UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

Notice

The court has reorganized the cases, placing all of the Final Rulings in the second part of these Posted Rulings, with the Final Rulings beginning with Item 31.

The court has also reorganized the items for which the tentative rulings are issued, Items 1–30, attempting to first address the items in which short oral argument is anticipated.

November 21, 2017, at 3:00 p.m.

1.	**17-27297-E-13** **PGM-1**	**ARLEANER COLLINS** **Peter Macaluso**	**MOTION TO EXTEND AUTOMATIC STAY O.S.T.** **11-15-17 [16]**

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.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 15, 2017. By the court's calculation, six days' notice was provided. The court required six days' notice and set the hearing for November 21, 2017. Dckt. 21.

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 xxxxx.

Arleaner Collins ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond thirty days in this case. This is Debtor's second bankruptcy petition pending in the past year. Debtor's prior bankruptcy case (No. 14-32316) was dismissed on November 1, 2017, after Debtor voluntarily dismissed the case. *See* Order, Bankr. E.D. Cal. No. 14-32316, Dckt. 73, November 1, 2017. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to Debtor thirty days after filing of the petition.

Here, Debtor states that the instant case was filed in good faith because Debtor's daughter will be contributing funds to the plan. Dckt. 18 at 2:17–19. The Motion argues that Debtor filed this case to cure a default on a reverse mortgage and to pay outstanding property taxes. Dckt. 16 at 3:16–19. The Motion also alleges that Debtor has $1,376.51 and that her daughter will provide an additional $660.00 to the Plan and $365.00 in food stamps. *Id.* at 3:20–23.

Debtor's daughter, Valerie Collins, submitted her own declaration in this case affirming that she can afford to pay $1,025.00 to her mother's plan each month and will pay up to $660.00 to the plan and $365.00 in food stamps. Dckt. 22.

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.

There is ambiguity about whether Debtor's daughter has actually promised to supplement Debtor's plan by $1,025.00 each month. The daughter's declaration states that she is able to pay that amount and that she will provide "up to" $660.00 in direct support of the Plan, but those statements fall just short of binding a non-debtor third party to contribute funds to this case for the next five years.

At the hearing, Valerie Collins appeared and affirmed that she will contribute a total of $1,025.00 each month to Debtor's Plan—$365.00 in food stamps and $660.00 in cash.

The Motion is xxxx.

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 Arleaner Collins ("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 xxxx.

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

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

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

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

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

The Motion to Substitute is denied without prejudice.

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

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

CHAPTER 13 TRUSTEE'S RESPONSE

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

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

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

JOINT DEBTOR'S SUPPLEMENTAL DECLARATION

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

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

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

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

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

OCTOBER 24, 2017 HEARING

At the hearing, the court continued the hearing on the Motion to 3:00 p.m. on November 21, 2017, to allow Debtor's counsel to address the rules for an incapacitated debtor. Dckt. 107.

DISCUSSION

No further pleadings have been filed since the October 24, 2017 hearing.

Federal Rule of Bankruptcy Procedure 1016 provides that, in the event a debtor passes away in a case "pending under chapter 11, chapter 12, or chapter 13, the case may be dismissed; or if further administration

is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." Consideration of dismissal and its alternatives requires notice and opportunity for a hearing. *Hawkins v. Eads (In re Eads)*, 135 B.R. 380, 383 (Bankr. E.D. Cal. 1991). As a result, a party must take action when a debtor in Chapter 13 dies. *Id*.

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

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

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

> The **motion for substitution together with notice of the hearing is to be served on the parties in accordance with Bankruptcy Rule 7005 and upon persons not parties in accordance with Bankruptcy Rule 7004 . . . .**

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

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

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

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

The Motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Substitute After Death filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

3. **15-21819-E-13 PLC-4** | **TERRY/CHARLOTTE SEELY** **Peter Cianchetta** | **MOTION FOR COMPENSATION BY OFFICE OF CIANCHETTA & THE LAW ASSOCIATES FOR PETER CIANCHETTA, DEBTORS' ATTORNEY(S)** **10-20-17 [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—No Opposition Filed.

Sufficient Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 21, 2017. By the court's calculation, 31 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

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

Peter Cianchetta, the Attorney ("Applicant") for Terry Seely and Charlotte Seely ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period March 18, 2015, through October 19, 2017. Applicant requests costs in the amount of $416.90, and fees ranging from $5,917.50 to $6,246.25.

CHAPTER 13 TRUSTEE'S RESPONSE

David Cusick ("the Chapter 13 Trustee") filed a Response on October 25, 2017. Dckt. 84. The Chapter 13 Trustee indicates that Applicant lists fees and costs requested as $6,663.15 on page 1 of the Application, but on page 3, he lists fees and costs requested as $6,334.15.

In addition, the Chapter 13 Trustee notes that the court has already ordered attorney fees of $4,000.00, of which $125.00 were paid by Debtor prior to filing and $3,875.00 to be paid through the Plan. Dckt. 19. The Chapter 13 Trustee affirms that the bankruptcy estate has already paid Applicant $1,937.40.

The Chapter 13 Trustee does not oppose a total fee and cost award of $6,334.40, less the $4,000.00 provided for in the confirmed plan, which would total $2,334.40.

INSUFFICIENT NOTICE OF MOTION

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Peter Cianchetta ("Applicant"), Attorney for Terry Seely and Charlotte Seely, the Chapter 13 Debtor, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

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

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

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

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A). An attorney must "demonstrate only that the services were reasonably likely to benefit the estate at the time rendered," not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the attorney exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. An attorney must exercise good billing judgment with regard to the services provided because the court's authorization to employ an to work in a bankruptcy case does not give that attorney "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

> (a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?
>
> (b) To what extent will the estate suffer if the services are not rendered?

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

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

A review of the application shows that Applicant's services for the Estate include pre-confirmation meetings with Debtor to establish the bankruptcy proceeding, including notifying creditors, attending the 341 Meeting of Creditors, and preparation of the Chapter 13 Plan. In addition, Applicant's services include post-confirmation preparation of motions, and other miscellaneous work. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

Applicant provides a task billing analysis with several categories, but he does not include any description of what work was completed in each one. The categories are:

General Case Administration: Applicant spent 3.0 hours in this category.

Motions to Confirm: Applicant spent 9.2 hours in this category.

Objections to Claims: Applicant spent 2.0 hours in this category.

Motions to Refinance. Applicant spent 3.7 hours in this category.

Motion for Fees. Applicant spent 2.5 hours in this category.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Peter Cianchetta, attorney	20.4 hours	$325.00–350.00	$5,917.50
Total Fees for Period of Application			$5,917.50

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $416.90 pursuant to this application.

The costs requested in this Application are,

Description of Cost	**Per Item Cost, If Applicable**	**Cost**
Postage		$23.55
Printing	$0.05 per page	$18.35
Filing Fee		$375.00
Total Costs Requested in Application		$416.90

RULING

In the Motion, Applicant lists that the total amount requested for fees and costs is both $6,663.15 and $6,334.40. Dckt. 77 at 1:22.5, 3:7.5. The Prayer lists a total amount of $6,334.40 to be approved. *Id.* at 3:26.

Throughout the Motion, costs are listed consistently as $416.90. The fees are not pleaded consistently, however. Subtracting the requested costs, the Motion requests $5,917.50 and $6,246.25. Listing the higher amount may have been an error because it is only listed once, but the way the amounts are pleaded in the Motion, the court cannot determine certainly what Applicant requests. There are also numerous references to amounts that have been paid already either through the Plan or before this bankruptcy case filed, which complicates how much Applicant seeks to be approved.

The Motion is denied without prejudice. Applicant can submit a new application that pleads clearly what amount he requests for fees and what amount he requests for costs, clearly delineating what work he performed and what he has been paid so far.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Peter Cianchetta ("Applicant"), Attorney for Terry Seely and Charlotte Seely, the Chapter 13 Debtor, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

4. **14-27630-E-13** **ROSIE GOMEZ** **MOTION TO MODIFY PLAN**
FF-4 **Gary Fraley** **10-10-17 [52]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 9, 2017. By the court's calculation, 43 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(g) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

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

Rosie Gomez ("Debtor") seeks confirmation of the Modified Plan because she incorrectly assumed that she could stop making plan payments when she ran out of payment labels. Dckt. 54. The Modified Plan extends the Plan to sixty-four months to account for the claim of Champion Mortgage ("Creditor") to be fully accounted for, including post-petition fees incurred. 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, 2017. Dckt. 64. He asserts that Debtor is in material default under the Modified Plan because it will complete in more than the permitted sixty months. According to the Chapter 13 Trustee, the Modified Plan will complete in sixty-two months due to insufficient monthly plan payments. To complete payments within sixty months, the Chapter 13 Trustee calculates that plan payments need to be approximately $1,350.00. The Modified Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

Though the court could see allowing Debtor a couple of extra months to clean up the payment paperwork and ensure all sixty months of payments were made, there are additional issues to address before a modified plan can be confirmed.

Treatment of Supplemental Claim and Total Payments Amount

In addition, the Chapter 13 Trustee points out that Creditor filed a supplemental claim of $1,090.73 on March 18, 2016, but Debtor does not specify in the Modified Plan a classification or monthly dividend for this supplemental claim.

Further, Section 6 of the Modified Plan indicates that Debtor has paid a total of $35,266.99 through September 2017, but the Chapter 13 Trustee's records indicate Debtor has paid a total of $35,264.99 through September 2017.

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 Rosie Gomez ("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 without prejudice, and the proposed Chapter 13 Plan is not confirmed.

5. **16-24337-E-13** **QUAY SAMONS** **MOTION TO VACATE DISMISSAL OF CASE**
NBC-2 **Eamonn Foster** **11-6-17 [77]**

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.

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 November 6, 2017. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion to Vacate 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 Vacate xxxxxxxxxxxxxxxx.

Quay Samons ("Debtor") filed the instant case on November 6, 2017. Dckt. 77. A plan was confirmed on February 18, 2017, and an order confirming the plan was entered on March 27, 2017. Dckts. 68 & 71.

On October 2, 2017, David Cusick ("the Chapter 13 Trustee") filed a Motion to Dismiss the Case due to Debtor being $2,650.00 delinquent in plan payments. Dckt. 72. On November 1, 2017, a hearing on the Motion to Dismiss was held, and the Motion was granted. Dckt. 76. The ruling was final because Debtor did not file any opposition.

On November 6, 2017, Debtor filed this instant Motion to Vacate, claiming Debtor's counsel failed to file a modified plan to cure Debtor's delinquency. Debtor believes that this should be considered excusable neglect, and that Counsel can affirm its own negligence.

Debtor seeks to have the order dismissing the case vacated, per Federal Rule of Civil Procedure 60(b).

CHAPTER 13 TRUSTEE'S RESPONSE

David Cusick ("the Chapter 13 Trustee") filed a Response on November 14, 2017, indicating that he does not oppose the Motion. Dckt. 91.

APPLICABLE LAW

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

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

FED. R. CIV. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199, 1203 (5th Cir. 1993). The court uses equitable principles when applying Rule 60(b). *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2857 (3d ed. 1998). The so-called catch-all provision, Federal Rule of Civil Procedure 60(b)(6), is "a grand reservoir of equitable power to do justice in a particular case." *Uni-Rty Corp. V. Guangdong Bldg., Inc.*, 571 F. App'x 62, 65 (2d Cir. 2014) (citation omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, relief under Rule 60(b)(6) may be granted in extraordinary circumstances. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 & n.11 (1988).

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

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

DISCUSSION

As an initial policy matter, the finality of judgments is an important legal and social interest. The standard for determining whether a Rule 60(b)(1) motion is filed within a reasonable time is a case-by-case analysis. The analysis considers "the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties." *Gravatt v. Paul Revere Life Ins. Co.*, 101 F. App'x 194, 196 (9th Cir. 2004) (citations omitted); *Sallie Mae Servicing, LP v. Williams (In re Williams)*, 287 B.R. 787, 793 (B.A.P. 9th Cir. 2002) (citation omitted).

The sole ground for the Motion to Dismiss was delinquency in plan payments. As a motion under Local Bankruptcy Rule 9014-1(f)(1), Debtor and Debtor's counsel were required to oppose the Motion in writing no later than fourteen days prior to the hearing. Instead, Debtor did not file an Opposition and let the court issue a final ruling without any argument.

Even though Debtor appears to have become current under the proposed Modified Plan before the November 1, 2017 hearing, Debtor did not appear to contest the Motion to Dismiss. Instead, Debtor and Debtor's counsel deemed it unadvised to: (1) clearly file an opposition to the motion to dismiss, (2) appear at the hearing on the motion to dismiss, and (3) when counsel read the proposed final ruling posted on the court's website dismissing the case the day before the scheduled hearing, counsel did not deem it appropriate to appear at the hearing and request the court call the matter to address the situation. (The court's posted proposed final rulings clearly stated "Appearances not Required," with the matter not being removed from the calendar.) Counsel could have made a telephonic request to the courtroom deputy to have the matter called, then make telephonic appearance, sitting at his desk working on other matters while waiting for the clerk to call the motion to dismiss, at a minimal cost, and addressed why the case should not be dismissed (and his failure to file any opposition to the motion).

The court's enforcement of the Local Bankruptcy Rules for filing of opposition and requiring parties to actually state oppositions arose in large part of various attorneys ignoring such rules in connection with motions to dismiss Chapter 13 cases. Some attorneys would react to a motion to dismiss by filing corrective documents, such as an amended plan and motion to confirm, but no opposition. Those attorneys believed it was the obligation of the Chapter 13 Trustee and the court to determine what opposition might exist, state that opposition for such attorney, and then rule on the opposition as stated by the court or the Trustee for that attorney.

Another group of attorneys would ignore the motion to dismiss, showing up on the day of the hearing, having at least twenty-eight days' notice, and advise the court, "well, we are going to think about what we might want to consider doing about this motion to dismiss, so judge, continue the hearing for sixty to ninety days so we can work on something.....maybe."

Here, counsel offers no explanation as to why or how there are grounds under Rule 60(b) to vacate the order dismissing the case. Counsel offers as explanation that he and Debtor did not appear at the

dismissal hearing to contest the motion because Counsel believed that a modified plan he had prepared had been filed and served already.

The court generally gives meaningful weight to the recommendation of the Chapter 13 Trustee when he wants to dismiss a motion to dismiss or to vacate an order dismissing a case, but generally that is in conjunction with a debtor who attempted to diligently oppose the motion to dismiss. The Chapter 13 Trustee does not state that he had agreed to dismiss the motion to dismiss or continue the hearing pending Debtor prosecuting the case.

No Prejudice to Dismissal and Debtor Filing a New Case

The Motion to Vacate the Dismissal does not allege that there will be a disproportionate, or any, prejudice to Debtor just filing a new bankruptcy case and diligently prosecuting that case. The current bankruptcy case was filed on July 1, 2016. The Plan confirmed in February 2017 is in default, and Debtor is having to propose a modified plan. There are no secured claims having been valued in this case. The only claim listed in the proposed plan is a Class 1 claim for Ditech Financial.

Debtor can file a new case, propose a plan, confirm a plan, and complete a plan.

Failure to Defend Motion to Dismiss

Debtor's Counsel offers as explanation that he did not defend the Chapter 13 Trustee's motion to dismiss because he mistakenly believed that a modified plan had been filed, served, and set for confirmation. Counsel states that he was not aware of the court's ruling until he received a copy of the civil minutes. Debtor and his counsel cannot ignore motions, taking whatever other action they think should resolve that motion, and then leave it for the court and Trustee to defend the Debtor.

What is telling about this representation is that the present "Motion" to vacate the dismissal fails to comply with the basic pleading requirements of Federal Rule of Bankruptcy Procedure 9013 and Local Bankruptcy Rules 9004-1 and 9004-2. The "Motion" merely states that relief is sought pursuant to Federal Rule of Civil Procedure 60 (not specifying any specific part) and Federal Rule of Civil Procedure 9024. Motion, Dckt. 77 at 1:16–17. No other "grounds" (as required by Federal Rule of Bankruptcy Procedure 9013) are asserted.

The Motion includes a section titled "Memorandum of Points and Authorities." The legal authorities consists of the following phrase:

> A motion to vacate is available to correct mistakes of fact and excusable neglect. Fed. R. Civ. Proc. R. 60(b)(1). Fed. R. Bankr. Proc. R. 9024 makes Fed. R. Civ. Proc. R. 60 applicable in Bankruptcy proceedings.

Points and Authorities, *Id.* at 2:3–5. The balance of the "Points and Authorities" are a series of factual allegations, which should properly be part of the Motion. The evidentiary support for these factual allegations is provided in the Declaration of Eamonn Foster, in which he testifies:

A. He is Debtor's counsel. Declaration, at 1:19.

B. Having received the Motion to Dismiss, counsel spoke with Debtor. He states that Debtor was upset by the "news" that the Chapter 13 Trustee was moving to dismiss the case because of Debtor's monetary defaults in plan payments. *Id.*, at 1:24–27.

