no such adversary proceeding has been commenced by Creditor to prosecute its asserted right of subordination.

DEBTOR'S REPLY TO CREDITOR'S OPPOSITION

Debtor filed a Reply to Creditor's Opposition on August 16, 2018. Dckt. 64. Debtor asserts that her Declaration is based on her personal knowledge, which she obtained from personal research. *Id.* at 1:23-26. Debtor argues further that the senior lienholder only received through modification what it was entitled to as interest payments that Debtor had not been making. *Id.* at 2:4-8. Debtor adds that the modification reduced the interest rate to 2% for the first 5 years, 3% in year 6, and 3.375% from years 7-22, whereas the original interest rate was and adjustable 5.99% to 12.99% rate. *Id.* at 2:8-12. Debtor concludes that Creditor is not in a worse position, may be in a better position because the modification prevented a foreclosure that would have left Creditor's claim largely unsecured, and therefore the Motion should be granted. *Id.* at 2:12-17.

AUGUST 21, 2018 HEARING

At the August 21, 2018 hearing, the court decided to continue the hearing to allow Creditor the opportunity to obtain an appraisal. Dckt. 66. The court made clear to Creditor that the sole purpose for continuing the hearing was to allow the introduction of evidence as to the value of the Property. The court noted during the hearing several deficiencies in Creditor's opposing arguments, and did not grant a continuance for the purpose of allowing Creditor to relitigate issues already before the court.

The court's Order stated explicitly:

IT IS ORDERED that the hearing on the Motion pursuant to 11 U.S.C. § 506(a) to value the secured claim of Bosco Credit LLC ("Creditor"), a second in priority deed of trust, is continued to 3:00 p.m. on November 6, 2018. On or before October 16, 2018, **Creditor shall file and serve its evidence of value**, and Replies, if any, filed and served on or before October 30, 2018. **No other or further supplemental pleadings are authorized in this contested matter.**

Order, Dckt. 72 (emphasis added).

**CREDITOR’S SUPPLEMENTAL OPPOSITION
AND EVIDENCE OF VALUE**

Creditor filed supplemental pleadings on September 21, 2018. Dckts. 81-83. The first is the Declaration of Appraiser Robb Roberts. Dckt. 83. Attached as Exhibit 1 to the Declaration is a 36 page appraisal report.^{FN. 2}

FN.2. Under the Local Bankruptcy Rules, a motion, opposition, each declaration, and the exhibits (which may be combined into one exhibit document) are to be filed as separate documents. L.B.R. 9004-1, 9004-2. The court is confident that future pleadings will be in compliance with these Rules.

Creditor also filed other/further supplemental pleadings, including a request for judicial notice of Proof of Claim, No. 1 (Dckt. 82) and a Supplemental Opposition. This was filed notwithstanding the court expressly ordering Creditor to file and serve its evidence of value and expressly ordering:

No other or further supplemental pleadings are authorized in this contested matter.

Order, Dckt. 72. Notwithstanding the court’s expressly order, Creditor has apparently “overruled” the court and issued its own authorization to file further supplemental pleadings.^{FN. 3}

FN. 3. Any issues and corrective action to be taken relating to the violation of this court’s order will be addressed in separate proceedings.

In large part, the Supplemental Opposition that Creditor authorized itself to file notwithstanding the court’s order merely rehashes what has already been argued in the Opposition. Some of the arguments include:

1. Creditor’s valuation should stand over Debtor’s because evidence from an expert is more weighty than that of a Debtor. Dckt. 81 at 3:1-5.
2. Debtor obtained a modification in 2012 with respect to the senior lien on the Property. *Id.* at 13.5-14.5. When the terms included in the modification are applied to the five factors used to determine if a modification is prejudicial, Specialized’s modification is prejudicial to Respondent. Even though many of the changes in the modification executed by the senior lienholder are not considered “prejudicial”, the remaining terms are. Now, the bulk of the loan is due at maturity. \$233,927.11. *Id.* at 4:20-24.
3. If the senior lienholder’s claim is subordinated due to prejudice of the modification, between \$51,000.00 and \$233,927.11 of the senior lienholder’s

claim would be subordinate to that of Respondent, thereby rendering all or part of Creditor's claim secured. *Id.* at 5:1-2.

4. Based on the foregoing, Creditor respectfully requests that the Court value the subject property at \$245,000.00. Further, Creditor respectfully requests that all or a portion of the senior lienholder's claim be determined to be subordinate to Creditor. *Id.* at 5:5-7.

As show in the rehashing of the prior arguments, Creditor prevailing will in large part (given senior lien creditor's Proof of Claim No. 1 being filed in the amount of \$241,164.68) turn on Creditor filing and successfully prosecuting an adversary proceeding subordinating a significant part of senior lien creditor's claim.

DEBTOR'S REPLY TO CREDITOR'S SUPPLEMENTAL OPPOSITION

Debtor filed a Supplemental Reply on October 30, 2018. Dckt. 90. As a part of its Reply, Debtor filed the Declaration of appraiser Wesley Clesi (Dckt. 91) and his appraisal report identified as Exhibit A. Dckt. 92. Debtor's new evidence asserts the Property had a value of \$195,000.00 as of the date of filing.

The Debtor's Supplemental Reply argues Creditor's claim, under either Debtor's personal or expert valuations, is completely unsecured. Debtor's Supplemental Reply argues further that the modification obtained in 2012 was not prejudicial to the Creditor, as the loan modification did not give the senior lienholder any more money than what was originally owed and actually provided for lower interest.

NOVEMBER 6, 2018 HEARING

At the November 6, 2018 hearing on the Motion, the court continued the hearing to November 20, 2018, so the judge presiding over the case then to-date could again hear the matter. In continuing the matter, the court issued an Order requiring the appearance of Kristin A Zilberstein, Esq. And Jennifer R. Bergh, Esq., counsel for Creditor in this Contested Matter, and Jason Borg, Esq., and each of them at the November 20, 2018 – No Telephonic Appearances Permitted. Order, Dckt. 97. The court further suspended the application of Federal Rule of Civil Procedure 41(a)(1)(A)(I). *Id.*

PROPOSED STIPULATION

On November 13, 2018, the parties filed a Stipulation proposing to resolve this Contested Matter. Dckt. 99. The Stipulation values Creditor's secured claim at \$0.00, and unsecured claim at \$153,184.89.

In agreeing to the Stipulation, the parties cite the cost of litigation, and a desire to amicably resolve the dispute.

However, the parties do not address the very significant and substantial arguments and rights (all subject to Federal Rule of Bankruptcy Procedure 9011 certifications) advanced by Creditors and how such significant and substantial rights have disappeared.

DISCUSSION

Proposed Stipulation

Creditor now seeks to resolve its Opposition to the Motion through Stipulation. The “compromise” agreed to by Creditor is that its significant and substantial rights asserted in the opposition have a value of \$0.00. As discussed above, Creditor advanced the position that it could have the court adjudicate the lien rights of the creditor holding the earlier recorded deed of trust in this Contested Matter only between Creditor and Debtor.

While the parties cite rising litigation costs and a desire to resolve the matter amicably as the impetus for Stipulation, the court notes the Creditor’s counsel was ordered by the court to appear in person at the continued hearing in part to address its choice to ignore an Order of this court disallowing further supplemental pleadings. It could appear that Creditor’s desire to stipulate to its asserted rights being worthless has less to do with the “newly appreciated lack of merits of its contentions,” and more to do with the court not blindly allowing Creditor to indirectly litigate rights of a third party.

The Stipulation by Creditor that the rights and interests it asserted are valueless does not resolve the court’s prior Order requiring the appearance of counsel at the November 20, 2018 hearing on the Motion.

Review of Motion and Prior Pleadings Filed

Opposition to Motion to Value

Creditor improperly seeks to litigate asserted subordination rights against a ghost party—HSBC Bank USA, N.A. not being a party to a motion to value the secured claim of Creditor. The court must have the real party in interest whose rights are being adjudicated before it.

To adjudicate the claim lien priority dispute between HSBC Bank USA, N.A. and Creditor (which are a core, plan confirmation and claim matters), there must be an adversary proceeding that has the real parties in interest - HSBC Bank USA N.A. and Creditor - before the court having their respective rights as creditors having interests in property of the bankruptcy estate adjudicated.

Absent such an adjudication, the record deeds of trust show HSBC Bank USA, N.A. having the senior lien claim on the property securing the two claims.

No Evidence as to Debtor’s Primary Residence

Creditor argued in its initial Opposition that Debtor cannot bifurcate a claim secured by a deed of trust in Debtor’s primary residence, and therefore Creditor’s secured claim cannot be valued if there is any equity. *See, Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 327 (1993). Creditor’s argument is well-taken.