C. Between October 5 and October 7, 2017, counsel spoke with Debtor and Debtor's daughter multiple times. *Id.*, at 2:1–2.

D. A modified plan was prepared and counsel awaited the response from Debtor as to the draft modified plan. *Id.*, at 2:6–8.

E. Debtor did not communicate with counsel about the proposed modified plan. *Id.*, at 2:13.

F. Though Debtor did not communicate with counsel, counsel's testimony is that,

> [I] mistakenly believed that the plan for this case had been filed and served as well. Because of the poor case management, I did not follow up with Debtor – I mistakenly believed I already had confirmation from Debtor and had filed and served the documents.

Id., at 2:15–17.

G. Debtor "complied" with the new plan requirements and paid $2,200.00 in October 2017. *Id.*, at 2:20–21.

Counsel offers the court no cases or authorities on how an alleged "mistake" should be determined. Rather, he merely gives a rule reference to the court, alleges some facts (as part of the Points and Authorities), and leaves it for the court to rubber stamp his conclusions.

It appears that counsel's contention is that the mistake consists of "the poor case management" by counsel. Debtor and counsel have not provided the court with "poor case management" as being a Rule 60(b)(1) "mistake." As discussed in Moore's Federal Practice, Civil § 60.41[2],

> In 1993 the Supreme Court clarified that clients must be held accountable for the acts or omissions of their attorneys. Therefore, in determining whether there is excusable neglect for purposes of a Rule 60(b)(1) motion, the proper focus is on whether the neglect of the moving party and of that party's counsel was excusable. Accordingly, older cases that attempted to distinguish between the negligence or mistakes of counsel and the negligence or mistakes of a party are no longer pertinent.

In discussing mistake, Moore's notes that attorney negligence or carelessness can constitute excusable neglect. *Id.*, § 60.41[1]. However, "in most cases such ignorance will continue to be inexcusable under the Pioneer standard." *Id.*

Debtor and counsel may protest that they think such application of the rules is too harsh, not fair, and the court should just look the other way. Unfortunately, once the court does that for one attorney, then every attorney will demand such largess and they (both creditor and debtor) all will just believe that the Rules requiring opposition to motions are "optional" and a final hearing is merely a calendaring date for the attorney and party to start thinking about when they need to actually consider taking appropriate action.

Alternative Grounds and "Restitution"

In other cases when counsel fails to oppose a motion and then seeks to have it vacated, citing to significant prejudice to the debtor, the court has required counsel to reimburse the Chapter 13 Trustee for the wasted time in having to deal with a motion to vacate. The monies are paid into the U.S. Trustee fund and not into the Chapter 13 Trustee's pocket.

Here, given that the dismissal was by final ruling, the Chapter 13 Trustee's time in conducing hearing on the Motion were minimal. However, the Chapter 13 Trustee has been required to deal with this Motion to Vacate and counsel's efforts to bring this case back from extinction.

The court computes that counsel for the Chapter 13 Trustee will have reasonably spent at least two hours, at a discount hourly rate of $250.00, for a total of $500.00 in otherwise unnecessary legal fees in having to address the present Motion and resurrection of this case from counsel's lack of diligence.

~~At the hearing, counsel for the Debtor agreed to pay, as a condition of vacating the dismissal, the $500.00 in reimbursement for otherwise unnecessary legal expenses to the Chapter 13 Trustee, with said payment to be made on or before December 1, 2017.~~

~~The reimbursement of such expenses allows the court to respect the Rules and Procedures governing federal judicial proceedings, reimburse opposing parties for otherwise unnecessary costs and expenses visited on them by the failure of Debtor and counsel to respond to a noticed motion, and not give counsel a "pass" from complying with the Rules, which does not exist for other attorneys and parties. This is not imposed as a sanction but as a voluntary payment as an election to continue in the prosecution of this case rather than Debtor just filing a new case. If Debtor and counsel elect not to reimburse the Chapter 13 Trustee for the otherwise unnecessary expense, they can then use that money toward a new case, electing to accept the dismissal caused by their inaction.~~

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 Vacate filed by Quay Samons ("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 xxxxxxxxxxxxxx.

6. **12-36944-E-13** **EDA URRIZA** **MOTION TO MODIFY PLAN**
PLC-11 **Peter Cianchetta** **10-11-17 [174]**

Counsel for Debtor and Counsel for the Chapter 13 Trustee Shall Have Met and Conferred to Resolve the Dollar Amount Issues Prior to the Hearing

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 11, 2017. By the court's calculation, 41 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(g) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

The Motion to Confirm the Modified Plan is denied.

Eda Urriza ("Debtor") seeks confirmation of the Modified Plan because unexpected financial changes (caring for an ailing father) made it impossible to keep current with plan payments. Dckt. 176. The Modified Plan proposes a monthly payment of $4,981.91 beginning with the October 2017 payment. 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, 2017. Dckt. 185. The Chapter 13 Trustee is uncertain of the total attorney fees to be paid under the Plan, whether $3,314.00 or a

higher number. He believes the Modified Plan reduces the amount to unsecured claims to the amounts previous paid.

The Chapter 13 Trustee states that Class 1 arrears, Class 2, and Class 5 claims have been paid in full. He has also disbursed $52,940.49 to unsecured claims, with $6,895.96, including the Chapter 13 Trustee's fees, remaining to be paid to unsecured claims under the confirmed plan. Debtor proposed a 0.00% dividend to unsecured claims in the proposed modified plan.

The Chapter 13 Trustee states that according to § 2.06 the attorney was paid $686.00 prior to filing and additional fees of $3,314.00 shall be paid through the plan. He argues that the attorney chose to comply with Local Bankruptcy Rule 2016-1(c). However, in the order confirming, the attorney indicated that he would file and serve a separate compensation motion.

Additionally, Debtor proposes in Section 6 additional provisions for Section 1.01 plan payments of $249.696.54 through October 10, 2017. The additional provisions do not state the term of the payments of $4,981.98 to begin October 25,2017. Yet, the Chapter 13 Trustee has received the payment due on October 25, 2017.

The Chapter 13 Trustee notes that Debtor filed a modified plan on June 22, 2017, that was denied on August 1, 2017. Dckt. 161. Furthermore, the attorney's compensation request was denied on August 14, 2017. Dckt. 162.

The Chapter 13 Trustee has placed a hold on disbursements pending the outcome of this modified plan. He has a balance on hand of $4,598.37.

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 Eda Urriza ("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.

7. **12-36944-E-13** **EDA URRIZA**
PLC-12 **Peter Cianchetta**

MOTION FOR COMPENSATION BY THE LAW OFFICE OF CIANCHETTA & ASSOCIATES FOR PETER CIANCHETTA, DEBTOR'S ATTORNEY(S)
10-11-17 [167]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 10, 2017. By the court's calculation, 42 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

Peter Cianchetta, the Attorney ("Applicant") for Eda Urriza, the Chapter 13 Debtor ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period March 18, 2015, through October 10, 2017. Applicant appears to request multiple fees in the amount of $6,663.15, $8,400.03, $9,100.00, and also indicated $1,000.00 was paid to Applicant prior to filing for part of the filing fees and costs.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on November 6, 2017. Dckt 188.

The Chapter 13 Trustee states that Applicant filed this Motion for Compensation with no supporting documents or task billing. Debtor's *Ex Parte* Application for Attorney Fees was denied on August 14, 2017, for failure to include the task billing analysis and time records. Dckt. 162.

The Chapter 13 Trustee is uncertain as to what amount to pay Applicant. Client's plan proposed to pay Applicant $3,314.00, opting into the local provisions, but Applicant opted out of the local rule. Dckts. 177, 111. Client's current plan does not have sufficient proceeds to pay attorney fees requested in this application within sixty months. $4,598.37 is the balance on hand in this case.

The Chapter 13 Trustee filed a Motion to Dismiss on October 4, 2017, due to Client's plan exceeding sixty months and Client being delinquent $4,139.08. Dckt. 163. On October 11, 2017, Client filed her Modified Plan and a Motion to Confirm Modified Plan. Dckt. 177, 174.

Lastly, the Chapter 13 Trustee states that there are four conflicting amounts of attorneys fees to be paid by the plan, and argues the following:

1. Applicant requests $6,663.15. Dckt. 167 at 1:22–23.

2. In the prayer, Applicant seeks an order approving fees and costs in the amount of $9,400.03. Applicant notes that after application of $1,000.00, the remaining $8,400.03 shall be paid by the Chapter 13 Trustee. *Id.* at 3:25–27.

3. Applicant's itemized work performed as Pre-Confirmation in the amount of $5,525.00, Post-Confirmation in the amount of $3,500.00, and Costs in the amount of $446.03 total $9,471.03. *Id.* at 2:1–17

4. Applicant indicated in the Motion for Compensation that $1,000.00 was paid to Applicant prior to filing. However, Applicant also indicated that a portion of the $1,000.00 was used to pay Client's filing fees, a credit report, making the balance $686.00. *Id.* at 2:20–23.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

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

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

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

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A). An attorney must "demonstrate only that the services were reasonably likely to benefit the estate at the time rendered," not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

APPLICABLE LAW

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the attorney exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. An attorney must exercise good billing judgment with regard to the services provided because the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

> (a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?
>
> (b) To what extent will the estate suffer if the services are not rendered?
>
> (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

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

A review of the application shows that Applicant's services for the Estate include case management and preparing Motions to Confirm, Value Collateral, Avoid Judicial Lien, Dismiss, and Compensation. The court finds the services were beneficial to Client and the Estate and were reasonable.

RULING

The Chapter 13 Trustee's objections are well-taken. The court finds that there are four conflicting amounts of attorneys fees to be paid by the plan: either $6,663.15, $8,400.03, or $9,471.03. The court has not approved any interim fees in this case for Applicant. As set forth in the June 26, 2013 Order Confirming the Chapter 13 Plan, Applicant was required to file a motion for approval of any and all fees in this case. Dckt. 111.

In light of Applicant's unclear request, the court denies the Motion without prejudice.

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

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

The Motion for Allowance of Fees and Expenses filed by Peter Cianchetta ("Applicant"), Attorney for Eda Urriza, the Chapter 13 Debtor, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied without prejudice.

8. **17-25945-E-13** **HARRY NASH** **OBJECTION TO CONFIRMATION OF**
DPC-1 **Peter Macaluso** **PLAN BY DAVID P. CUSICK**
10-25-17 [37]

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 25, 2017. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

A. Harry Nash ("Debtor") cannot make plan payments because it overlaps with his spouse's plan in the spouse's case;

B. There is undisclosed property from a probate for Debtor's mother-in-law that has not been settled, and there are no legal fees listed on Schedule J in connection with the pending probate;

C. The Plan is not Debtor's best effort because he did not file the required attachments for business income, he did not disclose retirement income from his spouse's previous spouse, and he did not reveal income listed on his 2015 and 2016 federal tax returns; and

D. There are several inaccuracies on Debtor's schedules and Statement of Financial affairs regarding incorrect names and addresses, omitted bank accounts, undisclosed retirement accounts, and unreported income.

The Chapter 13 Trustee's objections are well-taken. Debtor has not responded to this Objection, but he has amended the petition, schedules, statement of financial affairs, and disposable income calculation. *See* Dckts. 41–45. As with Debtor's prior calculation of disposable monthly income, Debtor reports that he has negative disposable income. *Compare* Dckt. 42 at 10, *with* Dckt. 17 at 47. Debtor's amendment to the petition lists that he has also been known as Buddy Nash and that his mailing address is different than where he lives. Dckt. 41 at 2, 3.

On Amended Schedule I, Debtor states that he and his wife have $17,037.60 in combined monthly income. Dckt. 44 at 13–14. Debtor's gross income is $17,724 per month, but he is paying only $877.00 per month for federal and state income taxes, medicare, and Social Security. *Id.* On Amended Schedule J, Debtor states he and his wife have $9,037.60 in reasonable and necessary monthly expenses. However, none of those are for any income taxes, self-employment taxes, or other taxes relating to the $17,724 in monthly gross income. *Id.* at 15–16.

In Debtor's Spouse's bankruptcy case, 17-25972, *In re Josephine Nash*, she requires $8,000.00 per month to fund her plan. Debtor's Plan requires $8,000.00 per month to fund the plan payments. Dckt. 18. As shown on Amended Schedules I and J, there is not $16,000.00 per month to fund the two plans.

The Statement of Financial Affairs now includes the missing information that the Chapter 13 Trustee revealed. Dckt. 43. One difference, though, is that the Chapter 13 Trustee notes that Debtor's 2015 and 2016 federal tax returns show him receiving $5,791.00 from a pension, but Debtor listed only $5,700.00 on Line 5. *Id.*

While Debtor has disclosed the numerous withheld items, he continues to assert that his monthly net income is exactly $8,000.00. Dckt. 44 at 16. That calculation includes income from his spouse who has her own pending case, however. So, as the Chapter 13 Trustee notes, it does not appear that Debtor can afford to pay $8,000.00 in this case while his spouse uses her own funds in her case as well. Debtor cannot afford plan payments under 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.

9.	**17-25972-E-13** **DPC-1**	**JOSEPHINE NASH** **Peter Macaluso**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **10-25-17 [43]**

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 25, 2017. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

A. Josephine Nash ("Debtor") cannot make plan payments because it overlaps with her spouse's plan in the spouse's case;

B. There is undisclosed property from a probate for Debtor's mother that has not been settled, and there are no legal fees listed on Schedule J in connection with the pending probate;

C. The Plan is not Debtor's best effort because she did not file the required attachments for business income, she did not disclose retirement income from her previous spouse, and she did not reveal income listed on her 2015 and 2016 federal tax returns;

D. There are several inaccuracies on Debtor's schedules and Statement of Financial affairs regarding omitted bank accounts, undisclosed retirement accounts, and unreported income.

The Chapter 13 Trustee's objections are well-taken. Debtor has not responded to this Objection, but she has amended the petition, schedules, statement of financial affairs, and disposable income calculation. *See* Dckts. 51–55. As with Debtor's prior calculation of disposable monthly income, Debtor reports that she has negative disposable income. *Compare* Dckt. 53 at 10, *with* Dckt. 23 at 47. Debtor's amendment to the petition lists that she has also been known as Jo Nash. Dckt. 54 at 2.

The Statement of Financial Affairs now includes the missing information that the Chapter 13 Trustee revealed. Dckt. 52. One difference, though, is that the Chapter 13 Trustee notes that Debtor's 2015 and 2016 federal tax returns show her spouse as receiving $5,791.00 from a pension, but Debtor listed only $5,700.00 on Line 5. *Id.*

While Debtor has disclosed the numerous withheld items, she continues to assert that her monthly net income is exactly $8,000.00. Dckt. 55 at 16. That calculation includes income from her spouse who has his own pending case, however. So, as the Chapter 13 Trustee notes, it does not appear that Debtor can afford to pay $8,000.00 in this case while her spouse uses his own funds in his case as well. Debtor cannot afford plan payments under 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.

10. 17-24755-E-13 CYB-1 | **ROBBIE/CHRISTI HOLCOMB** **Candace Brooks** | **CONTINUED MOTION TO VALUE COLLATERAL OF CELTIC BANK 9-13-17 [20]**

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, Creditor, creditors, parties requesting special notice, and Office of the United States Trustee on September 13, 2017. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

The Motion to Value Collateral and Secured Claim 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 Value Collateral and Secured Claim of Celtic Bank ("Creditor") is denied without prejudice.

The Motion filed by Robbie Holcomb and Christi Holcomb ("Debtor") to value the secured claim of Celtic Bank ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of business assets such as all inventory, chattel paper, accounts, equipment, and general intangibles ("Property"). Debtor seeks to value the Property at a replacement value of $585.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

CHAPTER 13 TRUSTEE'S RESPONSE

David Cusick ("the Chapter 13 Trustee") filed a Response on September 18, 2017. Dckt. 25. The Chapter 13 Trustee notes that Debtor has included Creditor on Schedule D and in Class 2B of the proposed Plan. He notes that, to date, Creditor has not filed a proof of claim regarding this matter.

OCTOBER 3, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on October 17, 2017. Dckt. 27.

OCTOBER 17, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on November 21, 2017, after the parties requested a continuance to allow them to document a settlement for this Motion. Dckt. 31.

RULING

No further pleadings have been filed since the October 17, 2017 hearing, and the court has not been presented with a settlement for this Motion.