However, as Creditor states, this proposition requires that the Property is Debtor’s primary residence. On Debtor’s Petition, she identifies her residence as 3350 Y Street, Sacramento, California (the “Y Street Property”). Dckt. 1. In its own proof of service for its Opposition, Creditor provides notice to Debtor at the

Y Street Property. Dckt. 61. Creditor has not offered any evidence (and in its supplemental pleadings has not addressed the issue) to show that the Property and not the Y Street Property is Debtor's primary residence. From the only evidence available to the court, it appears Debtor's principal residence is the Y Street Property. Therefore, Debtor is permitted under 11 U.S.C. § 506(a) to bifurcate the unsecured and unsecured portions of Creditor's claim.

Impaired Exemption Calculation

While this Motion is not for lien avoidance, Creditor still felt compelled in its initial Opposition to address the issue. Creditor concludes that the existence of any equity prevents its claims from being valued or avoided in any way. Dckt. 60 at 5:14-15. Creditor's conclusion seems to muddy valuation with avoidance of judicial liens under 11 U.S.C. § 522(f)(1). That formula requires adding all liens, the Debtor's exemptions, and the judicial lien to determine whether the judicial lien impairs the exemption ^{FN.4.} 11 U.S.C. § 522(f)(2)(A). Proof of Claim 1-1 filed by HSBC indicates a First deed of trust for \$241,164.68, and Proof of Claim 2-1 filed by Bosco Credit LLC Second deed of trust for \$153,184.89. These liens total \$394,349.57. For purposes of an impaired exemption analysis, it is unclear how Creditor is perceiving its "judicial lien" for \$79,227.45 is not wholly unsecured.

FN.4. The court notes again the Creditor does not have a judicial lien, and the avoidance analysis is entirely inapplicable to Creditor's consensual lien. The analysis provided is for the benefit of Creditor's counsel.

Conclusion

The various values asserted for the Property now include \$237,000.00 (Debtor's personal valuation), \$195,000.00 (Debtor's appraisal), and \$245,000.00 (Creditor's appraisal). HSBC Bank USA, N.A. Trustee's senior lien amounts to \$241,164.68. If the court were to average only Debtor's original valuation with Creditor's valuation, the Property would have a value of \$241,000.00. Creditor's claim is entirely unsecured in all but the most deferential valuation.

At the November 20, 2018, hearing **XXXXXXXXXXXXXX**.

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

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

The Motion to Value Collateral and Secured Claim of Bosco Credit, LLC ("Creditor") filed by Tena Robinson ("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 **XXXXXXXXXXXXXX**.

12. [18-23365-E-13](#) **TENA ROBINSON**
[JB-4](#) **Jason Borg**

**CONTINUED MOTION TO CONFIRM
PLAN
7-23-18 [44]**

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

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

Sufficient Notice Provided. The court set the matter The court set the matter for hearing November 6, 2018 at 3:00 p.m.

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

The Motion to Confirm Plan ~~is~~ granted.

Tena H. Robinson (“Debtor”) seeks confirmation of the Amended, which would be the first Confirmed Plan in this case. The Amended Plan provides for monthly payments of \$2,450.00 for a 37 month plan term, and a 0 percent dividend to unsecured creditors. Dckt. 43. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CREDITOR’S OPPOSITION

Bosco Credit, LLC (“Creditor”) holding a secured claim filed an Opposition on October 9, 2018. Dckt. 85. Creditor argues the Motion should be denied because (A) the plan impermissibly modifies Creditor’s rights as a secured creditor, (B) the plan does not provide for payments for Creditor’s secured claim and therefore is not feasible, (C) Creditor’s claim is not wholly unsecured, and (D) Debtor’s motion to value should be denied.

DEBTOR’S REPLY

Debtor filed a Reply to Creditor’s Opposition on October 18, 2018. Dckt. 87. Debtor points out in its Reply that Creditor’s grounds for opposition all depend on the Debtor’s motion to value will being denied. If that motion is granted, Creditor’s claim will be entirely unsecured.

NOVEMBER 6, 2018 HEARING

At the November 6, 2018 hearing on the Motion, the court continued the hearing to November 20, 2018, so the judge presiding over the case then to-date could again hear the matter. Dckt. 98.

PROPOSED STIPULATION

On November 13, 2018, the parties filed a Stipulation proposing to resolve the Motion to Value Collateral, which forms much of the grounds for Creditor's Opposition to this Motion. Dckt. 99. The Stipulation values Creditor's secured claim at \$0.00, and unsecured claim at \$153,184.89.

DISCUSSION

Creditor asserts as an objection possible rights it may have against the HSBC Bank USA, N.A., who holds the senior deed of trust, to subordinate part of claim secured by the senior deed of trust. In this opposition and the opposition to value Creditor's secured claim, Creditor improperly seeks to litigate asserted subordination rights against a ghost party - HSBC Bank USA, N.A. – which is not being a party to a motion to value the secured claim of Creditor. The court must have the real party in interest whose rights are being adjudicated before it.

To adjudicate the claim lien priority dispute between HSBC Bank USA, N.A. and Creditor (which are a core, plan confirmation and claim matters), there must be an adversary proceeding (Fed. R. Bankr. P. 7001(2)) that has the real parties in interest - HSBC Bank USA N.A. and Creditor - before the court having their respective rights as creditors having interests in property of the bankruptcy estate adjudicated.

Absent such an adjudication, the record deeds of trust show HSBC Bank USA, N.A. having the senior lien claim on the property securing the two claims. Creditor, having elected to not pursue such litigation and stipulating to have its secured claim valued at \$0.00, the opposition is overruled.

The proposed Chapter 13 Plan complies with the provisions of 11 U.S.C. §§ 1322 and 1325, the Motion is granted, 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 Motion to Confirm the Amended Chapter 13 Plan filed by Tena H. Robinson ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Confirm is ~~granted, and Debtor's Amended Chapter 13 Plan filed on July 19, 2018, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to David Cusick ("the Chapter 13 Trustee") for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.~~

B. The Chapter 13 Trustee is unable to determine whether the plan is in Debtor's best effort. First, Debtor may potentially earn more income that is reported on Schedule I. The average of three pay stubs provided by Debtor is \$3,800.37 or approximately \$8,381.89 gross and \$6,867.00 net per month. This leaves the net figure \$1,895.00 greater than reported on Schedule I. The Chapter 13 Trustee has requested Debtor to provide a full 6 month history of Debtor's income prior to filing.

Second, Debtor advised the Chapter 13 Trustee that Debtor's partner/significant other has obtained employment at a warehouse earning \$13.50 per hour and working 40 hours per week. This partner is listed as a dependent on Schedule J. The Chapter 13 Trustee requests Debtor amend Schedule I to include her partner's income and Schedule J to add any new expenses related to this employment.

C. Debtor has not provided the Chapter 13 Trustee with a full and complete copy of Debtor's Federal Income Tax Return with attachments for the most recent pre-petition tax year for which a return was required, the 2017 Tax Return, or a written statement of no such documents exists. Debtor has provided the Chapter 13 Trustee with Debtor's 2017 Returns but the document is missing the attachments and schedules.

DISCUSSION

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

Debtor is \$759.00 delinquent in plan payments, which represents one month of the \$759.00 plan payment. Before the hearing, another plan payment will be due. According to the Chapter 13 Trustee, the Plan in § 2.01 calls for payments to be received by the Chapter 13 Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Additionally, Debtor has paid \$0.00 into the plan as of this date. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

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

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

Trustee determined the average of Debtor's pay stubs provided totaled \$3,880.37, or approximately \$8,381.89 monthly gross and \$6,867.00 net per month. This figure is \$1,895.00 greater than reported on Schedule I. Without an accurate picture of Debtor's financial situation, the plan cannot be confirmed.

Furthermore, while Debtor lists his partner/significant other as a dependent on Schedule J, Trustee asserts that partner/significant other recently found employment at a warehouse, earning \$13.50 per hour and working 40 hours per week. Debtor has not explained why he is supporting his partner/significant who has a separate income, or why the partner/significant is not contributing income towards the plan.

Finally, Debtor did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. *See* 11 U.S.C. § 521(e)(2)(A)(I); FED. R. BANKR. P. 4002(b)(3). Debtor has failed to provide the tax transcript. Debtor has provided a document, however the Return provided to the Chapter 13 Trustee is missing the attachments and schedules. That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

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

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

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

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

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

14. [18-23379-E-13](#)
[AP-1](#)

WILLIAM BATTILANA, II
Gerald White

CONTINUED OBJECTION TO
CONFIRMATION OF PLAN BY PHH
MORTGAGE CORPORATION
9-19-18 [79]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, Office of the United States Trustee on September 19, 2018. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is overruled.

PHH Mortgage Corporation ("Creditor") holding a secured claim opposes confirmation of the Plan on the basis that:

- A. Debtor's plan improperly seeks to modify Creditor's rights by listing its claim as a Class 4 and denying it ongoing post-petition payments, as well as payment of arrears.
- B. Debtor's plan does not provide for the full amount of Creditor's claim.
- C. Debtor's plan does not promptly cure Creditor's arrears.

- D. Debtor's plan is not feasible because it relies on improper modifications.
- E. Debtor's plan fails to provide for ongoing post-petition payments.

DEBTOR'S OPPOSITION

Debtor filed a Response to Creditor's Objection on October 9, 2018. Dckt. 91. Debtor argues that Creditor's claim is provided for in full under the plan, that a Motion to Sell has already been filed, and that Creditor will suffer no harm through the delay in payments herein.

OCTOBER 23, 2018 HEARING

At the October 23, 2018, hearing, the court continued the hearing on the Motion in part to allow Debtor's pending Motion to Sell to be heard. Dckt. 109.

MOTIONS TO EMPLOY AND SELL

On October 9, 2018, Debtor filed a Motion to Sell (Dckt. 86); on October 30, 2018 Debtor filed a Motion to Employ broker. Dckt. 110. Both of those Motions were granted on November 7, 2018. Dckts. 121, 123.

DISCUSSION

Since the last hearing, Debtor has received authorization to sell his property for \$360,000. The claim of PHH Mortgage will be paid in full from the sale proceeds.

The Creditor here objects to a plan which proposes to pay Creditor's claim in full within six months through the sale of Debtor's real property. Debtor has already secured a buyer for the sale and obtained court approval to go forward with the sale. Adequate protection for Creditor's claim clearly exists from the significant equity cushion in the property (the property selling for \$360,000.00, Creditor's claim totaling \$187,063.00, and Debtor having claimed an exemption of \$100,000.00). *See* Dckt. 123; Amended Schedule C, Dckt. 46; and Proof of Claim, No. 11.

The Plan complies with 11 U.S.C. §§ 1322 and 1325(a). The Objection is overruled, 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 PHH Mortgage Corporation ("Creditor") holding a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection is overruled, and William Rudolph Battilana, II's ("Debtor") Chapter 13 Plan filed on August 17, 2018, is confirmed. Counsel for Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

15. [18-23379-E-13](#) **WILLIAM BATTILANA, II** **CONTINUED OBJECTION TO**
[DPC-1](#) **Gerald White** **CONFIRMATION OF PLAN BY DAVID**
P. CUSICK
9-19-18 [75]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and Counsel for the Chapter 7 Trustee on September 19, 2018. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is overruled.

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

- A. Debtor's plan fails to provide adequate protection and payments to PHH Mortgage Services in Class 1. Debtor has not listed mortgage, property tax, or insurance expenses on Schedule J. Debtor's plan proposes to sell the real property at 1 Glenville Circle, Sacramento, California within 6 months of confirmation.
- B. The plan provides for payment of compensation to the former Chapter 7 Trustee. The former Chapter 7 Trustee filed Proof of Claim, No. 7.
- C. The plan provides for payment of compensation to the former Chapter 7 Trustee's counsel. The former Chapter 7 Trustee's counsel filed Proof of Claim, No. 8.
- D. Debtor has not specified the minimum dollar amount creditors with unsecured claims will receive and the proposed sale of real property has not set a minimum sale price. The proposed plan provides for a 10 percent dividend, which Trustee estimates will amount to \$25,484.40. Trustee estimates that Debtor's non-exempt equity in this case may be as high as \$124,274 (including Debtor's property, money held by Debtor's ex-wife and her attorney's trust account, and various personal property).
- E. The proposed plan identifies money held by Debtor's ex-wife and her attorney's trust account as sources of plan funds, but does not explain the means of obtaining those funds (whether by litigation or other method).

DEBTOR'S OPPOSITION

Debtor filed an Opposition to Trustee's Objection on October 9, 2018. Dckt. 93. Debtor explains the claim of PHH Mortgage Services will be provided for in full after the sale of real property, Debtor currently having an offer totaling \$360,000.00 (which exceeds the claim of \$181,898.92). Debtor states further that the Trustee correctly notes the proposed plan provides for claims of the former Chapter 7 Trustee and her counsel.

Regarding Trustee's concern over the liquidation analysis, Debtor responds that the plan proposes to pay all non-exempt equity from the sale of Debtor's property into the plan (approximately \$53,000.00) and the Bankruptcy Code does not require Debtor to list a specific dollar amount for unsecured claim holders. Debtor states finally that he is unsure of how to recover money held by Debtor's ex-wife and her attorney's trust account, as he cannot afford to incur litigation costs.

OCTOBER 23, 2018 HEARING

At the October 23, 2018, hearing, the court continued the hearing on the Motion in part to allow Debtor's pending Motion to Sell to be heard. Dckt. 109.

MOTIONS TO EMPLOY AND SELL

On October 9, 2018, Debtor filed a Motion to Sell (Dckt. 86); on October 30, 2018 Debtor filed a Motion to Employ broker. Dckt. 110. Both of those Motions were granted on November 7, 2018. Dckts. 121, 123.

DISCUSSION

Since the last hearing, Debtor has received authorization to sell his property for \$360,000. The claim of PHH Mortgage will be paid in full from the sale proceeds. Furthermore, nonexempt proceeds of the sale will be put towards the plan. This resolves the Trustee's Objection.

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

IT IS ORDERED that the Objection is overruled, and William Rudolph Battilana, II's ("Debtor") Chapter 13 Plan filed on August 17, 2018, is confirmed. Counsel for Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

16. [18-23379-E-13](#)
[DPC-2](#)

WILLIAM BATTILANA, II
Gerald White

**OBJECTION TO DEBTOR'S CLAIM OF
EXEMPTIONS**
10-11-18 [95]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on October 11, 2018. By the court's calculation, 40 days' notice was provided. 28 days' notice is required.

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

The Objection to Claimed Exemptions is overruled.

David Cusick ("the Chapter 13 Trustee") objects to William Rudolph Battilana, II's ("Debtor") claimed exemptions under California law because they exceed the allowed amount. On Schedule C, Debtor claims a real property exemption of \$100,000 under California Civil Procedure Code section 704.730(a)(2). On Form 122C-1 line 16b, Debtor reports a 2 person household, but on Schedule J Debtor lists a minor child aged 4 and indicates that child does not live with Debtor. Trustee is uncertain whether Debtor is entitled to the claim of the family exemption.

DEBTOR'S OPPOSITION

Debtor filed a Response to Trustee's Objection on November 5, 2018. Dckt. 116. Additionally, Debtor filed his Declaration to support the Response. Dckt. 117. In his Declaration, Debtor declares under penalty of perjury the following:

1. Debtor has one minor child, aged 4.

2. Debtor has visitation of his child for more than 100 days per year. Every day this year Debtor had visitation, Debtor's child stayed with Debtor at his residence.

3. Debtor holds a room for his child at his residence.

4. In addition to normal visitation, Debtor is permitted to "FaceTime" as a means of regularly communicating with his child.

5. Debtor currently pays \$429.00 monthly to support his child, and believes he may receive greater visitation in the future.

Debtor argues that he meets the requirements of the exemption because he cares for and maintains his daughter at his residence, the law not requiring that Debtor's residence be the child's principal residence. Dckt. 116 at ¶13.

APPLICABLE LAW

The California Civil Procedure Code provides the following homestead exemptions:

(a) The amount of the homestead exemption is one of the following:

(1) Seventy-five thousand dollars (\$75,000) unless the judgment debtor or spouse of the judgment debtor who resides in the homestead is a person described in paragraph (2) or (3).

(2) One hundred thousand dollars (\$100,000) if the judgment debtor or spouse of the judgment debtor who resides in the homestead is at the time of the attempted sale of the homestead a member of a family unit, and there is at least one member of the family unit who owns no interest in the homestead or whose only interest in the homestead is a community property interest with the judgment debtor . . .

Cal. Civ. Proc. Code § 704.730. As to what constitutes a "family unit," the code further provides:

(b) "Family unit" means any of the following:

(1) The judgment debtor and the judgment debtor's spouse if the spouses reside together in the homestead.

(2) The judgment debtor and at least one of the following persons who the judgment debtor cares for or maintains in the homestead:

(A) The minor child or minor grandchild of the judgment debtor or the judgment debtor's spouse or the minor child or grandchild of a deceased spouse or former spouse.

(B) The minor brother or sister of the judgment debtor or judgment debtor's spouse or the minor child of a deceased brother or sister of either spouse.

(C) The father, mother, grandfather, or grandmother of the judgment debtor or the judgment debtor's spouse or the father, mother, grandfather, or grandmother of a deceased spouse.

(D) An unmarried relative described in this paragraph who has attained the age of majority and is unable to take care of or support himself or herself.