The court begins with the Property that secures Creditor's claim. The Motion states that the debt secured is that of Robbie Holcomb, dba the Holcomb Group. Exhibit A is identified as the document "describing" the collateral. Exhibit A is a copy of Schedule A/B filed in this case. Taken literally, Debtor could be stating that all assets listed on Schedule A/B secure Creditor's claim. The "argument" portion of the Motion makes reference to a financing statement filed as Exhibit B.

Exhibit B is a UCC Financing Statement in which Celtic Bank Corporation is listed as the secured creditor ("secured creditor" being a term of art under the Commercial Code). The "debtor" (as a Commercial Code term) is stated to be "The Holcomb Group." The collateral description on the Financing Statement is the general "all personal property" description commonly used by institutional lenders. Exhibit B, Dckt. 23.

> 4 .COLLATERAL: All Inventory, Chattel Paper, Accounts, Equipment, and General Intangibles, whether any of the foregoing is owned now or acquired later; all accessions, additions, replacements, and substitutions relating to any of the foregoing; all records of any kind relating to any of the foregoing; all proceeds relating to any of the foregoing (including insurance, general intangibles and other accounts proceeds).

Id.

Debtor does not provide the court with the loan documents or the security agreement (which is the binding document that describes the collateral).

In his Declaration, Debtor Robbie Holcomb testifies that "The Holcomb Group" is the name of his IT consulting business. Dckt. 22. He does not provide any testimony about the underlying obligation, when it was obtained, and the terms of such debt.

On Schedule A/B, in response to Question 35 "Any financial assets you did not already list, Debtor states:

"Business Assets - APC Smart UPS 2200-2U-$159, APC Smart

UPS 2200 times (2)-$99 each or total $198, APC Smart UPS 1400 times (2)-$55 each or total $110; Dell Optiplex GX280-$48.50, Dell Monitors 17# times (2)-$35 each or total $70; Total Value: $585.50"

Schedule A/B, Question 35; Dckt. 1 at 17.

However, in response to Question 37, Debtor states he has no "business assets." *Id.* In response to Question 17 on Schedule A/B, Debtor lists having $2,925.00 in "business" bank accounts. *Id.* at 15. But no "business" is listed on Schedule A/B.

The California Secretary of State lists there being a "Celtic Bank Corporation" (the name on the Financing Statement filed as Exhibit B) registered to do business in California. https://businesssearch.sos.ca.gov/CBS/Detail. The agent for service of process for Celtic Bank Corporation is Timothy J. McGoff, at an address in San Diego, California.

The FDIC lists a "Celtic Bank" as a federally insured financial institution that is located in Salt Lake City, Utah. FN.1.

FN.1.
https://research.fdic.gov/bankfind/detail.html?bank=57056&name=Celtic Bank&searchName=celtic bank&searchFdic=&city=&state=&zip=&address=&searchWithin=&activeFlag=&searchByTradename =false&tabId=2.

It is not clear that "Celtic Bank" is the same entity as "Celtic Bank Corporation." Reviewing the information available on LEXIS-NEXIS for entities with the words "Celtic Bank" in their names or tied by LEXIS-NEXIS to "Celtic Bank" include:

A. CELTIC INVESTMENT INC;

B. CELTIC BANK CORPORATION;

C. CELTIC BANK CORP;

D. CELTIC BANK;

https://advance.lexis.com/publicrecordshome/?pdmfid=1000200&crid=e94b297c-aa7e-439d-87f5-44f47a2c48ec.

The court is uncertain as to who the creditor is having a claim in this case, what business Debtor may have, what business assets exist, who the parties are to the loan documents and security agreement, and the assets subject to the lien.

The Motion is denied without prejudice. Debtor can file a new motion, with all of the necessary evidence for the court to identify the collateral, the creditor, the claim, and the secured claim to be determined pursuant to 11 U.S.C. § 506(a).

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 Robbie Holcomb and Christi Holcomb ("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.

11. 17-24755-E-13 DPC-1 | **ROBBIE/CHRISTI HOLCOMB** **Candace Brooks** | **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **8-29-17 [16]**

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

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 August 29, 2017. By the court's calculation, 35 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, and the Plan is not confirmed without prejudice.

David Cusick ("the Chapter 13 Trustee") opposes confirmation of the Plan on the basis that it relies upon the court granting a pending Motion to Value.

OCTOBER 3, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on October 17, 2017. Dckt. 28.

OCTOBER 17, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on November 21, 2017. Dckt. 33. The parties reported that they were documenting a settlement. Dckt. 32.

RULING

No further pleadings have been filed since the October 17, 2017 hearing, and the court has not been presented with a proposed settlement affecting this Objection.

A review of Debtor's Plan shows that it relies on the court valuing the secured claim of Celtic Bank. That Motion was heard at the November 21, 2017 hearing, and the court denied that motion without prejudice.

This Objection having been filed on August 29, 2017, and having been continued twice, the Objection is sustained, and the Plan is not confirmed without prejudice. If Debtor moves forward in the prosecution of the necessary motion to value, Debtor can file an amended plan and motion to confirm.

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

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

The Objection to 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 is sustained, and the Plan is not confirmed without prejudice.

12. 17-26064-E-13 DPC-1 | **MARTIN/MARIA ORTEGA** **Peter Macaluso** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 10-18-17 [42]**

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

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the 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 18, 2017. 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. The Plan relies upon a pending motion to value, and

B. The Plan may not have been proposed in good faith.

A review of Debtor's Plan shows that it relies on the court valuing the secured claim of Santander Consumer USA, Inc. That motion was heard and granted at the November 7, 2017 hearing, which resolves the Chapter 13 Trustee's first ground for objecting to confirmation. *See* Dckt. 65.

The Chapter 13 Trustee also argues that the Plan may not have been proposed in good faith under 11 U.S.C. § 1325(a)(3) because Martin Ortega and Maria Ortega ("Debtor") may have attempted to sell property of the Estate in prior case, Case No. 15-27210. The Chapter 13 Trustee reports that he received an e-mail from Tarunjit Ahluwalia on October 3, 2017, about the sale of a 2005 Lincoln automobile.

Apparently, Mr. Ahluwalia paid $3,600.00 into Debtor's prior case in an attempt to obtain title to the vehicle.

The Chapter 13 Trustee requested and received a receipt history for the prior case, which reveals that $2,585.82 of the $13,670.00 paid into the plan in that case was paid to Wells Fargo Dealer Services, who held a claim for the vehicle.

In this case, Debtor lists the vehicle on Schedule D and Class 2A of the Plan, as well as listing "Ahluwalia Tarvnjit" on Schedule F in the amount of $1.00 with an unsecured "Other" claim for the vehicle.

The Chapter 13 Trustee argues that appropriate motions may need to be filed to ratify the sale matter. The record is not clear about whether Debtor attempted to sell a vehicle in the prior case without the court's approval, and the Plan and Schedules in this case create confusion as to the claim asserted to be held by Mr. Ahluwalia. The court cannot determine that the Plan was filed in good faith.

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

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

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

13. 17-25975-E-13 DPC-2 | **PHILIP ROBERTS** **Peter Macaluso** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 10-18-17 [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 and Debtor's Attorney on October 18, 2017. 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. Philip Roberts ("Debtor") presented a Plan that is not Debtor's Best Effort under 11 U.S.C. § 1325(b);

B. Debtor's Plan lists expenses improperly; and

C. Debtor's Schedule F does not account for an unsecured claim.

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

> If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan the

value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

Debtor has supplied insufficient and incomplete information relating to his assets to assist the Chapter 13 Trustee in assessing Debtor's ability to pay unsecured claims. Schedule I lists Debtor's business income as $5,650.18, but it is not clear whether or not that is gross or net income. On the Statement of Financial Affairs, Debtor lists his year-to-date business income in the amount of $48,185.00, but he fails to list any income in Column A in Form 122C-1. Moreover, Debtor admitted at the 341 Meeting of Creditors on October 12, 2017, that he receives rental income from his roommate in the amount of $950.00 per month, but that income does not appear on the Statement of Financial Affairs, nor was it attached to Schedule I. Without an accurate picture of Debtor's financial situation, the Chapter 13 Trustee cannot determine if Debtor meets the required obligation to provide all disposable income to unsecured creditors.

In addition, the Chapter 13 Trustee asserts that Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor admitted at the 341 Meeting of Creditors that the support expense in the amount of $312.50 listed on Schedule J had increased by $123.50 per month, but Debtor has not changed that on the Schedule. Moreover, Debtor did not list any annual or monthly expense for the Royal Solaris Timeshare listed on Schedule A. Finally, the profit and loss statements provided by Debtor lists his truck payment as an expense in the amount of $425.00 per month, but the Plan lists the monthly dividend as $440.00 per month.

Lastly, the Statement of Financial Affairs states that Debtor owes $20,000.00 to the Noyos Family Trust, and Debtor admitted to paying $350.00 per month to the Trust. That payment to the Trust as an unsecured claim should be listed on Schedule F, but it is currently not listed.

Consequently, 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. 14-30877-E-13 TROY HARDIN — MOTION TO MODIFY PLAN
PGM-7 Peter Macaluso — 10-13-17 [152]

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, Chapter 13 Trustee, creditors, and Office of the United States Trustee on October 13, 2017. By the court's calculation, 39 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(g) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

The Motion to Confirm the Modified Plan is denied.

Troy Hardin ("Debtor") seeks confirmation of the Modified Plan because he received a loan modification and has "gainful employment." Dckt. 154 at 1:20.5–23. The Modified Plan proposes to have paid $56,390.00 into the Plan through September 17 and to make payments for $900.00 for twenty-six months beginning October 2017. 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, 2017. Dckt. 162. The Chapter 13 Trustee asserts that Debtor is $900.00 delinquent in plan payments, which represents one month of the $900.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

In addition, Section 2.08 of the Modified Plan authorizes Class 1 ongoing mortgage payments to Seterus in the amount of $31,275.79, when the Chapter 13 Trustee has actually disbursed a total of $32,982.78.

DEBTOR'S REPLY

Debtor filed a Reply on November 13, 2017, in which Debtor asserts that he will be current with plan payments on or before the November 21, 2017 hearing. Dckt. 167. In addition, Debtor agrees that the ongoing mortgage payments to Seterus is $32,982.78 and requests that this change be made in the court's order modifying the Chapter 13 plan.

RULING

Unfortunately for Debtor, there is no evidence before the court that he has cured the delinquency under the proposed plan. The Motion is denied.

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 Troy Hardin ("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.

15. **17-27083-E-13** **LEE OWENS** **MOTION TO EXTEND AUTOMATIC STAY**
MET-1 **Mary Ellen Terranella** **11-3-17 [8]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on November 3, 2017. By the court's calculation, 18 days' notice was provided. 14 days' notice is required.

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

The Motion to Extend the Automatic Stay is granted.

Lee Owens ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond thirty days in this case. This is Debtor's second bankruptcy petition pending in the past year. Debtor's prior bankruptcy case (No. 13-29066) was dismissed on October 25, 2017, after Debtor requested that it be dismissed. *See* Order, Bankr. E.D. Cal. No. 13-29066, Dckt. 93, October 25, 2017. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to Debtor thirty days after filing of the petition.

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed because Debtor was denied a loan modification and a foreclosure sale date was set, which prompted Debtor to request dismissal before filing this case. Dckt. 10 at 7–17.5. Debtor explains that she has a new job that is an improvement over her prior circumstances because it pays more and because it is full-time. *Id.*

CHAPTER 13 TRUSTEE'S RESPONSE

David Cusick ("the Chapter 13 Trustee") filed a Response on November 7, 2017. Dckt. 14. The Chapter 13 Trustee states that he does not oppose the Motion.

DISCUSSION

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). 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.

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 Owens ("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.

16. 12-25308-E-13 TJW-2 | **RAYMUNDO/SANDRA VALTIERRA** **Timothy Walsh** | **CONTINUED MOTION FOR OMNIBUS RELIEF UPON DEATH OF DEBTOR** **9-21-17 [54]**

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, parties requesting special notice, and Office of the United States Trustee on September 21, 2017. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

The Motion to Substitute 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 Substitute is denied.

Joint Debtor, Sandra Valtierra, seeks an order approving the motion to substitute Joint Debtor for the deceased Debtor, Raymundo Valtierra, Jr. This motion is being filed pursuant to Federal Rule of Bankruptcy Procedure 1016.

Joint Debtor and Debtor filed for relief under Chapter 13 on March 19, 2012. On June 26, 2012, Debtor's Chapter 13 Plan was confirmed. Dckt. 23. On January 12, 2016, Debtor Raymundo Valtierra, Jr., passed away. Joint Debtor asserts that she is the lawful successor and representative of Debtor.

Pursuant to Federal Rule of Bankruptcy Procedure 1016, Joint Debtor requests authorization to be substituted in for the deceased debtor and to perform the obligations and duties of the deceased party in addition to performing her own obligations and duties. A Suggestion of Death was filed on September 21, 2017. Dckt. 54. Joint Debtor is the spouse of the deceased party.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on October 3, 2017. Dckt. 60. The Chapter 13 Trustee states that Debtor has not amended Schedules B or C to reflect any life insurance that may have existed. Additionally, the Chapter 13 Trustee questions how the surviving debtor was able to make the final seventeen plan payments of $555.00 to complete the Plan. The Chapter 13 Trustee states that the deceased debtor's net income listed on Schedule I was $3,635.35, while the surviving debtor's net income from Schedule I was only $1,800.00.

OCTOBER 17, 2017 HEARING

At the hearing, the Chapter 13 Trustee concurred in Debtor's request for a continuance so that Debtor may provided additional information. Dckt. 63. The court continued the hearing to 3:00 p.m. on November 21, 2017. Dckt. 64. The court ordered Debtor to file supplemental pleadings by November 14, 2017. *Id.*

JOINT DEBTOR'S FIRST SUPPLEMENTAL DECLARATION

Joint Debtor filed her first Supplemental Declaration on October 31, 2017. Dckt. 66. FN.1. Joint Debtor states there was no life insurance for the deceased debtor. Instead, Joint Debtor was offered from his retirement to receive either a lump sum or monthly payments; she chose monthly payments through the Public Employees' Retirement System ("PERS"). She states that the net monthly amounts received from PERS are $1,554.53.

FN.1. Joint Debtor filed the Supplemental Declaration and Exhibits in this matter as one document. That is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, exhibits, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." LOCAL BANKR. R. 9004-2(c)(1). Counsel is reminded of the court's expectation that documents filed with this court comply as required by Local Bankruptcy Rule 9004-1(a). Failure to comply is cause to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(l).

These document filing rules exist for a very practical reason. Operating in a near paperless environment, the motion, points and authorities, declarations, exhibits, requests for judicial notice, and other pleadings create an unworkable electronic document for the court (some running hundreds of pages). It is not for the court to provide secretarial services to attorneys and separate an omnibus electronic document into separate electronic documents that can then be used by the court.

Joint Debtor also reports that she employed part-time earning monthly net income of $2,540.00. She also states that she receives $1,621.00 per month through Social Security.

JOINT DEBTOR'S SECOND SUPPLEMENTAL DECLARATION

Joint Debtor filed a second Supplemental Declaration (entitled "Additional Declaration") on November 7, 2017. Dckt. 68. Joint Debtor states that she has spoken with her counsel and with the Chapter 13 Trustee's office and has filed the second Supplemental Declaration in response to those conversations. Joint Debtor clarifies that she filed Amended Schedules I & J, but the expenses on Amended Schedule J have not changed since the case was filed in 2012.

Joint Debtor states that her listed expenses have not changed because "the figures are forever changing, [and] it is all estimate, and sometimes based upon 'wishful thinking.'" *Id.* at 2:1–2. Joint Debtor then argues that what she lists on Schedule J now is irrelevant anyway "because the time for payments has already passed." *Id.* at 2:6.

Joint Debtor believes that no one wants to argue about what her power bill costs and what she spends on food and gasoline, and she prefers to just leave those numbers as they have been listed. *Id.* at 2:7–8. She argues that what has been reported is an accurate and generalized representation of her finances in this case, though.

Finally, Joint Debtor expresses a concern that she does not want to mislead the court by amending her expenses to match her income, which is another reason why she chose to leave the expense numbers unchanged.

DISCUSSION

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

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

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

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

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

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

Financial Information

Here, Sandra Valtierra has not provided sufficient evidence to show that administration of the Chapter 13 case is in the best interest of creditors after the passing of the debtor. Through two supplemental declarations, Joint Debtor still has not provided sworn testimony to the court that she is the heir and legal successor to Raymundo Valtierra, Jr., despite testifying that he was her husband.

With respect to the "financial information," Debtor and Debtor's counsel appear to admit that the numbers used on Schedule J are made up, this Debtor being unable to provide an accurate estimation of the actual, truthful, honest expenses paid. Debtor makes the unwarranted conclusions that:

> I don't believe anyone wants to argue issues of the power bill, gas, food, etc. I believe those figures are better left as is. They do, however represent a true, generalized picture of the financial situation, during the course of this chapter 13 case.