Cal. Civ. Proc. Code § 704.710.

After the California Civil Code was amended, a prior residency standard requiring that the minor child primarily reside at the residence where the homestead exemption was claimed was left out while the general requirement for “care and maintenance” of the minor child remained. maintenance *In re Pugh*, 522 B.R. 277, 280 (Bankr. S.D. Cal. 2014).

DISCUSSION

Here, the Debtor cares for and maintains his 4 year old daughter for approximately 100 days at his residence. Dckt. 117. Debtor anticipates receiving more custody in the future. *Id.*

Debtor has met the requirement of California Civil Procedure Code section 704.730(a)(2) requiring “care and maintenance” of a minor child. The Chapter 13 Trustee’s Objection is overruled.

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

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

The Objection to Claimed Exemptions 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 is overruled.

17. [17-27692-E-13](#)
[PLC-5](#)

ELIZABETH MANZO
Peter Cianchetta

MOTION TO CONFIRM PLAN
9-25-18 [97]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on September 25, 2018. By the court's calculation, 56 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is denied.

Elizabeth Lopez Manzo ("Debtor") seeks confirmation of the Amended Plan. Debtor's Declaration states Debtor "filed a Chapter 13 case and proposed my Amended Chapter 13 Plan to deal with unexpected changes in my finances, and overwhelming unsecured debts." Dckt. 99 at ¶ 3. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on November 6, 2018. Dckt. 114. Trustee Opposes confirmation on the grounds that the Motion fails to state with particularity the grounds upon which relief may be granted. Trustee further argues that the proposed Amended Plan calls for a lump sum payment, which is not described with enough specificity for Trustee to assess its feasibility.

DISCUSSION

The Trustee's Opposition concerning the requirements of Federal Rule of Bankruptcy Procedure 9013 presents the court with the intersection of the Rule and the practicalities of pleading for a consumer attorney. For motions to confirm, the court has been more lenient (at least in the court's view) in this pleading requirement, looking for the attorneys to just state the various grounds for confirmation.

Here, the Motion appears to allege most of the grounds provided in 11 U.S.C. § 1325 for confirmation of a plan. Missing is any provision relating to the treatment of secured claims. The Motion does allege that all creditors will be paid 100% "as agreed upon." This last phrase may mean the creditors will be paid in accordance with their pre-petition contracts (agreements) or that there are post-petition "agreements" with each of the creditors.

From reviewing the Plan, it appears that neither of the two is accurate. The proposed Amended Plan does not provide for paying creditors pursuant to their pre-petition contracts, but to modify the terms for the Class 2 and Class 7 claims.

The Trustee is correct that the Motion does not comply with the "normal" application of Rule 9013. But the court does give debtor's counsel more leeway on motions to confirm. Even then, the motion is coming up short, ignoring the "grounds" for the secured claims.

This case further becomes an exception to the Rule given the very small amount of unsecured claims and there being only one Class 2 claim to be paid through the Plan.

Plan Feasibility

Debtor's proposed plan provides no details about the proposed sale of property which is being used to support the plan's proposed lump sum. Amended Plan, Dckt. 100. The Additional Provision for the sale states:

Section 6 - Additional Provisions

Lump sum payment upon the sale of real property listed for sale by owner.

Any Class 1 or Class 4 creditor is authorized and directed to provide customary monthly billing statements, annual accountings, escrow analysis statements under RESPA and tax reporting forms, as is applicable, directly to the debtor at the debtor's normal mailing address.

Additional Provisions Section 2.06 Debtor's Attorney Fees. All Debtor's Attorney fees shall be paid prior to payments to unsecured creditors.

Plan, p. 8; Dckt. 100. The court and interested parties are left to guess what value is sought to be put towards the plan from any potential sale, along with all other details of a possible transaction.

A review of the docket shows that Debtor's Motion to Sell (Dckt. 83) was denied on August 1, 2018. Order, Dckt. 92. In denying the Motion, the court found that Debtor failed to provide any evidence

establishing that the sale price was the property’s fair market value. Dckt. 90. The Court’s findings closed with the following:

“While the court does not have an amended plan before it, Debtor’s "creativity" in what has been stated on the Schedules, the inability to perform a plan by making monthly payments (as shown on Schedules I and J), and Debtor owning real properties with substantial non-exempt equity, her credibility in pursuing the current motion is in question.

It appears that Debtor and Debtor’s counsel need to circle back, determine how Debtor can prosecute a Chapter 13 case in good faith, how to document that proposed sales of properties are in good faith and for fair value, and what Debtor needs to amend to provide accurate statements under penalty of perjury.

Id., p. 4.

A review of the file discloses that Debtor (who is exercising the power of a trustee to sell the property) has not obtained authorization to employ (and pay) a real estate broker for the sale of property of the bankruptcy estate.

Here, Debtor proposes a plan that provides for sometime in the sixty months for Debtor to sell some unidentified property and from that pay creditors. Further, that the Debtor (fulfilling her fiduciary duties first as the Chapter 13 Debtor and then as the plan administrator) does not intend to hire a real estate professional to market the property to obtain its fair market value, but instead intends to have the property(ies) “listed by owner.”

Taken at face value as stated by the Debtor, the bankruptcy estate in this case includes the following real properties:

Property	Value on Schedule A/B (Dckt. 74)	Liens on Schedule D (Dckt. 9) or Proof of Claim Filed
Willow Vale Way	\$275,000	(\$27,000) (Abstract of Jdgt on all properties)
Grant Line Road	\$140,000	
Lord Street	\$25,000	
Center Street	\$100,000	(\$85,000) (Tantum)
E. Heintz Ave	\$5,000	
Elefa Ave	\$45,000	
F Street	\$85,000	

Though the Debtor has significant real property assets, there is no schedule for the sale of such assets to pay creditors.

Debtor's proposed plan relies on lump sums that have not been demonstrated to be feasible. 11 U.S.C. § 1325(a)(6). This is independent cause to deny the Motion.

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

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

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

The Motion to Confirm the Amended Chapter 13 Plan filed by Elizabeth Lopez Manzo ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

18. [18-25397-E-13](#) **MYEVA/FREDERICK THIERRY** **OBJECTION TO CONFIRMATION OF**
[DPC-1](#) **Paul Bains** **PLAN BY DAVID P. CUSICK**
10-17-18 [19]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor's Attorney, parties requesting special notice, and Office of the United States Trustee on October 17, 2018. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

- A. Debtor cannot make the \$1,165.00 plan payment. Debtor admitted at the 341 Meeting of Creditors to having adjusted Debtor's withholding to reduce the possibilities of owing taxes for 2018. Debtor's budget will not support the plan payment with this adjustment. Schedule I lists a deduction of \$492.33 for Mrs. Thierry and \$390.98 for Mr. Thierry; both advices already show \$0.00 withholdings for state and Federal taxes

- B. Debtor's plan may not be proposed in good faith or comply with applicable law. Debtor lists two vehicles as Class 4 within the proposed plan despite admitting they will be paid in full during the life of the plan. Chrysler Capital's claim, securing the 2015 Dodge Journey will be paid in full in approximately 2 years. TD Ameritrade's claim, securing the 2015 Mazda 5, will be paid in full in approximately 3 years.
- C. Debtor fails to identify Eva Freeman, one of the debtor's mother, as a co-debtor for the 2015 Dodge Journey on Schedule H. On Schedule A/B, Debtor indicates the mother is a co-signor on the 2015 Dodge Journey. The payment for that vehicle is also listed in the mother's bankruptcy case within the Central District of California, Case Number 16-26612.

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

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor's disposable income reflected in their Schedules is \$1,167.26, which is only \$2.26 more than their scheduled plan payment. The court interprets the Trustee's argument to be that Debtor's have reduced their withholding, which will increase tax liability to an amount that Debtor cannot make given that nearly all disposable income is put towards the plan. Therefore, the plan is not feasible. 11 U.S.C. § 1325(a)(6).

Trustee also argues that Debtor incorrectly provides for the claims secured by Debtor's two vehicles, and fails to list a co-debtor on one of the vehicles for which that co-debtor lists the vehicle on her own bankruptcy petition filed in another district. Debtor's failure to provide for claims correctly affects the feasibility of the plan. 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 David Cusick ("the Chapter 13 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

19. [18-27039-E-13](#) NADIA KOSTYUK
Julia Young

MOTION TO SET ASIDE TRUSTEE
SALE, MOTION TO IMPOSE
AUTOMATIC STAY O.S.T.
11-14-18 [11]

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

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

Local Rule 9014-1(f)(3) Motion—Hearing Required.

Sufficient Notice Provided. The court set the hearing for November 20, 2018. Dckt. 16.

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

The Motion To Set Aside Trustee Sale & Motion To Impose Automatic Stay is granted in part.

On November 8, 2018, Nadia Kostyuk, the Chapter 13 Debtor (“Debtor”), commenced this bankruptcy case. Ms. Kostyuk has filed two recent prior bankruptcy cases, which are:

Chapter 13 Case 18-26000 Represented by Counsel	Filed: September 23, 2018 Dismissed: October 12, 2018
Chapter 13 Case 18-25398 In <i>Pro Se</i>	Filed: August 28, 2018 Dismissed: September 17, 2018

In case 18-26000 Debtor was represented by the same counsel as in the present bankruptcy case.

MOTION TO SHORTEN TIME

On November 14, 2018, the Debtor filed a Motion to Shorten Time for hearing on Debtor's Motion for the substantive relief discussed below. Dckt. 10. Debtor requests the court conduct a hearing on November 20, 2018, because Debtor is seeking to have the court impose the automatic stay in this case pursuant to 11 U.S.C. §362(c)(4)(B). There are stated to be a number of "threatened" state court actions relating to a non-judicial foreclosure sale which occurred on November 9, 2018, one day after the current bankruptcy case was filed.

The court issued an Order granting the Motion To Shorten Time on November 15, 2018. Order, Dckt. 16.

MOTION TO SET ASIDE TRUSTEE SALE & MOTION TO IMPOSE AUTOMATIC STAY

On November 14, 2018, Debtor filed a multifaceted pleading titled "Notice of Motion and Motion to Set Aside Trustee Sale; Motion by Debtor for an Order Obtaining and Imposing the Automatic Stay Pursuant to 11 U.S.C. § 362(c)(4)(B), Memorandum of Points and Authorities, Declaration of Julia M. Young, Declaration of Nadia Kostyuk, and Declaration of Alex Kostyuk." Dckt. 11. This pleading is actually just the Notice of Motion, Motion, and Points and Authorities, with the Declarations (properly) filed as separate documents. The combined Notice/Motion/Points and Authorities is eight pages in length.

Local Bankruptcy Rule 9004-1(c)(1) requires that the motion, notice of motion, points and authorities, each declaration, and the exhibits (which may be combined into one exhibit document) be filed as separate documents. Because the motion and points and authorities are combined ten pages or less, they may be filed as one combined pleading. L.B.R. 9014-1(d) 3) C). The only improper pleading practice is the combining of the notice with the motion/authorities. The court waives that defect for this contested matter.

Absence of Docket Control Number

Debtor has not assigned a Docket Control Number to the Motion. The use of Docket Control Numbers is required under the Local Bankruptcy Rules. L.B.R. 9014-1(c). The use of Docket Control Numbers is necessary for the court to properly organize the numerous pleadings filed in a bankruptcy case for the numerous contested matters that are filed. Though the court waives this defect for this Contested Matter, failure to comply with this and other pleading requires may result in the imposition of corrective sanctions. L.B.R. 9014-1(l).

Failure to State Grounds With Particularity in Motion

Consistent with what is required in Federal Rule of Civil Procedure 7(b), for all contested matters in bankruptcy court the motion must state with particularity the grounds and the relief requested. Fed. R. Bankr. P. 9013. The grounds cannot be sprinkled in the points and authorities, declarations, exhibits, and "all other documents filed in the case" for the court to assemble. The Movant lives or dies based upon the grounds stated with particularity in the Motion.

The present Motion portion of the combined motion and points and authorities, states the following grounds and relief requested:

- A. Debtor will request the court to set aside the Trustee’s sale that occurred on November 9, 2018. Motion, p. 2:1-3; Dckt. 11.
- B. The sale occurred notwithstanding counsel for Debtor advising the junior lien holder on the property that was the subject of the sale that a bankruptcy petition had been filed (no date of filing stated in the Motion) and requested that the foreclosure sale be postponed. *Id.*, p. 2:4-8.
- C. Debtor requests the court impose and extend the automatic stay to enjoin lender (unidentified person) from conducting another sale. *Id.*, p. 2:8-9.
- D. The Motion is based on the points and authorities and the Declaration. *Id.*, p. 2:11.5-13.

If the court were to stop here, based on the grounds stated with particularity in the Motion, there would be no relief to grant. It is not for the court to provide legal services to a party and assemble whatever the court thinks would be the “winning grounds” for the motion from the arguments, authorities, and evidence dumped on the court.

As with the other waivers, in light of the issues raised, the court will mine the points and authorities to determine what “grounds” are stated with “particularity” therein and assume that the Debtor would have stated such grounds in the Motion.

Improper Combining of Relief

The Motion seeks to have the court enter two different types of relief: (1) set aside a trustee’s sale and (2) impose the automatic stay. For contested matter practice, the combining of such different types of relief in one motion is not permitted. The Supreme Court, in adopting Federal Rule of Bankruptcy Procedure 9014(c) specifically excluded the provisions of Federal Rule of Civil Procedure 18 and Federal Rule of Bankruptcy Procedure 7018 from contested matters. Multiple claims for different types of relief cannot be combined into one motion.

As addressed below, the court anticipates proceeding with the request to impose the stay, with the request for relief setting aside a foreclosure sale being a separate adversary proceeding or contested matter.

Review of Substance of The Motion

The Motion requests several different types of relief. First, the Motion requests the court impose an automatic stay pursuant to 11 U.S.C. § 362(c)(4)(B) in this case. No stay went into effect due to the Debtor having two prior bankruptcy cases that were pending and dismissed within one year of the commencement of this current case. 11 U.S.C. § 362(c)(4)(A).

The Points and Authorities portion of the pleadings begins with a page and one-half narrative of the history of the dealings. These alleged “facts” are summarized as follows:

- A. On August 28, 2018, Debtor filed a skeletal bankruptcy petition on the advice of another Law Group in Los Angeles. Debtor and her husband were working with that Law Group to try and negotiate a payoff of the obligation secured by the second mortgage on the property.
- B. The Law Group prepared the skeletal petition for the Debtor. It is further alleged that the Law Group had agreed to substitute in, but failed to do so and the August 2018 bankruptcy case dismissed.
- C. Then on September 23, 2018, Debtor with the assistance of her current counsel commenced her second Chapter 13 case. However, that case was dismissed for failure to file a plan. It is asserted that the plan was prepared, but due to a problem with counsel’s account it was not received by the court.
- D. On November 8 the current (third) bankruptcy petition was filed and counsel for the Debtor contacted counsel for the loan servicer for the creditor (generally referenced as the “Creditor”) conducting the foreclosure sale.
- E. When counsel for the Debtor advised counsel for the Creditor of the reason for the filing of the third petition and requested that the pending foreclosure sale be postpone, it is asserted that counsel for Creditors states “‘those are your issues not mine’ and he was going forward with the sale.”
- F. It is further alleged that counsel for the creditor made an unseemly reference to the Debtor and her husband and contended that Debtor had not made any payments on the obligation.
- G. The foreclosure sale occurred on November 9, 2018, and the creditor was the purchaser at the sale.

Motion, p. 3-4; Dckt. 11.

The Points and Authorities then continues with a discussion of the automatic stay. The Debtor asserts that the automatic stay goes into effect when a case is filed. *Id.*, p.4:21-26. The Points and Authorities note an exception to the automatic stay “automatically” going into effect when the debtor has had pending and dismissed two bankruptcy cases in the one-year period preceding the filing of the then current case. *Id.*, p. 5:1-3. For this exception to the automatic stay, there is a presumption on the filing of the third bankruptcy case, which may be rebutted by clear and convincing evidence. *Id.*, 5:3-8.

The Points and Authorities then alleges facts concerning the filing of the prior two cases. It discusses the failure of the Los Angeles Law Group to substitute in the first case. It discusses what is alleged to be a technical error that caused the Chapter13 plan not to be filed in the second case, which resulted in the

dismissal of that case. This portion of the motion appears to assert that the technical error existed at the court and not at counsel's office.^{FN.1.}

FN.1. No relief was requested in the second bankruptcy case from the dismissal pursuant to Fed. R. Civ. P. 60(b) and Fed. R. Bankr. P. 9024. One month passed between the dismissal of the second case and the filing of the current third bankruptcy case.

The Points and Authorities then recounts the filing of the current third Chapter 13 bankruptcy petition. It is alleged that Debtor's counsel communicated with "Barbara" at Nationwide Posting on November 8, 2018, providing notice of the third bankruptcy filing and was told by Barbara the sale was on hold "until" Nationwide received direction from creditor. *Id.*, p. 5:21-16.

On November 9, 2018, the foreclosure sale was still scheduled. Debtor's counsel then contacted the loan servicers again. The loan servicer would not give counsel direct contact information for the creditor. Counsel for Debtor then called, emailed, and faxed a letter to creditor informing it of the third bankruptcy petition. *Id.*, p. 6:1-5. When Counsel for Debtor communicated with a principal for creditor, she was told that the foreclosure was proceeding.