Declaration, p. 2:7–9; Dckt. 68. At the least, the court is concerned that the information be truthful and accurate, which is required as a condition of confirming and prosecuting a plan.

The Chapter 13 Trustee has not filed additional pleadings, but the court notes that his initial concern was that Joint Debtor's finances probably changed in January 2016. Joint Debtor admits that her income changed, but she does not report when it changed. Instead, she discusses what the changed amounts are, and she provided two PERS statements from June 2017, two earnings statements from mid-January 2017 through early February 2017, and an undated letter from the Social Security Administration stating what amounts Joint Debtor may expect to receive in 2017. None of those items show how Joint Debtor's income changed in January 2016, and she has not presented any convincing evidence or argument that a modified plan was not appropriate to pay more than the 0.00% dividend provided for in the confirmed plan. *See* Dckt. 5.

The Chapter 13 Trustee filed his Final Report and Account on August 16, 2017. Dckt. 48. That report shows that $159,087.69 in unsecured claims was discharged without payment. *Id.* At this time, the court cannot determine that further administration of this case is in the best interest of creditors. The Motion is denied.

Here, the co-Debtor died on January 12, 2016. The bankruptcy case was filed on March 19, 2012, and the sixty-month plan commenced with April 2012. The surviving Debtor's finances dramatically changed with the forty-sixth month of the Plan.

Though the deceased co-debtor passed away in January 2016, surviving Debtor and counsel failed to disclose (hid from the court) the death until September 21, 2017, when the Notice of Death and the Omnibus Motion were filed. Dckt. 54. That was in the fifty-fourth month of the Plan. The hearing on the Motion was set for October 2017, the fifty-fifth month of the Plan. The delay has apparently been used by Debtor to now argue—the sixty months are about over, there is nothing to see what my finances have been during the final fourteen months of the plan—I keep the money, no questions asked. FN.1.

FN.1. Clearly the court's paraphrasing has a sharp, sarcastic tone. However, that is how the arguments of counsel and the surviving Debtor read. Hopefully, using this literary device may well help the surviving

Debtor and counsel to appreciate that providing financial information under penalty of perjury has a legal significance and that intentional delay cannot be used as a device to circumvent federal law.

Debtor tells the court, the Chapter 13 Trustee, and Creditors that the estate (the asset being undisclosed and upon conversion all such rights going to the Chapter 7 estate administered by the Chapter 7 trustee) is to receive a lump-sum payment or the annuity payment running well after the end of the Chapter 13 Plan (and the discharge of creditor unsecured claims provided for in the Plan with a 0.00% dividend).

Based on the testimony provide by the surviving Debtor concerning her finances, because of her annuity election, surviving Debtor's monthly gross income increased $1,644.53 per month. Though now she has only a family of one, she purports to there being no reduction in expenses, which total $4,875.53 per month. Supplemental Schedule J, Dckt. 65; Original Schedule J, Dckt. 1.

On Original Schedule I, to generate the projected disposable income of $555.00 shown on Original Schedule J, gross income of $4,688.02 a month from the deceased Debtor was required. Original Schedule I, Dckt. 1 at 27. Even with that gross income, surviving Debtor and the deceased Debtor were able to only eke out only $559.00 for projected monthly disposable income to fund a plan. Dckt. 1 at 28.

On Supplemental Schedule I, surviving Debtor states under penalty of perjury that there has been $0.00 in income from the deceased Debtor from some unspecified date. (Surviving Debtor and counsel not using the correct supplemental schedule I form to show the date from which the change occurs). But surviving Debtor shows that she has generated gross income of $3,132.00 per month for some unstated period of time. Dckt. 65 at 5. However, the financial information relied upon by the court when the Plan was confirmed in 2012 stated that the surviving Debtor had only $1,800.00 of unemployment income. Dckt. 1 at 27. It may well be that surviving Debtor and deceased Debtor have had an "extra" $1,300.00 in monthly income throughout most of this Chapter 13 Plan, with such amount never disclosed to the court. Further, the potential for such disclosure, which counsel knew would occur when the death of the deceased Debtor was disclosed, was delayed until the surviving Debtor could make her argument that "it is too late, the Plan is almost over, nobody look at our actual income." She, and apparently her counsel, have tried to ensure that nobody would have known about the lump-sum payment or, to this day, the amount of such lump-sum payment.

The surviving Debtor has demonstrated that she is not capable of fulfilling the duties of being the representative of the deceased Debtor. Her manifested attitude that the bankruptcy laws do not apply to her and her financial dealings amplifies the short-comings. Further, these belated disclosures of her actual finances are not "too late" to be considered by the court, the Chapter 13 Trustee, and parties in interest. They are relevant, not only to the current motion, but whether this case should proceed or be dismissed as to both the surviving Debtor and the deceased Debtor.

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

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

The Motion for Substitute After Death filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied.

17. 17-23596-E-13 HDR-1 — KRYSTAL/JONATHAN HASSON — Harry Roth — MOTION TO CONFIRM PLAN — 10-6-17 [30]

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's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on October 6, 2017. By the court's calculation, 46 days' notice was provided. 42 days' notice is required. FED. R. BANKR. P. 2002(b); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is denied.

Krystal Hasson and Jonathan Hasson ("Debtor") seek confirmation of the Amended Plan to account for claims being filed higher than anticipated. Dckt. 33. The Amended Plan proposes payments of $3,175.00 for sixty months with a 100.00% dividend to unsecured claims. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on November 6, 2017. Dckt. 40. The Chapter 13 Trustee asserts that Debtor is $3,175.00 delinquent in plan payments, which represents one

month of the plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

The 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 Krystal Hasson and Jonathan Hasson ("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. **17-25909-E-13** **LYUDMILA POKATILOV** **OBJECTION TO CONFIRMATION OF**
DPC-1 **Harry Roth** **PLAN BY DAVID P. CUSICK**
10-18-17 [24]

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 parties requesting special notice on October 18, 2017. 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. Lyudmila Pokatilov ("Debtor") cannot afford the plan payment;

B. The Plan fails the liquidation analysis;

C. The Plan does not reconcile how claims being paid in a pending Chapter 7 case filed by Debtor's spouse will be paid in this case; and

D. Attorney's fees that have been paid may not be disclosed.

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). The Plan calls for Debtor to make a lump sum

payment of $26,798.10 in the sixtieth month, but Debtor has not explained how that is possible when Schedule J indicates that Debtor can afford only $1,067.68 per month.

Additionally, Debtor's income may be different because he admitted at the Meeting of Creditors that he will be receiving $1,009.00 in monthly child support, and he has not filed an Amended Schedule I. Debtor may have also omitted expenses for a dissolution proceeding, and he has admitted that his ongoing mortgage payment calculation does not include property taxes and insurance. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtor's plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). The Chapter 13 Trustee states that in Debtor's Chapter 7 case, there is a motion to employ a broker to sell real property that Debtor has listed as owning fully. Based upon the value of the property to be sold, the Chapter 13 Trustee argues that unsecured claims may receive more in Chapter 7.

Spouse's Chapter 7 Case

The Chapter 13 Trustee directs the court to the Chapter 7 bankruptcy case filed by Aleksandr Pokatilov, Debtor's husband, 16-24744 ("Spouse Bankruptcy Case"). In the Spouse Bankruptcy Case, the husband states that his gross wages are only $699.00 per month. 16-24744; Statement of Current Monthly Income, Dckt. 12. He also states that he is receiving Food Stamps and Cash Aid of $58 per month. *Id.* On Schedule I, husband states that his actual income as of the commencement of his bankruptcy case was $0.00 per month. *Id.*; Schedule I, Dckt. 12 at 32.

On the Statement of Financial Affairs, husband listed a family law divorce proceeding with Debtor in this Case. *Id.*; Dckt. 12 at 41.

On Schedule A, husband lists two pieces of real property, which are identified as 5630 Mount Everest Court and 673 O Street for which he is the only owner. *Id.*; Schedule A, Dckt. 12 at 5. From Schedule D filed by husband, it appears that there are substantial equities in both properties to be administered by the Chapter 7 Trustee in husband's case.

In the current case, Debtor states that she is the only owner of the Mount Everest Court Property. Schedule A, Dckt. 16 at 3. For the 673 O Street Property, Debtor states that she has an interest in it with at least one other person. *Id.* at 4.

With the husband's Chapter 7 case pending, the Plan does not include any method for reconciling what claims will be paid through this case, which could result in a claim being paid more than owed through either Chapter 7 or 13. That would violate 11 U.S.C. § 1325(a)(1).

Additional Representation of Debtor

Finally, Debtor admitted at the Meeting of Creditors that his counsel has also been hired to represent Debtor in a pending dissolution, but neither the Plan nor the 2016(b) statement disclose what he has been paid for those services.

Lump Sum Payment

The Chapter 13 Plan is to be funded with $1,500.00 per month payments by Debtor. Dckt. 17. The Additional Provisions state that a single lump sum payment of $26,798.10 will be made in month sixty of the Plan, with no source identified or provision to fund such payment. Using Debtor's financial information provided under penalty of perjury on Schedule I and J, she has only $1,067 per month in projected disposable income. Dckt. 16 at 24–28.

If Debtor were to be able to have $1,500.00 per month to fund the Plan, the monthly payments would be disbursed as follows:

A.	Current Mortgage Payment	$850.04
B.	Mortgage Arrearage Payment	$395.19
C.	Class 2 Auto Loan	$ 27.57
D.	Counsel for Debtor (averaged over 60 months)	$ 42.50
E.	CH 13 Trustee Fees (est. 8%)	$120.00

Required payments before priority and general unsecured claim distributions total $1,435.30, leaving effectively nothing to be paid to creditors with priority and general unsecured claims until the sixtieth month $26,798.10 lump sum payment.

According to the Plan, Debtor has a priority unsecured claim owed to the Internal Revenue Service of $40,684.00, which must be paid in full through the Plan, unless the Service agrees to other treatment. Proof of Claim No 2 filed by the Internal Revenue Service asserts a priority claim of $41,949.86.

Even if Debtor can make projected disposable income of $1,500.00 appear to fund the Plan, it is nothing more than a "prayer" that in the sixtieth month only about half of what is necessary to fund the Plan to pay the Class 5 Priority Claims will appear by financial miracle.

On its face, even with the "financial miracle," the Plan is not feasible.

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. 15-20336-E-13 DEF-6 ANTWANETTE RAYMOND David Foyil MOTION FOR HARDSHIP DISCHARGE 9-29-17 [142]

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 28, 2017. By the court's calculation, 54 days' notice was provided. 28 days' notice is required.

The Motion for Hardship Discharge has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen 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 for Hardship Discharge is denied without prejudice.

Antwanette Raymond ("Debtor") moves for the entry of a hardship discharge pursuant to 11 U.S.C. § 1328(b). Debtor argues that she was placed on disability pay after a disk bulged in her back. She expected to be back to work by month thirty (July 2017), but that time has passed and she is on disability still. Debtor argues in the Motion that she is paying everything she can into the Plan, but that she cannot afford to complete the plan payments. She argues that a modification is not practicable.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on November 6, 2017. The Chapter 13 Trustee notes that a Modified Plan was filed and set for hearing on November 21, 2017, which indicates that further modification may be practicable instead of seeking a hardship discharge.

APPLICABLE LAW

Section 1328(b) of the Bankruptcy Code states:

> Subject to subsection (d), at any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if–

> (1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;
>
> (2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and
>
> (3) modification of the plan under section 1329 of this title is not practicable.

The provisions of 11 U.S.C. § 1328(b) are written conjunctively and must all be satisfied to grant a hardship discharge. *See, e.g.*, *In re Cummins*, 266 B.R. 852, 855 (Bankr. N.D. Iowa 2001). Debtor has the burden or proving each of those elements. *Spencer v. Labarge (In re Spencer)*, 301 B.R. 730, 733 (B.A.P. 8th Cir. 2003). "Unsubstantiated and conclusory statements" about a debtor's inability to afford plan payments anymore are insufficient when considering a motion for a hardship discharge. *See, e.g.*, *In re Dark*, 87 B.R. 497, 498 (Bankr. N.D. Ohio 1988).

Some courts have looked for a catastrophic event to justify a hardship discharge, but others have relied upon the plain meaning of 11 U.S.C. § 1328(b) to determine whether a "debtor is justly accountable for the plan's failure." *In re Bandilli*, 231 B.R. 836, 840 (B.A.P. 1st Cir. 1999). Determining whether a debtor is justly accountable is fact-driven, and some considerations include:

A. Whether the debtor has presented substantial evidence that he or she had the ability and intention to perform under the plan at the time of confirmation;

B. Whether the debtor did materially perform under the plan from the date of confirmation until the date of the intervening event or events;

C. Whether the intervening event or events were reasonably foreseeable at the time of confirmation of the Chapter 13 plan;

D. Whether the intervening event or events are expected to continue in the reasonably foreseeable future;

E. Whether the debtor had control, direct or indirect, of the intervening event or events; and

F. Whether the intervening event or events constituted a sufficient and proximate cause for the failure to make the required payments.

Id.

At least one court has found that an economic hardship (i.e., lost business revenue and increased expenses) is not the kind of event "such as death or disability which prevent[s] a debtor, through no fault of his or her own, from completing payments." *In re Nelson*, 135 B.R. 304, 306 (Bankr. N.D. Ill. 1991).

Sub-section 11 U.S.C. § 1328(b)(1) "requires that the circumstances leading to the debtor's failure to make payments be beyond the debtor's control." *In re Cummins*, 266 B.R. at 855. Such aggravating circumstances need to be "truly the worst of the awfuls—something more than just the temporary loss of a job or a temporary physical disability." *In re Nelson*, 135 B.R. at 307 (citation omitted).

The second portion of 11 U.S.C. § 1328(b) requires that unsecured claims receive no less than they would have through Chapter 7 liquidation. That is called the "best interests" test that is identical to Chapter 13 plan confirmation in 11 U.S.C. § 1325(a)(4). *In re Cummins*, 266 B.R. at 856 (citations omitted). If an unsecured claim would not receive a distribution through Chapter 7, then any payment from a Chapter 13 plan satisfies that requirement. *Id.* (citing *In re Nelson*, 135 B.R. at 308).

Finally, 11 U.S.C. § 1328(b)(3) requires that modifying the Chapter 13 plan not be practicable. Proposing a modified plan "is not 'practicable' if there is no source of income to fund the modified plan." *Id.* (citing *In re Bond*, 36 B.R. 49, 51 (Bankr. E.D.N.C. 1984)).

The Ninth Circuit has instructed that "[n]othing in the Code compels a bankruptcy court to close, rather than dismiss, a Chapter 13 case when a debtor fails to complete [a] plan." *HSBC Bank USA, N.A. v. Blendheim (In re Blendheim)*, 803 F.3d 477, 496 (9th Cir. 2015). Furthermore, "the availability of case closure does not eliminate a bankruptcy court's duty to ensure that a debtor complies with the Bankruptcy Code's 'best interests of creditors' test, 11 U.S.C. § 1325(a)(4), and the good faith requirement for confirming a Chapter 13 plan." *Id.* The Ninth Circuit found explicitly that a "bankruptcy court [had] properly conditioned permanent lien-voidance upon the successful completion of the Chapter 13 plan payments. If the debtor fails to complete the plan as promised, the bankruptcy court should either dismiss the case or, to the extent permitted under the Code, allow the debtor convert to another chapter." *Id.*

DISCUSSION

A review of the docket shows that Debtor simultaneously filed both this Motion for Hardship Discharge and a Motion to Confirm a Modified Plan, with the Modified Plan also being filed. The simultaneous filing of a modified plan and motion to confirm is a *de facto* admission that Debtor believes it is possible to modify the plan in her case so that she can complete it and receive a discharge without having to request that the court enter a hardship discharge.

With a possible *de facto* admission, the court looks at the proposed modified plan. The modified plan would reduce the payments to $100 per month for months 32 to 34. Proposed Modified Plan, Dckt. 148 at 8. The confirmed Plan in this case (Dckt. 36) required payments of $470.00 per month for sixty months. That Plan was based on Debtor having $4,192 per month in Combined Monthly Income and ($3,722.50) in reasonable and necessary expenses. Amended Schedules I and J, Dckt. 38.

On Supplemental Schedule I, Debtor states having Combined Monthly Income of $3,168.00. Dckt. 150 at 4–5. Debtor's expenses are reduced to $3,068.00. Supplemental Schedule J. *Id.* at 6–7. That yields a projection of only $100.00 per month in disposable income.

In reading Debtor's Declaration, some issues arise. First, Debtor states that under her Plan she is to pay Hyndai [sic] Capital America $14,000 on its secured claim (valued pursuant to 11 U.S.C. § 506(a)), for

which the collateral is Debtor's car. As of March 2017, Debtor has paid only $6,762.47. Thus, Debtor still has to pay approximately $7,500.00 to get the benefit of her 11 U.S.C. § 506(a) valuation. To get that valuation, though, Debtor must "complete the contract" (the Chapter 13 Plan). Taking a hardship discharge, which admits that the plan was not completed puts Debtor back in the car finance hole, which was stated to be $20,547.66 when this case was filed. See Proof of Claim No. 8 filed by Hyundai Capital America.

What is missing from Debtor's disability plea is any evidence from a doctor attesting to the illness and providing the court with expert medical opinion that Debtor will be unable in the foreseeable future to get back to work, save her Chapter 13 Plan, and reap the benefits of the valuation and two years already spent in the case.

Based upon Debtor appearing to prosecute a motion to confirm a modified plan, this Motion is denied without prejudice.

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

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

The Motion for Hardship Discharge filed by Antwanette Raymond ("Debtor") having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied without prejudice.

20. 15-20336-E-13 ANTWANETTE RAYMOND MOTION TO MODIFY PLAN
DEF-7 David Foyil 9-29-17 [146]

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 28, 2017. By the court's calculation, 54 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(g) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

The Motion to Confirm the Modified Plan is denied.

Antwanette Raymond ("Debtor") seeks confirmation of the Modified Plan because Debtor remains on medical disability and cannot afford payments under the confirmed plan. Dckt. 149. The Modified Plan withdraws payments for the Internal Revenue Service and Franchise Tax Board. 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 3, 2017. Dckt. 157. He argues that the Modified Plan violates 11 U.S.C. § 1325(b)(4)(B) because it will complete in less than the permitted sixty months without providing full payment of all allowed unsecured claims. Debtor has proposed a plan term of thirty-four months, but Debtor has not proposed a dividend to unsecured claims.

In addition, the Chapter 13 Trustee asserts that Debtor is $3,020.00 delinquent in plan payments under the current confirmed plan, and $200.00 under the proposed plan. 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 also asserts that the Internal Revenue Service has a claim for $11,513.36 in priority unsecured debt and $996.54 in general unsecured debt. Proof of Claim No. 1, filed on June 12, 2015. The Plan does not provide for all priority debt as required by 11 U.S.C. § 1322(a)(2). Additionally, the Chapter 13 Trustee maintains that unsecured creditors have filed other claims totaling $10,032.66, which will not be paid under the plan.

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

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by Antwanette Raymond ("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.

21. 17-25942-E-13 DPC-2 | **FIAZ JAVED** **Robert McCann** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 10-24-17 [38]**

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 24, 2017. 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.

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

A. Fiaz Javed ("Debtor") failed to attend the 341 Meeting of Creditors.

B. Debtor is delinquent.

C. Debtor's plan does not list a dividend to unsecured claims.

D. Debtor is unable to make payments or comply with the plan.

E. Debtor's plan exceeds sixty months.

F. Debtor failed to provide for multiple secured claims.

G. Debtor's plan fails the liquidation analysis.

H. Debtor failed to provide pay advices.

I. Debtor failed to provide tax returns.

J. The Chapter 13 Trustee objects to attorney compensation because the attorney failed to appear at the 341 Meetings of Creditors.

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

Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. To attempt to confirm a plan while failing to appear and be questioned by the Chapter 13 Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

The Chapter 13 Trustee asserts that Debtor is $150.00 delinquent in plan payments, which represents one month of the $150.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

The Chapter 13 Trustee asserts that Debtor's plan does not provide a dividend to unsecured creditors as the dividend blank has been left blank, failing to designate a treatment for claims of a particular class under 11 U.S.C. § 1328(a)(3). Failure to provide a treatment may result in a failure to discharge unsecured debts under 11 U.S.C. § 1328(a).

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6).

1. Debtor's plan payment is insufficient to fund the plan. In Class 1 of the Plan, Debtor proposed a plan payment of only $150.00 per month when Bank of America's ongoing mortgage payments was listed as $150.00. The Chapter 13 Trustee argues that the plan payment must be no less than $162.52 per month to pay the Class 1 monthly contract installment and the Chapter 13 Trustee fees of 7.7%.

2. Debtor's Plan proposes to pay interest on arrears to Bank of America in Class 1, however, this creditor may not be entitled to interest under 11 U.S.C. § 1322(e), unless the note provides for interest on late payments or applicable non-bankruptcy law requires it.

3. Debtor's Plan proposes to pay ongoing mortgage payments in Class 1 of the Plan but fails to propose a monthly dividend to cure the $8,500.00 in arrearages.

Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

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 152 months due to insufficient plan payments to pay ongoing mortgage payments, attorney fees, mortgage arrears, and the 7.7% dividend to the Chapter 13 Trustee. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

Debtor fails to provide for multiple secured claims listed on Schedule D including: Chase Home Mortgage, Chase Auto Loan, Wells Fargo Bank N.A., d/b/a Wells Fargo Dealer Services, and NDSC-National Default Servicing. Wells Fargo Bank N.A., d/b/a Wells Fargo Dealer Services filed Claim No. 1-1 on October 12, 2017 asserting a claim of $11,781.13. Debtor's Schedule D estimates the amount of Chase Home Mortgage's claim as $14,814.61, Chase Auto Loan's claim as $9,966.26, Wells Fargo Bank N.A., d/b/a Wells Fargo Dealer Services as $12,978.00, and NDSC-National Default Servicing as $73,274.22. The Plan provides for treatment of this as a Class 2 claim, but (because Debtor asserts that it is subject to a claims valuation pursuant to 11 U.S.C. § 506(a)), proposes to pay a $0.00 monthly dividend on account of these claims.

Additionally, the Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtor's plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). The Chapter 13 Trustee states that Debtor has reported non-exempt equity in 290 Alcantar Circle, Sacramento, California, for the amount of $400,000.00, and Debtor is proposing a zero percent dividend to unsecured claims, but additional equity exists. On Schedule D, Debtor lists Chase Home Mortgage for $14,814.61 secured by Debtor's real property, and Bank of America for $73,274.22. Debtor has not explained how, under the proposed plan and the schedules filed under penalty of perjury, the unsecured claimants are entitled to a zero percent dividend when there may be upward of $311,911.39 in non-exempt equity.

Debtor has not provided the Chapter 13 Trustee with employer payment advices for the sixty-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv). Also, the Chapter 13 Trustee argues that Debtor did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year, specifically the 2016 Tax Return, for which a return was required. *See* 11 U.S.C. §§ 521(e)(2)(A), 1325(a)(9); FED. R. BANKR. P. 4002(b)(3). While Debtor has provided some pay stubs, Debtor has failed to provide all necessary pay stubs and has failed to provide the tax transcript. Those are independent grounds to deny confirmation. 11 U.S.C. § 1325(a)(1).

Lastly, the Chapter 13 Trustee objects to attorney compensation under Local Bankruptcy Rule 2016-1, which requires the attorney to appear at the 341 Meeting of Creditors with Debtor.

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

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

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

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

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

22. 17-24453-E-13 MWB-2 | **MICHELLE QUINLIVAN** **Mark Briden** | **MOTION TO CONFIRM PLAN** **9-26-17 [66]**

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, Chapter 13 Trustee, creditors, and Office of the United States Trustee on September 26, 2017. By the court's calculation, 56 days' notice was provided. 42 days' notice is required. FED. R. BANKR. P. 2002(b); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is denied.

Michelle Quinlivan ("Debtor") seeks confirmation of the Amended Plan to list Chase Mortgage in Class 4. Dckt. 66 at 2:7. The Amended Plan lists Chase Mortgage in Class 4 (the only claim listed) and provides a 2.00% dividend to unsecured claims. FN.1. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

FN.1. Debtor filed the Motion and Amended Plan in this matter as one document. That is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, exhibits, memoranda of points and authorities, other supporting documents, proofs

of service, and related pleadings shall be filed as separate documents." LOCAL BANKR. R. 9004-2(c)(1). Counsel is reminded of the court's expectation that documents filed with this court comply as required by Local Bankruptcy Rule 9004-1(a). Failure to comply is cause to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(l).

These document filing rules exist for a very practical reason. Operating in a near paperless environment, the motion, points and authorities, declarations, exhibits, requests for judicial notice, and other pleadings create an unworkable electronic document for the court (some running hundreds of pages). It is not for the court to provide secretarial services to attorneys and separate an omnibus electronic document into separate electronic documents that can then be used by the court.

CREDITOR'S OPPOSITION

JPMorgan Chase Bank, N.A. ("Creditor") holding a secured claim filed an Opposition on October 12, 2017. Dckt. 78. The objecting creditor holds a deed of trust secured by Debtor's residence. Creditor has filed a timely proof of claim in which it asserts $879.05 in pre-petition arrearages. Claim No. 7-1. The Plan does not propose to cure those arrearages. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments because it does not provide for the surrender of the collateral for this claim. *See* 11 U.S.C. §§ 1322(b)(2) & (5), 1325(a)(5)(B). The Plan cannot be confirmed because it fails to provide for the full payment of arrearages.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on November 3, 2017. Dckt. 87. The Chapter 13 Trustee opposes confirmation on the grounds that the Amended Plan violates Local Bankruptcy Rule 3015-(d)(1) and that Debtor cannot perform under the Amended Plan now that PNC Bank's claim has been removed from Class 2C.

Local Bankruptcy Rule 3015-1(d)(1) states that if an amended plan is filed, then it must be filed with a motion to confirm, and it must "be filed as a separate document." Here, Debtor filed the Motion and the Amended Plan as one document in violation of the procedure established in this district.

Additionally (and more troublesome), Debtor has omitted PNC Bank from the Amended Plan entirely. PNC Bank filed a secured claim that is presently subject to a pending motion to value on January 18, 2018, but there is no plan provision for the claim. *See* Claim No. 5-1. If the motion to value is not granted, then Debtor will not be able to perform the plan in violation of 11 U.S.C. § 1325(a)(6). That is sufficient to deny confirmation.

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 Michelle Quinlivan ("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.

23. 11-48055-E-13 PLC-8 | **CURTIS HEIGHER** **Peter Cianchetta** | **MOTION TO DETERMINE FINAL CURE AND MORTGAGE PAYMENT RULE 3002.1** **10-24-17 [157]**

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, and Office of the United States Trustee on October 24, 2017. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion to Determine Final Cure and Mortgage Payment 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 Determine Final Cure and Mortgage Payment is denied.

Curtis Heigher ("Debtor") moves for the court to determine the final cure and payment on a mortgage pursuant to Federal Rule of Bankruptcy Procedure 3002.1(h). On September 12, 2017, David Cusick ("the Chapter 13 Trustee") filed a Notice of Final Cure Payment for Wells Fargo Bank NA ("Creditor"). Dckt. 155. Creditor filed a Response to the Notice stating that it was owed $26,242.11 in post-petition payments. Exhibit B, Dckt. 159.

Debtor disagrees with Creditor's assertion that its claim has not been cured. In support of that disagreement, Debtor provides an accounting for all payments being made through May 2017. *See* Exhibit

C, Dckt. 159. Debtor argues that Creditor's error is due to an Objection to Notice of Mortgage Payment Change (PLC-06) that was sustained and due to another Objection to Notice of Mortgage Payment Change that was settled tentatively without a settlement agreement ever being produced. FN.1.

FN.1. With this caveat, the adjudication of this Motion appears to be in doubt. It appears that Debtor is asserting rights under a tentative settlement for which no settlement was finalized and no settlement agreement ever prepared.

Debtor moves the court to rule that all pre-petition arrears for Creditor have been cured and that all post-petition payments to Creditor are current through May 15, 2017.

CHAPTER 13 TRUSTEE'S RESPONSE

The Chapter 13 Trustee filed a Response on November 7, 2017. Dckt. 161. The Chapter 13 Trustee notes that Creditor's Response to the Notice of Final Cure Payment indicates that pre-petition defaults were paid in full but that Debtor is due for payments that came due on December 15, 2016.

The Chapter 13 Trustee states that he has paid $105,404.26 in ongoing mortgage payment in this case, with $9,980.76 paid to pre-petition arrears. Finally, the Chapter 13 Trustee believes that at least sixty mortgage payments have been disbursed to Creditor in satisfaction of the Plan.

CREDITOR'S RESPONSE

Creditor filed a Response on November 7, 2017. Dckt. 165. Creditor admits that the pre-petition arrears have been cured fully, but Creditor argues that the post-petition payments owed to it consist of ten payments. Four of the payments are in the amount of $2,847.42 due between December 2016 and March 2017, and six payments are for $2,498.32 due between April 2017 and September 2017, less $137.49 held in suspense.

Creditor argues that it credited $12,849.30 in compliance with the court's December 2014 order sustaining an objection to notice of mortgage payment change and found that there remained $26,242.11 in post-petition amounts due.

Creditor provides information about a series of Notices of Mortgage Payment Change that were issued after the court sustained an objection to the first notice. Those notices are summarized as:

A. January 9, 2015 Notice
   1. Effective February 15, 2015
   2. Interest only minimum payment of $1,436.69
   3. Escrow payment of $569.17
      i. $495.39 for escrow and $73.78 for shortage

B. March 31, 2015 Notice
   1. Effective May 15, 2015

2. Principal and interest minimum payment of $1,866.11
3. Escrow payment of $569.17
4. Interest rate increase from 5.625% to 6.50%

C. September 4, 2015 Notice
1. Effective October 15, 2015
2. Principal and interest minimum payment of $1,866.11
3. Escrow payment of $905.57
i. $591.47 for escrow and $314.10 for shortage

D. May 12, 2016 Notice
1. Effective June 15, 2016
2. Principal and interest minimum payment of $1,866.11
3. Escrow payment of $981.31
i. $723.08 for escrow and $258.23 for shortage

E. March 13, 2017 Notice
1. Effective April 15, 2017
2. Principal and interest minimum payment of $1,866.11
3. Escrow payment of $632.21
i. $632.21 for escrow with a $49.18 overage

As for various credits totaling $12,849.30, Creditor argues that it provided:

A. $8,950.80 on July 21, 2014, for unnoticed payment changes that occurred through August 15, 2014;

B. $947.82 on September 22, 2014, after a notice of payment change was not issued on September 15, 2014, as had been expected;

C. $982.68 on January 7, 2015, to comply with the court's December 2014 order; and

D. $1,968.00 on July 26, 2017, as part of a settlement in *In re Green* for unnoticed increases in February and March 2015.

CHAPTER 13 TRUSTEE'S REPLY

The Chapter 13 Trustee filed a Reply on November 14, 2017. Dckt. 170. The Chapter 13 Trustee requests that, because of the complexity of this matter, that the court allow for further discovery and briefing. Specifically, the Chapter 13 Trustee points to complications from a pre-confirmation loan modification, the court's order sustaining an objection to a Notice of Mortgage Payment Change, and a notice of a tentative settlement regarding a payment change.

RULING

The court begins with Movant's evidence in support of Debtor's contentions. No testimony is provided in support of the Motion. Exhibit A is the Notice of Final Cure Payment filed by the Chapter 13 Trustee. Dckt. 159. Exhibit B is the Wells Fargo Bank, N.A. Response stating that the cure has not been made and that there is a $26,242.11 post-petition arrearage. *Id.* Exhibit C is a document titled "Debtor's Accounting," which Exhibit has not been authenticated as required by Federal Rule of Evidence 901 et seq. While the first two exhibits are taken from the court's own file, Exhibit C is the construct of Debtor and Debtor's counsel, for which nobody has stepped forward to testify as to its accuracy, how it was created, or why it is credible.

The Wells Fargo Bank, N.A. Opposition is supported by the Declaration of Crystal Massey, a Vice President with the Bank. Dckt. 166. The Declaration provides a detailed accounting of how Creditor computes the post-petition arrearage. The asserted post-petition defaults are based on post-petition Notices of Mortgage Payment Change filed on February 9, 2015 (for which Debtor's Objection was dismissed); March 31, 2015; September 4, 2015; May 12, 2016; and March 13, 2017, for which no objections were asserted by Debtor. Declaration, ¶¶ 14, 15, 16, and 17; Dckt. 166.

In the Massey Declaration, the missed payments are shown for December 2016 to March 2017 and April 2017 through September 2017. Declaration, ¶ 20; Dckt. 166. On unauthenticated Exhibit C, Debtor states that the December 2016 through May 2017 payments were made, and none past that point.

Debtor's "Motion" is little more than a demand that the court grant the Motion because Debtor demands it. Absent evidence, the court cannot, and will not, grant the relief requested. If Debtor had the simple evidence showing that the payments had been made, rather then merely taking a shot at a Motion for which Debtor did not (or could not) provide any evidentiary support, then Debtor could have presented that evidence.

The Motion is denied.