Though Debtor's counsel told creditor that she would get the sale set aside, the creditor proceeded with the sale.

Extension of Stay

Debtor then discusses the provision of 11 U.S.C. Section 362(c)(4)(A),^{FN.2} stating that it limits the automatic stay to thirty days after the filing of the later bankruptcy case when there are two or more that were pending and dismissed in the one-year period prior to the commencement of the case at issue. Further, that the Bankruptcy Code allows for an extension of the automatic stay upon a motion within thirty days of the commencement of the bankruptcy case at issue.^{FN.3.}

FN.2. 11 U.S.C. § 362(c)(4)(A) provides:

(4) (A) (I) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case; and

(ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect;

FN.3. 11 U.S.C. § 362(c)(4)(B) and (C) provide:

(B) if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

(C) a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect;

It is alleged that cause exists to impose the automatic stay in this case. It is asserted that Debtor is seeking relief under the Bankruptcy Code so she can pay off the obligation secured by the second mortgage and retain her home. It is asserted that Debtor is current on the obligation secured by the first mortgage and has other limited debt.

It is requested that the court impose the automatic stay and extend it until the Chapter 13 Plan is confirmed.

Setting Aside the Foreclosure

The Points and Authorities make no reference to setting aside the foreclosure sale, the basis for such relief, or request such relief.

Review of Declarations

The First Declaration filed is that of Debtor's Counsel, Julia M. Young. Dckt. 12. Counsel discusses her communications with the Law Group in Los Angeles and the need for Debtor and her husband to file bankruptcy. Counsel for Debtor successfully electronically filed the Debtor's bankruptcy petition and schedules^{FN.4.} for the second bankruptcy case. The Plan was not included because Counsel was still working on it.

FN.4. In looking at Schedule I, Debtor fails to disclose the income of her husband, the non-filing spouse, which is required, completing the fields "NA," which the court interprets as Debtor concluding that the information is "not applicable" in her bankruptcy case. Dckt. 1 at 22. On the Statement of Financial Affairs Debtor confirms that she is married. Stmt of Fin. Affs. Question 1., *Id.* at 27.

Counsel then testifies that she electronically filed the Plan on October 9, 2018 (the last date it was due), but noticed that she did not receive an email confirmation of filing. Counsel testifies that she emailed the plan to several other persons and on October 10, 2018 spoke with the Chapter 13 Trustee about it.

Counsel states that she was receiving email notifications from the Northern District and Eastern District Courts, but did not receive any notifications from the Eastern District Bankruptcy Court. On

October 23, 2018, Counsel received notification of the second bankruptcy case being dismissed, and she contacted the Chapter 13 Trustee.

Counsel states that she then contacted the Bankruptcy Court, and was advised that the automatic email messages were not going out for her email address, but that the problem had been fixed.

Counsel then recounts her communications with creditor and the rejection of her request for a continuance of the foreclosure sale.

The Second Declaration filed is that of Alex Kostyuk, Debtor's husband. Dckt. 14. He testifies that on January 26, 2018, he and the Debtor signed a promissory note which is secured by a deed of trust.^{FN.5.} The testimony then recounts the history of the obligation and payments being applied to interest. Mr. Kostyuk then recounts his dealing with Olympia Law Group (the Los Angeles Law Group) and the filing of a *pro se* bankruptcy case for his wife, the current Debtor. He concludes that "we" intend to pay the obligation secured by the second deed of trust through a Chapter 13 plan.

FN.5. On Schedule H Debtor states that there are no co-obligors on any debt. Dckt. 1 at 21. This is inconsistent with Debtor's husband's testimony.

The Third Declaration is that of the Debtor. She confirms that both she and her husband executed the note secured by the second mortgage. She recounts her husband's efforts to negotiate a settlement with the assistance of the Olympia Law Group. Finally, Debtor confirms that it is her intention to pay the obligation secured by the second mortgage through a Chapter 13 Plan.

APPLICABLE LAW

When stay has not gone into effect pursuant to 11 U.S.C. § 362(c)(4), a party in interest may request within 30 days of filing that the stay take effect as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed. 11 U.S.C. § 362(c)(4)(B).

For purposes of subparagraph (B), a case is presumptively filed not in good faith as to all creditors if:

(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;

(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney), failed to provide

adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7, with a discharge, and if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; . . .

11 U.S.C. § 362(c)(4)(D).

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); *see also* Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209–10 (2008). An important indicator of good faith is a realistic prospect of success in the second case, contrary to the failure of the first case. *See, e.g., In re Jackola*, No. 11-01278, 2011 Bankr. LEXIS 2443, at *6 (Bankr. D. Haw. June 22, 2011) (citing *In re Elliott-Cook*, 357 B.R. 811, 815–16 (Bankr. N.D. Cal. 2006)). Courts consider many factors—including those used to determine good faith under §§ 1307(c) and 1325(a)—but the two basic issues to determine good faith under § 362(c)(3) are:

- A. Why was the previous plan filed?
- B. What has changed so that the present plan is likely to succeed?

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

DISCUSSION

Imposition of Automatic Stay

Debtor stated with particularity in the Motion and provided supporting evidence explaining the prior case was dismissed due to inadvertent error, the proposed Chapter 13 plan having been “filed” but not received by the court. Debtor has sufficiently rebutted the presumption of bad faith under the facts of this case and the prior cases for the court to impose the automatic stay.

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

Motion to Set Aside Trustee’s Sale

As discussed, *supra*, the Motion, Points and Authorities, and other supporting pleadings make no reference to any basis for setting aside the foreclosure sale. Debtor has not stated grounds for this relief, and therefore the request to set aside the trustee’s sale is denied without prejudice.

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

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

The Motion to Impose the Automatic Stay filed by Nadia Kostyuk (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted, and the automatic stay is imposed pursuant to 11 U.S.C. § 362(c)(4)(B) for all purposes and parties, unless terminated by operation of law or further order of this court.

IT IS FURTHER ORDERED that the request to set aside the Trustee’s sale is denied without prejudice.

No other further relief is granted.

20. [18-26824-E-13](#) **LEE WUERZBURGER**
[SLH-1](#) **Seth Hanson**

**MOTION TO EXTEND AUTOMATIC
STAY
O.S.T.
11-8-18 [12]**

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

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

Local Rule 9014-1(f)(3) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on November 8, 2018. By the court’s calculation, 12 days’ notice was provided. The court set the hearing for November 20, 2018. Dckt. 17.

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

-----.

The Motion to Extend the Automatic Stay is granted.

Lee Emerson Wuerzburger (“Debtor”) seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(a) extended beyond thirty days in this case. This is Debtor’s second bankruptcy petition pending in the past year. Debtor’s prior bankruptcy case (No. 18-23937) was dismissed on September 28, 2018, because Debtor was not making payments timely and had not filed tax returns for the four year period prior to filing. *See* Order, Bankr. E.D. Cal. No. 18-23937, Dckt. 35, September 28, 2018; *See Also* Motion To Dismiss, Bankr. E.D. Cal. No. 18-23937, Dckt. 15. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to Debtor thirty days after filing of the petition.

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed because Debtor had a stroke, stopping his work, forcing the sale of his business, and causing

arrears to pile up. Dckt. 14. Debtor also notes that the Motion to Dismiss the prior case was based on failure to file tax returns for the four year period prior to filing.

Debtor argues the present case is filed in good faith and the plan will succeed because Debtor has now filed the necessary tax returns. *Id.*

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). As this court has noted in other cases, Congress expressly provides in 11 U.S.C. § 362(c)(3)(A) that the automatic stay **terminates as to Debtor**, and nothing more. In 11 U.S.C. § 362(c)(4), Congress expressly provides that the automatic stay **never goes into effect in the bankruptcy case** when the conditions of that section are met. Congress clearly knows the difference between a debtor, the bankruptcy estate (for which there are separate express provisions under 11 U.S.C. § 362(a) to protect property of the bankruptcy estate) and the bankruptcy case. While terminated as to Debtor, the plain language of 11 U.S.C. § 362(c)(3) is limited to the automatic stay as to only Debtor. The subsequently filed case is presumed to be filed in bad faith if one or more of Debtor's cases was pending within the year preceding filing of the instant case. *Id.* § 362(c)(3)(C)(i)(I). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* § 362(c)(3)(C).

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); *see also* Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209–10 (2008). An important indicator of good faith is a realistic prospect of success in the second case, contrary to the failure of the first case. *See, e.g., In re Jackola*, No. 11-01278, 2011 Bankr. LEXIS 2443, at *6 (Bankr. D. Haw. June 22, 2011) (citing *In re Elliott-Cook*, 357 B.R. 811, 815–16 (Bankr. N.D. Cal. 2006)). Courts consider many factors—including those used to determine good faith under §§ 1307(c) and 1325(a)—but the two basic issues to determine good faith under § 362(c)(3) are:

- A. Why was the previous plan filed?
- B. What has changed so that the present plan is likely to succeed?