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

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

The Motion to Determine Final Cure and Mortgage Payment filed by Curtis Heigher ("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 hearing on the Motion For Determination of Final Cure Payment is denied.

24. 17-22866-E-13 DAO-3 | **ABEL RUSFELDT** / **Dale Orthner** | **CONTINUED MOTION TO CONFIRM PLAN** / **8-23-17 [79]**

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, creditors, parties requesting special notice, and Office of the United States Trustee on August 23, 2017. By the court's calculation, 55 days' notice was provided. 42 days' notice is required. FED. R. BANKR. P. 2002(b); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is xxxxxx.

Abel Rusfeldt ("Debtor") seeks confirmation of the Amended Plan to reflect that his home located at 5408 Iron Point Court, Rocklin, California ("Residence") is community property and to modify a mortgage. Dckt. 81. The Amended Plan includes a first mortgage and proposes plan payments of $4,272.00, with a 0.5% dividend to general unsecured claims. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

OVERVIEW OF OPPOSITION AND PRIOR HEARINGS

Because this is a continued matter and presents complex issues, the court begins with a general overview of the Motion, Opposition, and prior hearings.

Chapter 13 Trustee's Opposition

David Cusick ("the Chapter 13 Trustee") filed an Opposition on September 18, 2017. Dckt. 97. The Chapter 13 Trustee opposes confirmation on the limited basis that the Amended Plan fails to state clearly

when the Chapter 13 Trustee is supposed to begin disbursements to the ongoing mortgage now listed in Class 1. The Chapter 13 Trustee believes that payments are supposed to begin on September 25, 2017.

The Chapter 13 Trustee also notes that Debtor has not informed the court whether he made the first four post-petition mortgage payments called for in the plan dated April 28, 2017, or if any post-petition mortgage arrears exist.

The Chapter 13 Trustee believes that the issues can be resolved in an order confirming if Debtor's intent to for payments to Nationstar to begin with the funds received on September 25, 2017.

Creditor's Opposition

Home Ally Financial, LLC ("Misidentified Creditor") filed an Objection on October 3, 2017. Dckt. 103. Misidentified Creditor argues that Debtor cannot reorganize the debt owed to Misidentified Creditor because it is owed solely by Debtor's non-filing spouse.

Misidentified Creditor argues that Maria De Los Angeles Torres Lopez executed a note secured by a first deed of trust on June 1, 2005, in the amount of $64,000.00. The original holder of the note (allegedly) was First Franklin, a Division of Nat. City Bank of IN. Misidentified Creditor alleges the following:

A. That National City Bank was acquired by PNC Bank, National Association on November 7, 2009;

B. That PNC Bank National Association, Successor by Merger to National City Bank assigned all beneficial interests to Dreambuilders Investments, LLC on February 10, 2015;

C. That Dreambuilder Investments, LLC assigned all beneficial interests to Home Ally Financial II, LLC on February 10, 2015; and

D. That Home Ally Financial II, LLC assigned all beneficial interests to Certis PN 1, LLC on March 13, 2015.

Misidentified Creditor argues Debtor's and his non-filing spouse's attempt to classify their residence as community property fails because the property was acquired in June 2005, Debtor and his spouse have lived in the property for more than eleven years, but neither party took any effort to effect a transmutation of the property away from its legal status as being owned solely by the non-filing spouse—the only named party on the borrowing note and deed of trust.

Without being community property, Misidentified Creditor argues that the corresponding debt cannot be treated as community debt. That in turn prevents Debtor from modifying the loan in this case, according to Misidentified Creditor.

Debtor's Reply

Debtor filed a Reply on October 10, 2017. Dckt. 107. Debtor asserts that he and his non-filing spouse have established that they have been married and living in the subject property for more than eleven years and that they have used community income to pay both mortgages on the property.

Debtor asserts that the "*pro tanto* community property interest" in California gives the community an interest in property that is paid with community income. *Id.* at 1–2 (citing *In re Marriage of Green*, 56 Cal. 4th 1130 (2013); *Forbes v. Forbes*, 118 Cal. App. 2d 324, 325 (1953)). Debtor argues that a community interest in the property allows Debtor to provide for it in his plan.

October 17, 2017 Hearing

At the hearing, the court continued the hearing to 3:00 p.m. on November 21, 2017. Dckt 112. The court ordered that supplemental pleadings were to be filed by October 31, 2017, with replies, if any, filed by November 10, 2017. Dckt. 113.

DISCUSSION

No further pleadings have been filed for the court's review since the October 17, 2017 hearing. The court's following discussion expands upon the October 17, 2017 civil minutes and upon the arguments presented at that prior hearing.

Inaccuracy in Statements by Asserted Creditor

First, the court addresses some inaccuracies in statements presented to the court by Misidentified Creditor. Misidentified Creditor holds itself out to the court as a "secured creditor," but that is incorrect. "Secured creditor" is not a term that is defined in the Bankruptcy Code; it is a term from the Commercial Code. In bankruptcy, there can be creditors with secured claims and unsecured claims, but there is no such entity as a secured creditor.

Additionally, Home Ally Financial, LLC is not the actual creditor. According to the supporting documents filed with Proof of Claim No. 20-1—which, coincidentally, was filed by the same attorney who filed Misidentified Creditor's Opposition—Home Ally Financial, LLC, was actually the servicer for Home Ally Financial II, LLC. Home Ally Financial II, LLC, assigned the Deed of Trust to Certis PN 1, LLC, in January 2015, however. Misidentified Creditor's misstatements about its identity could lead to the court granting relief to a party that is not the true Misidentified Creditor.

Finally, Misidentified Creditor asserts that it "holds a deed of trust encumbering the real property," but that phrase is also a misstatement because the actual obligation is evidenced by a Note "held" by the Misidentified Creditor, for which the Deed of Trust dutifully follows and is not held by "Misidentified Creditor."

Issue Raised Regarding Debtor's Interest in Property

Misidentified Creditor does raise a substantial issue in questioning what and how property is appearing in this bankruptcy case. Debtor cannot state what interest he actually has, providing only a cryptic description of the interest as being an "equitable interest," apparently admitting that he has no "legal interest" in the Property. Dckt. 84.

Misidentified Creditor has provided the court with a copy of the note and deed of trust at issue with Misidentified Creditor's Motion for Relief from the Stay. Exhibits 1, Note, and 2, Deed of Trust, Dckt. 39; authenticated by Declaration, Dckt. 37. The borrower on the note is "Maria Lopez" and is dated June 1, 2005. The Deed of Trust is identified as a "Secondary Lien," with Ms. Lopez identified as "a married woman as her sole and separate property."

Claimed Ownership by Debtor's Spouse

In the Motion for Relief from the Stay, Misidentified Creditor states that Maria Lopez has filed her own prior bankruptcy case, No. 16-27069 ("Maria Bankruptcy Case"). That case was filed on October 24, 2016, and dismissed on April 12, 2017. Ms. Lopez's attorney in the Maria Bankruptcy Case is the same attorney as for Debtor in this case. In the Maria Bankruptcy Case, a Chapter 13 Plan was confirmed. 16-27069; Order, Dckt. 71. That confirmed Chapter 13 Plan required monthly plan payments of $3,248.00 for sixty months. *Id.*; Plan, Dckt. 7. Under that Chapter 13 Plan, there were no Class 1 claims paid, and Class 2 provided for paying several car loans and paying Misidentified Creditor's $111,000.00 claim with 3% interest at the rate of $1,994.52 (providing for fully amortizing the loan over the sixty months of the Chapter 13 Plan).

The Maria Bankruptcy Case was dismissed in April 2017 because of $9,744 in defaults. *Id.*; Civil Minutes, Dckt. 79. The Chapter 13 Trustee's Final Report discusses that only $3,248.00 was paid into the Chapter 13 Plan for the five months of the Plan (with monthly payments of $3,248.00 each). *Id.*, Final Report, Dckt. 85.

On Schedule A in the Maria Bankruptcy Case, Maria Lopez stated under penalty of perjury that she owns the Property that secures Misidentified Creditor's claim and that she is the only person who has an interest in the Property. *Id.*; Dckt. 1 at 11. That appears to be in conflict with Debtor in the current case stating that he is the only person having an interest in the property. On her Schedule I, Debtor states that she has no income but that her spouse has gross income of $9,300 per month. *Id.* at 29–30. On Schedule J, Ms. Lopez states that her household consists of two persons, Maria Lopez and her husband. *Id.* at 31.

On Schedule J in the current case, Debtor states under penalty of perjury that the household consists of four persons—Debtor, Maria Lopez, a nine-year-old daughter, and a twelve-year-old son. Dckt. 84 at 13. Debtor's statement under penalty of perjury in this case is in conflict with Maria Lopez's statement under penalty of perjury in 2016.

Debtor and Maria Lopez have a third bankruptcy case that they filed jointly in 2013, No. 13-28581. In that Chapter 7 case, they were represented by an attorney who is not the same one who represents them

in their individual Chapter 13 cases. Debtor and Maria Lopez obtained their Chapter 7 discharges on October 15, 2013. 13-28581; Discharge Order, Dckt. 15.

On Schedule I filed in the Chapter 7 case, Debtor and Maria Lopez state under penalty of perjury that their family unit is four persons, the two adult debtors and two children (ages six and nine). *Id.*; Dckt. 1 at 39. On Schedule A in the Chapter 7 case, Debtor and Maria Lopez state under penalty of perjury that they both own the property securing Misidentified Creditor's claim with their **interests being those of joint tenants**. *Id.* at 12.

Interest Arising from a Deed of Trust Under California Law

Debtor argues that because there is a deed of trust on the Property, Debtor can have merely some undefined "equitable interest" in the Property. That is what Debtor states on Schedule A in this case, Dckt. 1 at 4. In the Maria Lopez Case, Ms. Lopez changed her statement of interest in the Property, asserting that only she has an interest in the Property and that it is merely some undefined "Equitable Interest." 16-27069; Schedule A/B, Dckt. 1 at 11. Ms. Lopez was represented by the same attorney in the Maria Lopez case as is representing Debtor in this case.

More than 150 years ago, California "adopted the 'lien' theory of mortgages, [and] it adopted the 'title' theory in reference to deeds of trust." *Bank of Italy Nat. Trust & Sav. Assn. v. Bentley*, 217 Cal. 644, 655 (Cal. 1933); *see McMillan v. Richards*, 9 Cal. 365 (Cal. 1858); *Koch v. Briggs*, 14 Cal. 256 (Cal. 1859); *Dutton v. Warschauer*, 21 Cal. 609 (Cal. 1863). Those distinctions have become well-settled law in California. *See Sacramento Bank v. Alcorn*, 121 Cal. 379 (Cal. 1898); *Hodgkins v. Wright*, 127 Cal. 688 (Cal. 1900).

In California, "a deed of trust differs from a mortgage in that title passes to the trustee in case of a deed of trust, while, in the case of a mortgage, the mortgagor retains title." *Bank of Italy Nat. Trust & Sav. Assn.*, 217 Cal. at 655. A deed of trust's trustee "carries none of the incidents of ownership of the property, other than the right to convey upon default on the part of the debtor in the payment of his debt," however. *Id.* at 656; *see also Shuster v. BAC Home Loans Servicing, LP*, 211 Cal. App. 4th 505, 511 (Cal. Ct. App. 2012) (quoting *Bank of Italy Nat. Trust & Sav. Assn.*, 217 Cal. at 656).

The California Supreme Court has even stated that practically (if not legally) "a deed of trust is a lien on the property." *Monterey S.P. Partnership v. W. L. Banham, Inc.*, 49 Cal. 3d 454, 460 (Cal. 1989); *see also Peterson v. Wells Fargo Bank, N.A.*, 236 Cal. App. 4th 844, 854 (Cal. Ct. App. 2015) (quoting *Monterey S.P. Partnership*, 49 Cal. 3d at 460).

That legal concept of what rights and interests the owner of property has and what "legal interest" is transferred to the trustee under the deed of trust is thoroughly and conclusively discussed in California Real Estate, Miller and Starr.

> A mortgage with a power of sale and a deed of trust are practically identical. Except for some minor distinctions, for all practical purposes, a mortgage that contains a power of sale has the same legal effect and economic function as a deed of trust. Each is subject to the same procedures and limitations for judicial and nonjudicial foreclosure, each is subject to

the same redemption provisions both prior to and after the foreclosure sale, and each is subject to the same antideficiency limitations. Both are intended by the parties to serve the same economic function of providing security for the performance of an obligation.

5 CALIFORNIA REAL ESTATE, MILLER AND STARR, ¶ 13.1 (4th ed.).

A deed of trust is the functional equivalent of a mortgage. While there is a statutory form of mortgage, there is no statutory form of deed of trust. There are no enabling statutes that set forth the form of the deed of trust, its required provisions, or its legal effects. However, the statutes regulating enforcement of deeds of trust implicitly recognize their validity.

The forms of trust deeds in general use provide that the trustor of the deed of trust "grants, transfers and assigns" the property to the trustee, who holds the title as security for the performance of the obligation. Despite its title and form, the deed of trust is an anomaly because it includes none of the incidents of a normal trust. Since the early period when deeds of trust began to replace mortgages as the primary real property security device, it was recognized that trust deeds are not true trusts but are practically and substantially the equivalent of mortgages with a power of sale.

Trust deed creates only a lien. For trust deeds, courts generally arrive at the same conclusion as the "lien theory" traditionally applicable to the mortgage. In practical effect, if not in legal parlance, a deed of trust, like a mortgage, is a lien on the property.

The trustor retains the incidents of title. The trustee has none of the attributes of an owner. **If the trustee held the title to the property, the trustor could not convey, encumber, or homestead the property. However, when property is subject to a deed of trust, the title to the property and all the incidents of title are retained by the trustor;** the deed of trust only imposes a lien on the property. **All the incidents of ownership**, **including** the rights of possession, maintenance, **encumbrance, and transfer are reserved to the trustor**. [FN.]23

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23. *Hagge v. Drew*, 27 Cal. 2d 368, 376, 165 P.2d 461 (1945); *Bank of Italy Nat. Trust & Sav. Ass'n v. Bentley*, 217 Cal. 644, 656, 20 P.2d 940 (1933); *Hollywood Lumber Co. v. Love*, 155 Cal. 270, 273, 100 P. 698 (1909); *Charles A. Warren Co. v. San Francisco Sav. Union*, 153 Cal. 771, 774–75, 96 P. 807 (1908); *MacLeod v. Moran*, 153 Cal. 97, 99–100, 94 P. 604 (1908); *Sacramento Bank v. Alcorn*, 121 Cal. 379, 383, 53 P. 813 (1898); *Bank of America Nat. Trust and Sav. Ass'n v. Embry*, 188 Cal. App. 2d 425, 428, 10 Cal. Rptr. 602 (Cal. Ct. App. 1961); *Zolezzi v. Michelis*, 86 Cal. App. 2d 827, 830, 195 P.2d 835 (Cal. Ct. App. 1948); *Lupertino v. Carbahal*, 35 Cal. App. 3d 742, 748, 111 Cal. Rptr. 112 (Cal. Ct. App. 1973); *Conlin v. Coyne*, 19 Cal. App. 2d 78, 83–85, 64 P.2d 1123 (Cal. Ct. App. 1937); *Davidow v. Corp. of America*, 16 Cal. App. 2d 6, 11, 60 P.2d 132 (Cal Ct. App. 1936).

> While technically the "title" to the property security is in the trustee, the trustor retains the right to possession of the property and its rents and profits. The trustor can secure another trust deed by a lien on the property and homestead the property, and the trust deed is not a conveyance that would abandon a prior homestead. The trustor retains the right to sell, transfer, or devise the encumbered property, or grant an easement across it, without the consent of the beneficiary or trustee, even though the beneficiary may be able to demand a payment of the debt as a result of the transfer. When transferred, the grantee of the property receives the title subject to all existing deeds, mortgages, and other liens or encumbrances of which he or she has actual or constructive notice.

Id., ¶ 13:2 (lien versus title theories) (emphasis added).

Review of Certis PN 1, LLC Proof of Claim

Proof of Claim No. 20 filed by Certis PN 1, LLC for the claim at issue has attached to it the deed of trust upon which Ceteris PN 1, LLC's rights and interests in the Property are founded. That deed of trust is consistent with the above statements of California law that the "title" and power of sale given the trustee under the deed of trust is limited to that of exercising the power of sale in the event of a default. Those provisions include:

A. Title of Document: "Deed of Trust (Secondary Lien)." Deed of Trust Attachment, Proof of Claim No. 20 at 11.

B. "(A) 'Security Instrument' means this document, which is dated June 01, 2005, together with all Riders to this document." *Id.*

C. "(B) 'Borrower is MARIA LOPEZ, A MARRIED WOMAN AS HER SOLE AND SEPARATE PROPERTY Borrower is the trustor under this Security Instrument." *Id.*

D. "(C) 'Trustee' is STEWART TITLE." *Id.*

E. "(N) 'Mortgage Insurance' means insurance protecting Lender against the nonpayment of, or default on, the Loan." *Id.* at 12.