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

Debtor has sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay. Debtor fell behind in plan payments after suffering a stroke. Furthermore, Debtor has now filed the necessary tax returns which also formed grounds for dismissal of the prior case.

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

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

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

The Motion to Extend the Automatic Stay filed by Lee Emerson Wuerzburger (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

Review of Objection

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

- A. The IRS filed Claim 3 on October 3, 2018 indicating Debtor failed to file tax returns during the 4-year period preceding the filing of the Petition, including the 2015, 2016, and 2017 years.
- B. The IRS’ Claim 3 indicates Debtor has a \$79,169.41 secured tax lien, which may hinder Debtor’s ability to make plan payments. Debtor has not provided for this claim inside or outside the plan.
- C. Debtor’s plan relies on a \$225,000.00 lump sum payment by the 12th month of the plan or August 25, 2019. Upon examination at the 341 Meeting of the Creditors, Debtor cannot identify the source of funds for the payment.
- D. Debtor may have additional assets undisclosed on Debtor’s Schedules. Debtor’s non-filing spouse may have an interest in various properties in Thailand, including a rubber tree plantation, a bar/pub in Thailand, and a second residence in Thailand at 39176 Bohemian #1, Thailand.
- E. Trustee objects to the allowance of attorney fees under the “no look” procedure of LBR 2016-1(a). Debtor’s plan fails to indicate in Section 3.05 whether Debtor proposes to pay fees in accordance with Local Bankruptcy Rule 2016-1(c) or whether Debtor will be filing and serving motion for attorneys’ fees.

DEBTOR’S REPLY

Debtor filed its Reply to the Chapter 13 Trustee’s Objection to Confirmation of Chapter 13 Plan on November 6, 2018. Dckt. 53. Debtor asserts:

1. Tax returns have been provided to Trustee.
2. While the IRS secured claim should be modified as Class 2, 5, or 7, the amount owing to the IRS is less than anticipated and does not effect the proposed plan’s feasibility.
3. Debtor intends to file an Amended Plan to clarify the source of the lump sum.
4. The Debtor is having his wife’s family attorney prepare a memorandum to discuss a foreign national (the debtor) ability to gain interest in Thai assets and businesses to confirm this understanding, but ultimately he has no power to personally own any of the property or businesses in Thailand and can only gain a short window to sell property in Thailand if his wife dies and has no children.

5. Debtor asserts that Trustee's objection as to the attorney's fees provisions is well-taken; the issue will be corrected in the amended plan to be filed well before this hearing.

CREDITOR'S JOINDER

Creditor Aronowitz Skidmore Lyon, a Professional Law Corporation ("Creditor") filed a Joinder and Objection to Confirmation on October 25, 2018. Creditor seeks to join the Trustee's Objection, and asserts as an additional basis for Objection that Debtor's proposed plan relies on lump sum proceeds generated by the sale of a partnership interest Debtor may not have.

DISCUSSION

Creditor's Joinder

Creditor has not stated within its Objection what authority permits joinder of its Objection to the Trustee's.

Conclusion

As stated *supra*, the new Amended Plan having been filed, rendering the present one effectively "dismissed." The Objection is sustained, the Debtor no longer pursuing confirmation hereof.

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

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

The Motion to Confirm the Amended Chapter 13 Plan filed by Richard Sterling Greene ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection to Confirmation is overruled as moot, and the plan is not confirmed.

23. [18-25364](#)-E-13 GARY BROWN OBJECTION TO CONFIRMATION OF
[DPC-1](#) Helga White PLAN BY DAVID P. CUSICK
10-9-18 [[24](#)]

The Hearing on the Objection is continued to 3:00 p.m. on January 15, 2019, pursuant to prior order of the court.

24. [18-25364](#)-E-13 GARY BROWN OBJECTION TO CONFIRMATION OF
[PPR-1](#) Helga White PLAN BY WILMINGTON SAVINGS FUND
SOCIETY, FSB
9-28-18 [[17](#)]

The Hearing on the Objection is continued to 3:00 p.m. on January 15, 2018, pursuant to prior order of the court.

25. [18-24479-E-13](#) VLADIMIR TISKIY
Pro Se

TRUSTEE'S OPPOSITION TO
DEBTOR'S MOTION TO VACATE
DISMISSAL
10-24-18 [42]

DEBTOR DISMISSED: 10/15/2018

Final Ruling: No appearance at the November 20, 2018, hearing is required.

Debtor Vladimir Tiskiy, *Pro Se* (“Debtor”), filed a Motion to Vacate Dismissal of this case on October 22, 2018. Dckt. 41. The Chapter 13 Trustee, David Cusick (“Trustee”), filed an Opposition to the Motion on October 24, 2018. Dckt. 42.

**The hearing on the Motion having been conducted on November 6, 2018,
and the Motion denied, the Matter is removed from the calendar.**

The court set the Motion to be heard November 6, 2018. Dckt. 45. The court issued an Order denying the Debtor’s Motion on November 7, 2018. Order, Dckt. 48. **The matter is removed from the calendar.**

26. [18-24785-E-13](#)
[TOG-1](#)

MARIA CUIEL
Thomas Gillis

MOTION TO CONFIRM PLAN
10-8-18 [21]

Final Ruling: No appearance at the November 20, 2018, hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on October 8, 2018. By the court's calculation, 43 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Maria Lisa Curiel ("Debtor") has provided evidence in support of confirmation. David Cusick ("the Chapter 13 Trustee") filed a Non-Opposition on November 1, 2018. Dckt. 30. The Amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

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

The Motion to Confirm the Amended Chapter 13 Plan filed by Maria Lisa Curiel ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted, and Debtor’s Amended Chapter 13 Plan filed on October 8, 2018, is confirmed. Debtor’s Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to David Cusick (“the Chapter 13 Trustee”) for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

27. [18-26407-E-13](#) **NICHOLE MORGAN** **MOTION TO VALUE COLLATERAL OF**
[RWH-2](#) **Ronald Holland** **TRAVIS CREDIT UNION**
 10-18-18 [16]

Final Ruling: No appearance at the November 20, 2018 hearing is required.

Local Rule 9014-1(f)(1) Motion—No Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 13 Trustee, Creditor, and Office of the United States Trustee on October 18, 2018. By the court’s calculation, 33 days’ notice was provided. 28 days’ notice is required.

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

The Motion to Value Collateral and Secured Claim of Travis Credit Union (“Creditor”) is granted, and Creditor’s secured claim is determined to have a value of \$31,827.00.

The Motion filed by Nichole Morgan (“Debtor”) to value the secured claim of Travis Credit Union (“Creditor”) is accompanied by Debtor’s declaration. Debtor is the owner of a 2015 Ford Explorer (“Vehicle”). Debtor seeks to value the Vehicle at a replacement value of \$31,827.00 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).

TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response to the Motion on November 6, 2018, indicating nonopposition. Dckt. 25.

DISCUSSION

The lien on the Vehicle's title secures a purchase-money loan incurred on or about May 2, 2015, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a current balance of approximately \$40,250.00. Creditor has not opposed this Motion. The Trustee has filed a statement of nonopposition. Therefore, Creditor's claim secured by a lien on the asset's title is under-collateralized. Creditor's secured claim is determined to be in the amount of \$31,827.00, the value of the collateral. *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 to Value Collateral and Secured Claim filed by Nichole Morgan ("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 Travis Credit Union ("Creditor") secured by an asset described as 2015 Ford Explorer ("Vehicle") is determined to be a secured claim in the amount of \$31,827.00, 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 \$31,827.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

28. [18-24434-E-13](#)
[DPC-1](#)

LINDA OLIVER
Julius Cherry

CONTINUED OBJECTION TO
CONFIRMATION OF PLAN BY DAVID
P. CUSICK
8-28-18 [16]

Final Ruling: No appearance at the November 20, 2018 hearing is required.

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

The court continued the Motion for final hearing, for which no further objection has been filed.

The Objection to Confirmation of Plan is overruled without prejudice.

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

- A. Debtor failed to appear at the First Meeting of Creditors scheduled for August 23, 2018. Debtor is required to attend the meeting under 11 U.S.C. § 343. Debtor’s counsel emailed Trustee August 16, 2018, advising Trustee that Debtor missed the meeting due to surgery. The Meeting was continued to September 13, 2018. (As reported below, Debtor attended the continued meeting.)
- B. Debtor would be unable to afford payments or comply with the proposed Plan. Debtor’s proposed plan relies on a motion to value collateral being filed for Travis Credit Union, listed in the proposed plan as a Class 2B claim.

TRUSTEE’S STATUS REPORT

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

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

OCTOBER 2, 2018 HEARING

At the October 2, 2018 hearing, the court determined the sole remaining grounds for opposing confirmation of the plan was reliance on Debtor's Motion to Value. Therefore, the court continued the hearing to October 16, 2018 to be heard alongside that motion. Dckt. 37.

OCTOBER 16, 2018 HEARING

At the October 16, 2018 hearing, the Trustee requested this matter be continued to be heard alongside Debtor's pending Motion to Value (Dckt. 20) which had been continued. The court continued the hearing on this Motion to that date to allow Debtor to supplement the record.

ORDER GRANTING MOTION TO VALUE

On October 22, 2018, the court issued an Amended Order granting Debtor's Motion to Value. Dckt. 42.

DISCUSSION

The court has granted Debtor's Motion to Value Collateral set to be heard the same day as the hearing on this Motion. No grounds for objection remaining, the objection is overruled.

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

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

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

IT IS ORDERED that the Objection is overruled, and Linda Oliver's ("Debtor") Chapter 13 Plan filed on July 16, 2018, is confirmed. Counsel for Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

29. [18-24449-E-13](#) STEVEN SMITH
[AF-1](#) Arasto Farsad

CONTINUED AMENDED MOTION TO
VALUE COLLATERAL OF BANK OF
NEW YORK MELLON AND/OR
AMENDED MOTION TO AVOID LIEN
OF BANK OF NEW YORK MELLON
8-27-18 [\[22\]](#)

Final Ruling: No appearance at the November 20, 2018 hearing is required.

Local Rule 9014-1(f)(1) Motion—No Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee and Creditor on August 6, 2018. By the court’s calculation, 36 days’ notice was provided. 28 days’ notice is required.

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

The Motion to Value Collateral and Secured Claim of the Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificate holders of CWABS, Inc., Asset Backed Certificates, Series 2006-SPS2, as owner and holder of loan/contract originated by Countrywide Home Loans, Inc., its assignees and/or successors in interest (“Creditor”) is dismissed without prejudice.

The Motion to Value filed by Steven Claude Smith (“Debtor”) to value the secured claim of the Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificate holders of CWABS, Inc., Asset Backed Certificates, Series 2006-SPS2, as owner and holder of loan/contract originated by Countrywide Home Loans, Inc., its assignees and/or successors in interest (“Creditor”) is accompanied by Debtor’s declaration. Debtor is the owner of the subject real property commonly known as 444 Middle Creek Court, Chico, California (“Property”). Debtor seeks to value the Property at a fair market value of \$270,000.00 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).

Debtor offers the Declaration of Ramon Gil, a broker and realtor with 25 and 37 years' experience, respectively, who opines that the value of the Property is \$270,000.00.

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

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

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

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

TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on August 24, 2018. Dckt. 17. Trustee argues that Debtor's Motion:

- (1) improperly combines a Motion to Value and Motion to Avoid Lien;
- (2) improperly combines the Motion and Exhibits;
- (3) fails to notify respondents about viewing prehearing dispositions as required by the Local Bankruptcy Rules; and
- (4) relies on a declaration not complying with the requirements of 28 U.S.C. § 1746.

CREDITOR'S OPPOSITION

Creditor filed an Opposition to this Motion on August 27, 2018. Dckt. 20. Creditor opposes the Motion on the following grounds:

1. The Motion fails to prove, by way of admissible and authenticated evidence, the validity, priority, and extent of a senior lien.
2. Notwithstanding that Debtor has failed to provide any admissible evidence of the value of the Property, and payoff figures for the senior lien, Secured Creditor believes the Value of the Subject Property is approximately \$410,000 – greater than the \$270,000 alleged in Debtor’s Motion. In the event that this court allows Debtor to proceed with his Motion to Value, Secured Creditor respectfully requests more time to obtain and provide the Court with an appraisal.
3. Debtor may not modify or bifurcate the rights of Secured Creditor, as Secured Creditor’s claim is a secured claim “secured only by a security interest in real property that is the debtor’s principal residence.” 11 U.S.C. §1322(b)(2). Therefore, Debtor’s valuation of the Property cannot be cause for a modification of Secured Creditor’s lien and the MTV must be denied as a matter of law.

DEBTOR’S AMENDED MOTION

Debtor filed an Amended Motion on August 27, 2018. Dckt. 22. Debtor also filed Amended Declarations, Notice, and separately filed Exhibits. Dckts. 24-26.

Reviewing the Amended Declarations, it is clear Debtor sought to (and did) remedy the failure to comply with 28 U.S.C. § 1746 by stating clearly and declaring “under penalty of perjury” that “the foregoing is true and correct.” The court also notes the Exhibits were filed separately and the Notice was amended to comply with the Local Bankruptcy Rules.

With its Amended Pleadings, Debtor has addressed substantially all of Trustee’s opposition. While the court notes Local Bankruptcy Rule 9004-2(c)(1) requires motions be filed separately, the court is willing to waive the defect. However, counsel is reminded failure to comply is cause to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(l).

SEPTEMBER 11 AND 18, 2018, HEARINGS

At the September 11, 2018 and September 18, 2018 hearings, the court continued the hearing on the Motion to allow for discovery.

No supplemental pleadings have been filed.

DISCUSSION

On November 16, 2018, Debtor filed a pleading titled “Withdrawal of Document.” No authority is provided for a party merely “withdrawing a document” filed with the court. Additionally, Debtor asserts

that the Motion is moot, Debtor having now decided to pay creditor's claim, curing the arrearage through the plan.

Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 7041 and 9014, allow a party to request the dismissal of a contested matter after a responsive pleading has been filed. The court construes - For This Contested Matter Only - the "withdrawal" to be an *ex parte* motion to dismiss the present Motion.

The Motion is dismissed without prejudice.

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

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

The Motion to Value Collateral and Secured Claim filed by Steven Claude Smith ("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 dismissed without prejudice.

30. [18-25674-E-13](#)
[DPC-1](#)

DESIREE JAMES
Julius Cherry

OBJECTION TO CONFIRMATION OF
PLAN BY DAVID P. CUSICK
10-23-18 [21]

Final Ruling: No appearance at the November 20, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor’s Attorney on October 23, 2018. By the court’s calculation, 28 days’ notice was provided. 14 days’ notice is required.

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

**The hearing on the Objection to Confirmation of the Plan is continued to
December 4, 2018, at 3:00p.m. .**

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

- A. Debtor’s plan does not have sufficient monies to pay the secured claim held by Hyundai Capital America in full. Debtor proposes to value that secured claim, but has not filed a motion to value collateral.
- B. Debtor failed to file a Business Budget detailing Debtor’s business income and expenses. Schedule I lists \$1,676.00 in net business income, but does not include an attachment providing gross income and a breakdown of business expenses. While Trustee has been informed Debtor is self employed, the detailed statement is still required by the Statement of Financial Affairs.

DISCUSSION

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

A review of Debtor's Plan shows that it relies on the court valuing the secured claim of Hyundai Capital America. Debtor has now filed a Motion to Value that claim (Dckt. 25), and an Amended Motion to Value. Dckt. 31. Because the feasibility of the proposed plan relies on the outcome of the Motion to Value, the court shall continue the hearing on this Motion to December 4, 2018, at 3:00p.m. to be heard alongside the Motion to Value.

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

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

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

IT IS ORDERED that the hearing on the Objection to Confirmation of the Plan is continued to December 4, 2018, at 3:00p.m.

31. [18-25798-E-13](#)
[DPC-1](#)

EVERARDO PEREZ
Thomas Gillis

**OBJECTION TO CONFIRMATION OF
PLAN BY DAVID P. CUSICK
10-23-18 [15]**

Final Ruling: No appearance at the November 20, 2018 hearing is required.

Local Rule 9014-1(f)(2) Objection—No Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor’s Attorney on October 23, 2018. By the court’s calculation, 28 days’ notice was provided. 14 days’ notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

- A. Debtor may not be eligible for a Chapter 13 under 11 U.S.C. § 109(e). While Debtor lists numerous creditors on Schedule E/F, the claim amounts are not provided. Furthermore, Debtor is paying \$2,000 in attorney fees and only \$750 in towards general unsecured claims. Trustee is uncertain Debtor needs Chapter 13 relief.
- B. Debtor failed to provide proof of Social Security number at the Meeting of Creditors pursuant to 11 U.S.C. § 521(h)(2).

DEBTOR’S NONOPPOSITION

Debtor filed a non-opposition to Trustee’s Objection on November 6, 2018. Dckt. 19.

DISCUSSION

Trustee's objections are well-taken. Debtor has not filed completed Schedules or provided proof of identity. Furthermore, Debtor has indicated nonopposition to the Objection.

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

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

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

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

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