F. "**TRANSFER OF RIGHTS IN THE PROPERTY**

> This Security Instrument secures to Lender: (i) the repayment of the Loa and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to .Trustee, in trust, with power of sale, the following described property located in . . . ." *Id.* at 13.

G. "THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property." *Id.*

H. "**5. Property Insurance.** Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term 'extended coverage,' and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance." *Id.* at 15.

I. "**17. Transfer of the Property or a Beneficial Interest In Borrower.** As used in this Section 17, 'Interest in the Property' means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by applicable law." *Id.* at 18.

The terms of the Deed of Trust are consistent with California Law, that while the trustee under the Deed of Trust acquires some interest in the Property (that being to sell in the event of a default), the borrower retains all other interests, including the right to transfer legal title to any other person. (See Transfer of Property Section, commonly called a "Due on Sale Clause.")

As concluded by the California Supreme Court in *Wellenkamp v. Bank of America, N.A.*, the owner of the property subject to a deed of trust had the right to sell the property. 21 Cal. 3d 943, 953 (1978). Further, such sale could not trigger a Due on Sale Clause "[u]nless the lender could demonstrate that enforcement was reasonably necessary to protect again impairment of its security or the risk of default." Repeatedly, the California Supreme Court has recognized that the trustor who gives a deed of trust continues to hold, and has the ability to transfer, legal title to the property (except for such legal rights relating to the power of sale given to the trustee under the deed of trust).

Possible Interests of Debtor

While not taking a LexisNexis public record search as conclusive evidence, an online search indicates that there may be a deed from September 2005 that Debtor can provide to clarify what interest he has in the property. The LexisNexis Public Records Search for the Property discloses that there is reportedly a deed recorded on September 26, 2005 for the Property, which is identified as a "INTRAFAMILY TRANSFER & DISSOLUTION." It identifies Maria Torres Lopez as the "Seller" and Abel Ram Rusfeldt as the "Buyer." It may well be that Debtor is already on title to this Property, without the operation of California Community Property law.

Conclusion—Interests of Debtor in Property Subject to Deed of Trust

Though Debtor's counsel may argue that any deed of trust in existence defeases the trustor of all legal interests, leaving only some undefinable "equitable interest," such is not consistent with long-established California law. Though the trustee may hold some portion of the legal title (that amount only sufficient to allow title to be transferred in the event of a default), the trustor, as the owner of the property, holds all other legal and equitable rights. Such rights must be clearly stated on the Statement of Financial Affairs. As discussed below, even if there is no September 2005 deed transferring title into Debtor, by the operation of California Community Property Law, this Property is property of the bankruptcy estate.

TRANSMUTATION TO COMMUNITY PROPERTY BY OPERATION OF LAW

There is no dispute that the Deed of Trust at issue states that the trustor is Maria Lopez, a married woman. Further, no party disputes that she purports to transfer the interest to the trustee under the Deed of Trust from her "sole and separate property." Debtor is not listed on the Deed of Trust.

The 2005 purchase date for the property was twelve years before the April 2017 commencement of this bankruptcy case. In her Declaration filed on August 23, 2017, in this case, Ms. Lopez (Debtor's wife) states under penalty of perjury:

> 3. I have lived with my husband in my home for more than 11 years, and have used community income to pay on both mortgages. I have no agreement with my husband that the community has no interest in the home, or that I retain any separate interest in the home. I believe the home to be solely the property of the marital economic community, and that neither I nor my husband have any separate interest in the home. Both I and my attorney missed the "community property" checkbox on the original Schedule A/B filed in my previous bankruptcy case.

Declaration, Dckt. 82. The court reads that testimony to be an admission that for the entire time that the Property has been owned, it has been paid for with community property monies, that Ms. Lopez asserts no separate interests in the Property, and that the Property is 100% community property.

Debtor provides his testimony under penalty of perjury, which is consistent with that of his wife, Ms. Lopez. He too admits that the Property is 100% community property, testifying:

> 4. The plan originally filed with the court incurred objections, including that my home was not community property, and therefore I could not modify the mortgage loan of my wife. I have lived with my wife in my home for more than 11 years, and have used community income to pay on both mortgages. I have no agreement with my wife that the community has no interest, or that she retains any separate interest in the home. I believe the home to be solely the property of the marital economic community, and that neither I nor my wife have any separate interest in the home. Both I and my attorney missed the "community property" checkbox on the original Schedule A/B, which is now corrected.

Declaration, Dckt. 81. As with Ms. Lopez, his wife, the court accepts the testimony that for more than eleven years the community has paid for the Property.

In looking at the loan documents, it appears that the Property was purchased for $640,000.00. The first deed of trust secures an initial obligation of $512,000.00. That is exactly 80% of the purchase price. The second deed of trust secures an initial obligation of $64,000.00, which is exactly 10% of the purchase price. Thus, those two notes cover 90% of the purchase price. No testimony is provided that the remaining 10% came from any source other than the existing marital assets (community property) of Debtor and Ms. Lopez, his wife.

California Family Code § 852(d) addressing the voluntary transmutation of property from separate to community and visa versa expressly provides that, "(d) Nothing in this section affects the law governing characterization of property in which separate property and community property are commingled or otherwise combined." As show from Debtor's and Ms. Lopez's, his wife, testimony, community property has been used to pay for the Property from the time it was purchased.

Nice document "formalities" are not required to transmute property into community property. *Estate of Wilson*, 64 Cal. App. 3d 786, 798 (Cal. Ct. App. 1976) (citations omitted). Oral agreement between joint tenant spouses is sufficient to transmute property into community property. *Id.* The acts of the parties in using community property to pay for property titled as "separate" works the conversion.

California law starts with the premise that property acquired during the marriage is community property.

Here, Debtor states that he and his wife have been using community income to pay for the first and second mortgages and have been living together for more than a decade, which indicates the parties' intent that the property be treated as community property, effecting a transmutation from Maria Lopez's separate property into community property. Even Maria Lopez states in her declaration sworn under penalty of perjury that she thinks the property is community property and not separate property for herself or Debtor. Dckt. 82.

Formula to Calculate Separate and Community Property Percentages

Merely because separate property is brought into a marriage does not guarantee that it remains separate property. There is a formula to calculate the community property interest when community property funds have been used to pay the mortgage on a property. *In re Marriage of Benson*, 36 Cal. 4th 1096, 1102 (Cal. 2005). When community funds are used to make payments on property purchased by one of the spouses before marriage, the rule developed through decisions in California gives the community an interest in such property in the ratio that the payments on the purchase price with community funds bear to the payments made with separate funds. *In re Marriage of Marsden*, 130 Cal. App. 3d 426, 436–37 (Cal. Ct. App. 1982).

As discussed by the California Supreme Court in *In re Marriage of Valli*, 58 Cal. 4th 1396, 1400 (2014):

> Property that a spouse acquired before the marriage is that spouse's separate property. (Fam. Code, § 770, subd. (a)(1).) Property that a spouse acquired during the marriage is community property (id., § 760) unless it is (1) traceable to a separate property source (*In re Marriage of Lucas* (1980) 27 Cal.3d 808, 815 [166 Cal. Rptr. 853, 614 P.2d 285]; In re Marriage of Mix (1975) 14 Cal.3d 604, 610, 612), (2) acquired by gift or bequest (Fam. Code, § 770, subd. (a)(2)), or (3) earned or accumulated while the spouses are living separate and apart (id., § 771, subd. (a)). A spouse's claim that property acquired during a marriage is separate property must be proven by a preponderance of the evidence. (*In re Marriage of Ettefagh* (2007) 150 Cal. App.4th 1578, 1591; see *Estate of Murphy* (1976) 15 Cal.3d 907, 917 [126 Cal. Rptr. 820, 544 P.2d 956] [a spouse asserting that property acquired by purchase during a marriage is separate property must prove that the property is not community].)

The court has not been presented with any written statement by which Debtor agreed to transmute the Property acquired during the marriage to Ms. Lopez, his wife. What Misidentified Creditor argues is that on her prior individual Chapter 13 case which was dismissed, Ms. Lopez, Debtor's wife, listed the Property as being owned only by her and that she had only an "equitable interest." Opposition, ¶ 8; Dckt. 103. Then, in the current case Debtor asserts that he has only an "equitable interest." *Id.*, ¶ 11. Misidentified Creditor states that title to the Property is only in the name of Maria Lopez, Debtor's wife.

Misidentified Creditor neglects to direct the court to the Schedule A filed in the joint case by Debtor and Maria Lopez, his wife in which they both state under penalty of perjury that they both own the property as joint tenants. 13-28581; Schedule A, Dckt. 1 at 12. That is clearly a statement, made under penalty of perjury, that the Property is not Ms. Lopez's separate property.

Even if the Property were to somehow start as Ms. Lopez's separate property, there is no evidence that anything other than community property has been used for the purchase of and payment of the purchase loans against the Property. The California Supreme Court has approved and affirmed a formula to determine the respective community and separate interests in the property. *In re Marriage of Marsden*, 130 Cal. App. 3d 426, 437 (Cal. Ct. App. 1982) (citing *In re Marriage of Aufmuth*, 89 Cal. App. 3d 446, 454–57 (Cal. Ct. App. 1979); *In re Marriage of Lucas*, 27 Cal. 3d 808, 816–17 (Cal. 1980)). The formula gives recognition to the economic value of any loan proceeds contributed toward the purchase of the property, and where the loan was extended before marriage and was based on separate assets, it is a separate property contribution. *Id.*

A spouse's separate property percentage interest is determined by crediting the separate property with the down payments and the full amount of the loan, less the amount by which the community property payments reduced the principal balance of the loan. *Id.* That sum is then divided by the purchase price for the separate property percentage share. The community property percentage interest is then found by dividing the community property payments on the loan principal by the purchase price. *Id.*

Here, however, the only evidence is that the Property was acquired during the marriage and paid for using community property. Therefore, it is 100% community property.

Community Property and Property of the Estate

All community property is property of a bankruptcy estate. 11 U.S.C. § 541(a)(2). Here, the Property is 100% community property, with no separate property interest held either by Debtor or Ms. Lopez, his wife. One hundred percent of the Property is property of the bankruptcy estate in this case by operation of federal law. 11 U.S.C. § 541(a)(2).

Ability to Provide for a Claim

The Bankruptcy Code provides that a Chapter 13 plan may provide for treatment of a secured claim in several different ways, stating:

> (b) Subject to subsections (a) and (c) of this section, the plan may–
> . . .
>
> > (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;
> >
> > (3) provide for the curing or waiving of any default; . . . .
>
> (c) Notwithstanding subsection (b)(2) and applicable nonbankruptcy law–
>
> > (1) a default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured under paragraph (3) or (5) of subsection (b) until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law; and
> >
> > (2) in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title.

11 U.S.C. § 1322(b), (c).

The statutory definition of a secured claim begins with the definition of a "claim" in bankruptcy. The term "claim" is defined in 11 U.S.C. § 101(5) as:

> (5) The term "claim" means–
>
> > (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

A "claim" is a right to payment, whether secured or unsecured. Here, Certis PN 1, LLC (as apparently does Misidentified Creditor) asserts the right to be paid from the Property that is property of this bankruptcy estate. In Proof of Claim No. 20, Certis PN 1, LLC correctly states that it has a secured claim in this case.

The fact that the secured claim is non-recourse (Debtor not personally obligated on the Note) does not preclude it from being a claim in this bankruptcy case. *See Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991), stating:

> Even after the debtor's personal obligations have been extinguished, the mortgage holder still retains a "right to payment" in the form of its right to the proceeds from the sale of the debtor's property. Alternatively, the creditor's surviving right to foreclose on the mortgage can be viewed as a "right to an equitable remedy" for the debtor's default on the underlying obligation. Either way, there can be no doubt that the surviving mortgage interest corresponds to an "enforceable obligation" of the debtor.

This secured claim is then valued as provided in 11 U.S.C. § 506(a).

Here, Debtor's plan provides for curing the default on the Certis PN 1, LLC claim during the term of the Plan as follows: (1) regular post-petition monthly payment of $579.46 and (2) arrearage cure payment of $827.99. Amended Plan, ¶ 2.08(c). The Property securing the Certis PN 1, LLC claim is 100% community property, which is 100% included in this bankruptcy estate as provided in 11 U.S.C. § 541(a)(2). This cure of a default on a claim in this case is clearly permitted treatment in a Chapter 13 Plan as provided in 11 U.S.C. § 1322(c)(1).

The Opposition of the Misidentified Creditor is overruled.

RULING

There remains the Opposition of the Chapter 13 Trustee to confirmation. These points are and have been addressed at the Continued Hearing as follows.

Debtor's plan requires the $4,272.00 monthly plan payment to commence in September 2017 and continue to the end of the Plan term. Plan, Additional Provisions, Dckt. 83. September is the fifth month of the Plan. The Additional Provisions state that through August 2017 the Plan will be funded with $7,725.00, less than two months of plan payments. *Id.* Those payments are not quite sufficient to fund the Class 1 secured claim payments for the monthly post-petition regular payments and the arrearage payments for the first four months of the Plan. (Combined current monthly payment of $1,974.14 + combined arrearage payment of $905.05 = $2,879,19 x 4 months = $11,516.76).

Debtor's Original Chapter 13 Plan improperly placed the secured claim (first deed of trust) of Deutsche Bank National Trust, Company as Trustee, as a Class 4 claim being paid directly by Debtor. Plan, ¶ 2.11; Dckt. 7. If Debtor has paid those amounts, then there would be adequate funding for the payment of the Class 1 secured claims in the Amended Plan.

At the hearing, **xxxxxxxxxxxxxxxxxxxxxxxxx**.

The Amended Plan ~~does/does not~~ comply with 11 U.S.C. §§ 1322, 1323, and 1325(a) and **is/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 Abel Rusfeldt ("Debtor") having been presented to the court, the court having determined that the real property commonly known as 5408 Iron Point Court, Rocklin, California is 100% community property (neither Debtor nor Maria De Los Angeles Torres Lopez, his wife, having any separate property interests in said Property), said community property being included in this bankruptcy estate (11 U.S.C. § 541(a)(2)), 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 **xxxxxxxxxxxxxxx**.

25. 17-26977-E-13 TOG-2 | **GERARDO REYES** **Thomas Gillis** | **MOTION TO IMPOSE AUTOMATIC STAY AND/OR MOTION TO EXTEND AUTOMATIC STAY** **11-7-17 [15]**

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.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 7, 2017. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Extend the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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 xxxxx.

Gerardo Reyes ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond thirty days in this case. This is Debtor's second bankruptcy petition pending in the past year. Debtor's prior bankruptcy case (No. 16-14414) was dismissed on September 19, 2017, after Debtor failed to confirm a Chapter 13 plan by September 14, 2017. *See* Order, Bankr. E.D. Cal. No. 16-14414, Dckt. 127, September 19, 2017. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to Debtor thirty days after filing of the petition.

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed because he could not afford the higher plan payments that were being called for by the Chapter 13 trustee in that case.

CHAPTER 13 TRUSTEE'S RESPONSE

David Cusick ("the Chapter 13 Trustee") filed a Response on November 14, 2017. Dckt. 24. FN.1. The Chapter 13 Trustee states that he does not oppose the Motion.

FN.1. An "Amended Response" was also filed on November 14, 2017, but the Chapter 13 Trustee filed a Notice of Errata explaining that it should not have been filed because it is for another case. *See* Dckts. 22, 26.

DISCUSSION

Improper Request Under 11 U.S.C. § 362(c)(4)

The court notes that the Motion frames the requested relief under 11 U.S.C. § 362(c)(4) requesting that the stay be imposed in this case or continued against two named creditors. The court has not been presented with any legal grounds or arguments for "continuing" the automatic stay as to only two creditors, and the request to impose the automatic stay is improper in this case because the automatic stay is already in effect—for the first thirty days of this case.

Given the pleadings, and a review of Debtor's prior cases, there is only one case that has been pending in the prior year, which means that upon filing this case, the automatic stay went into effect and would terminate by operation of law after thirty days unless the court orders the stay to be extended.

This case was filed on October 23, 2017, which is twenty-nine days before the hearing on this Motion. No motion to extend the automatic stay has been filed on the docket. Even though Debtor has moved for relief under the incorrect section of the Bankruptcy Code, the court determines that unnecessary harm may occur if the court does not recast this Motion as one to extend the automatic stay, as opposed to one to impose the automatic stay. The court proceeds to analyze the Motion under 11 U.S.C. § 362(c)(3).

Framework for 11 U.S.C. § 362(c)(3)

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.

RULING

Debtor explains that his prior case was dismissed because he could not afford the higher plan payments that were being called for by the Chapter 13 Trustee, but Debtor does not provide any evidence to the court that his circumstances have changed such that he is able to afford plan payments now. When discussing income from Debtor's trucking business, all Debtor provides as evidence under penalty of perjury is his intention "to continue operating [his] business in Sacramento seeking newer, more profitable loads for [his] truck." Dckt. 17 at 2:3–5.

The Motion pleads additional grounds that are not supported by evidence, and those grounds include that "Debtor has located new and more profitable customers for his hauls. . . . Debtor has also developed a business relationship with a large trucker who has the need to use Debtor's truck with more profitable hauls." Dckt. 15 at 3:26–4:3. Neither of those statements, though, indicate that Debtor's financial circumstances have changed. Instead, all Debtor reports is that he has "located" customers and "developed" a relationship with a trucker. Debtor has not reported that he has actually acquired new customers that can improve his finances.

Debtor has not sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay, but the Chapter 13 Trustee has reviewed the case and has indicated that he does not oppose extending the automatic stay.

At the hearing, Debtor reported that his finances have actually changed for the better in the following ways: xxxxxxxxxxxx.

At the hearing, the Chapter 13 Trustee reported that he does not oppose extending the automatic stay because xxxxxxxxxxxxxx.

The Motion is xxxx.

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 Gerardo Reyes ("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 xxxx.

26. 17-26182-E-13 DPC-1 | **DMITRY BRODSKIY** **Dale Orthner** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 10-26-17 [17]**

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.

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 26, 2017. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is xxxxxxxxxxxxxxx.

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

A. Dmitry Brodskiy ("Debtor") is delinquent in plan payments;

B. Debtor's Plan does not satisfy the Liquidation Analysis; and

C. Debtor has proposed a Plan that violates 11 U.S.C. § 1325 (a)(3) because administration of the estate will require means forbidden by law.

The Chapter 13 Trustee's objections are well-taken. The Chapter 13 Trustee asserts that Debtor is $1,252.00 delinquent in plan payments, which represents one month of the $1,252.00 plan payment. 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 shows on Schedule I that he earns $6,300.00 per month from Base of Operation, Inc., $1,000.00 from his father per month, and $2,150.00 each month from the State of California for taking care of his mother. The amount earned from Base of Operation is related to Debtor's marijuana business. As such, 66.66% of Debtor's monthly income is from a federally prohibited business venture.

Consequently, the Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtor's plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). The Chapter 13 Trustee states that while Debtor asserts that he receives $6,300.00 per month from Base of Operation, Inc., the company is recorded as having a value of $0.00 on Schedule A/B. The Statement of Financial Affairs shows income for this year for the company as $25,200.00.

When the Chapter 13 Trustee requested additional information from about Debtor about his business, Debtor presented bank statements showing deposits between May 2017 and September 2017 totaling $328,258.45. The Chapter 13 Trustee cannot determine how much cash was available in the business when this case was filed, but there may be additional equity that would go to unsecured claims in Chapter 7.

In addition, Debtor earns over 60% of his income from a marijuana-related business, which is illegal under the Controlled Substances Act. 21 U.S.C. §§ 801 et seq. 21 U.S.C. § 802(16) defines marijuana as a controlled substance under the Act, and § 841(a) outlines how the manufacturing, distribution, or dispensing of marijuana is prohibited under federal law. In Schedule A/B, Debtor outlines how he owns 100% shares of Base of Operation, Inc. ("Company"), which is described as a domestic non-profit business. Dckt. 17. The Articles of Incorporation on file with the California Secretary of State reflect that the Company is organized as a corporation to form a collective among qualified patients as defined under California Health & Safety Code §§ 11362.5 & 11362.7 for medical use of marijuana.

For Debtor's Plan to be confirmed, it must comply with both state and federal law. *In re Arm Ventures, LLC*, 564 B.R. 77, 84 (Bankr. S.D. Fla. 2017). In this case, however, the Chapter 13 Trustee asserts that Debtor's Plan violates federal law because his business involves the sale of marijuana. *See In re McGinnis*, 453 B.R. 770, 772 (Bankr. D. Or. 2011). As such, the Chapter 13 Trustee may not administer the most valuable asset in this estate. *See, e.g.*, *In re Arenas*, 535 B.R. 845, 854 (B.A.P. 10th Cir. 2015).

Though several other Bankruptcy Courts have addressed this issue, there is no controlling Circuit authority as to how businesses not administered by a trustee are handled in a Chapter 13 case. It may be that the responsibility for the disbursement of monies under the Plan will need to be handled by someone other than the Chapter 13 Trustee, with that person accounting to the Chapter 13 Trustee for the payments made and disbursing the Chapter 13 Trustee's fees to the Chapter 13 Trustee (presumably from the 40% of the income not related to the asserted objectionable activity).

Or, it may be documented that the net monthly plan payment of $1,751.00 is made from the IHSS payments received by Debtor's spouse. *See* Amended/Supplemental (sic) Schedule I, Dckt. 1 at 43. Such monthly payment to the spouse can be made into a separate account and the disbursement to the Chapter 13 Trustee made from that account. FN.1.

FN.1. In addressing "not forbidden by law" in 11 U.S.C. § 1325(a)(2), that provision relates to the process in obtaining confirmation, not the Chapter 13 Trustee becoming the criminal prosecutor, judge, and executor for a debtor. *See Geiger v. Cook Invs. NW, SPNWY, LLC (In re Cook Invs. NW, SPNWY, LLC)*, No. 17-5516 BHS, 2017 U.S. Dist. LEXIS 136129, at *7 (W.D. Wash. Aug. 24, 2017). As noted by the *Geiger* court, the proposed plan provided "for sufficient payment to creditors without the inclusion of the monthly proceeds" from a marijuana business. *Id.* The court emphasized how courts have rejected the argument that a plan cannot be confirmed merely because a provision violates another law, as long as the plan is a sincere attempt to reorganize and is proposed in a manner not forbidden by law. *Id.* (citing *In re Food City, Inc.*, 110 B.R. 808, 813–14 (Bankr. W.D. Tex. 1990); *In re Sovereign Group, 1984-21 Ltd.*, 88 B.R. 325, 328 (Bankr. D. Colo. 1988)).

The District Court acknowledged that it was "not sticking its head in the sand and recognize[d] the complexities of states allow and regulating the sale of recreational marijuana despite federal laws criminalizing such conduct. *Id.* at *9. With a bankruptcy plan involved, though, the court declined to "require the Debtor to certify that *all* of its business activities do not violate any law." *Id.* at *8.

While the court appreciates the concerns of the Chapter 13 Trustee, this does not appear to be a simple binary question, but a complex financial situation created by the political gyrations over the past century. Thus, the solution in the "simple" civil world of bankruptcy may require more thought, effort, and legal creatively.

What is clear is that the issue of whether Debtor can avail himself of the bankruptcy relief provided by Congress as mandated by Article I of the Constitution requires deeper analysis and further proceedings.

Xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

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 **xxxxxxxxxxxxxxx**.

27. 17-26182-E-13 DMITRY BRODSKIY MOTION TO DISMISS CASE
DPC-2 Dale Orthner 11-7-17 [25]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on November 7, 2017. The court set the hearing for November 21, 2017. Dckt. 29.

The Motion to Dismiss 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 hearing on the Motion to Dismiss is continued to xxxxxxxxxxxxxxxxxx.

David Cusick ("the Chapter 13 Trustee") moves to dismiss Dmitry Brodskiy's ("Debtor") Chapter 13 case on two grounds: (1) no plan payments have been made, and (2) Debtor's income comes from a source that violates federal law.

Delinquency as a Ground to Dismiss

The Chapter 13 Trustee argues that Debtor did not commence making plan payments and is $1,252.00 delinquent in plan payments, which represents one month of the $1,252.00 plan payment. 11 U.S.C. § 1307(c)(4) permits the dismissal or conversion of the case for failure to commence plan payments. Debtor did not present any opposition to the Motion.

Income from a Marijuana Business as a Ground to Dismiss

Additionally, the Chapter 13 Trustee argues that Debtor's business and primary source of income stem from the distribution and sale of marijuana in violation of the Controlled Substances Act, 21 U.S.C. § 841(a).

While the private marijuana industry is set to become legal in California on January 1, 2018, there are numerous implications that the new industry will have on the law. For instance, can Debtor, an individual whose income is earned through a marijuana business, seek the extraordinary relief afforded by Congress in the Bankruptcy Code? As the Bankruptcy Appellate Panel for the Tenth Circuit summarized succinctly, "No." *Arenas v. United States Trustee (In re Arenas)*, 535 B.R. 845, 847 (B.A.P. 10th Cir. 2015).

The Bankruptcy Appellate Panel for the Tenth Circuit analyzed whether being involved in the marijuana business as a debtor amounts to "cause" or a "lack of good faith" to dismiss a case. *Id.* at 849–53. The court, after applying several relevant factors, agreed with the bankruptcy court's outcome that a debtor was incapable of proposing a confirmable Chapter 13 plan because it would violate federal criminal law, which was sufficient to find a lack of good faith. *Id.* at 852–53.

Bankruptcy courts across the country have reached similar (and further) conclusions. The Bankruptcy Court for the South District of Florida reviewed the emerging intersection of bankruptcy law and marijuana and was convinced that "the law is very clear—a bankruptcy plan that proposes to be funded through income generated by the sale of marijuana products cannot be confirmed unless the business generating the income is legal under both state law and federal law." *In re Arm Ventures, LLC*, 564 B.R. 77, 84 (Bankr. S.D. Fla. 2017).

Those absolute mandates from other bankruptcy courts do not take into account the complexity of the federal/state situation, the right of the sovereign states to govern within their boundaries, and the Article I mandate to Congress to implement one uniform bankruptcy law in the United States. U.S. CONST. art. I, § 8, cl. 4.

As the Ninth Circuit Court of Appeals has noted, Congress has issued an appropriations rider prohibiting the United States Department of Justice from preventing jurisdictions from implementing their own medical marijuana laws. *United States v. McIntosh*, 833 F.3d 1163, 1169 (9th Cir. 2016). That does not bar federal prosecution for marijuana-related crimes, however, if the culprit was growing, transporting, or selling marijuana outside of compliance with state law. *Id.* at 1178. However, so long as the person is in compliance with the state's laws concerning the state legal marijuana business, federal prosecution is barred. If, as a matter of criminal law, Congress has determined that prosecution is not proper, then in the mere "civil world" of bankruptcy law one would question whether Congress would want its Article I mandate hobbled by such legal state law business activity. In this case, however, the Chapter 13 Trustee has not alleged that Debtor is in violation of California law, just federal law.

The Bankruptcy Court for the Western District of Michigan stretched the analysis even further when it was presented with a debtor who had income from marijuana sales but who was proposing plan payments sourced from Social Security income. *In re Johnson*, 532 B.R. 53 (Bankr. W.D. Mich. 2015). The court noted that the debtor was authorized to grow and sell marijuana by state law, but the continued operation of the debtor's marijuana business concerned the court. Even with the Social Security and marijuana funds segregated from one another, the court noted that operating the marijuana business would cause the court, the debtor, and the trustee to violate federal law. *Id.* at 56–57. However, in reaching that conclusion, the court in *Johnson* does not explain how the U.S. Government, issuing Social Security Benefits, has those Social Security Benefits converted into illegal monies because a person may have some other activity that may be illegal under some other law. The *Johnson* court conflates "Debtor's financial life" into one big

activity, apparently making the Social Security Benefits a federal criminal activity. This court is not so convinced. (Nor is the court convinced that the Internal Revenue Service is engaging in illegal activities when it collects taxes relating to the business or that the U.S. Postal Service is engaging in illegal activities when depositing mail containing checks written on bank accounts containing Debtor's monies that relate to the marijuana activities.)

As the court noted in connection with the hearing on the Objection to Confirmation, Debtor's spouse has separate income from the State of California—it having nothing to do with the marijuana business being conducted under state law. That net income is $1,751.00 per month. Schedule I, Dckt. 1 at 43. That is more than enough to fund the Chapter 13 Plan with monies that have no connection to the objected-to business operated by Debtor's corporation.

This Motion was set on an order shortening time, which the court did in light of the need to get the parties addressing this issue sooner rather than later.

Therefore, the court sets the following briefing schedule for this Motion:

A. Debtor shall file and serve Opposition pleadings on or before **xxxx, 20xx.**

B. Trustee shall file and serve Reply pleadings, if any, on or before **xxxx, 20xx.**

C. The continued hearing on the Motion to Dismiss will be conducted at 10:00 a.m. on **xxxxx, 20xx**.

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

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

The Motion to Dismiss the Chapter 13 case filed by 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 Motion to Dismiss is continued to **10:00 a.m. on xxxxxxxx, 20xx**.

IT IS FURTHER ORDERED that Dmitry Brodskiy ("Debtor") shall file and serve Opposition pleadings on or before **xxxx, 20xx**, and the Chapter 13 Trustee shall file and serve Reply pleadings, if any, on or before **xxxx, 20xx.**

28. **17-25491-E-13** **KATHLEEN HILL** **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK**
DPC-1 **George Burke** **10-4-17 [24]**

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 4, 2017. 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. Kathleen Hill ("Debtor") is delinquent in plan payments; and

B. Debtor failed to provide the Chapter 13 Trustee with pay advices.

NOVEMBER 7, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on November 21, 2017, to allow Debtor's attorney to appear. Dckt. 28.

RULING

The Chapter 13 Trustee's objections are well-taken. The Chapter 13 Trustee asserts that Debtor is $975.00 delinquent in plan payments, which represents one month of the $975.00 plan payment. Before the hearing, another plan payment will be due. According to the Chapter 13 Trustee, the Plan in § 1.01 calls for payments to be received by the Chapter 13 Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Debtor has yet to pay any amount into the Plan. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

In addition, Debtor has not provided the Chapter 13 Trustee with employer payment advices for the sixty-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv). This is an independent ground 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.

29. **17-25991-E-13** **EMILY CLARKVIVIER** **OBJECTION TO CONFIRMATION OF**
DPC-1 **Michael Croddy** **PLAN BY DAVID P. CUSICK**
10-18-17 [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, Debtor's Attorney, and parties requesting special notice on October 18, 2017. 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 Emily ClarkVivier ("Debtor") has not shown that she can make the plan payments and comply with the Plan when considering issues that exist from her spouse's pending Chapter 7 case.

The Chapter 13 Trustee's objection is well-taken. Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). The Chapter 13 Trustee notes that the Plan is a 100% plan, but it includes debts that have been discharged in Debtor's spouse's case. *Compare* Dckt. 1 at 29–33, *with* Case No. 15-29874, Dckt. 83. The Plan does not provide any method for reconciling payments made to claims that may receive payments through Debtor's spouse's pending Chapter 7 case.

Additionally, the Chapter 13 Trustee notes that Debtor's budget relies upon income from her spouse, and her monthly expenses exceed her income without the spouse's income. According to allegations in a withdrawn motion to dismiss, the Chapter 13 Trustee argues that the spouse's income may not be reliable because of health issues. *See* Case No. 15-29874, Dckt. 69.

Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable. 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.

30. **17-25991-E-13** **EMILY CLARKVIVIER** **OBJECTION TO CONFIRMATION OF**
SBC-1 **Michael Croddy** **PLAN BY FIRST BANK**
11-6-17 [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's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on November 6, 2017. By the court's calculation, 15 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 without prejudice.

First Bank, a Missouri state banking corporation, ("Creditor") holding a secured claim opposes confirmation of the Plan on the basis that Emily ClarkVivier's ("Debtor") income is unreliable because it is dependent on receiving income from her spouse.

Creditor has argued to the court that the Plan is not feasible because Debtor's income is based "solely on her Spouse's income." Dckt. 23 at 2:21. Creditor also presents the unsupported conclusion that the spouse's income "is not reliable." *Id.* at 2:22–23. Creditor has not presented the court with any factual evidence that Debtor cannot afford plan payments; nor has Creditor presented any legal grounds for the court deny confirmation. What Creditor seems to basing its objection upon is the Chapter 13 Trustee's objection, as noted by Creditor stating "As pointed out in the Trustee's Objection . . . ." *Id.* at 2:23.

First, Creditor's assertion that Debtor's income only comes from her spouse does not reflect an accurate reading of Schedule I filed in this case. *See* Dckt. 1 at 39–40. Schedule I discloses that Debtor is

employed as a Kindergarten teacher and receives net monthly income of $4,491.47 from her employment. While that amount alone may not be sufficient to fund the Plan, it is enough to be distinguishable from her spouse's income. Contrary to Creditor's assertion, Debtor has listed separate income.

Second, the court declines to construct arguments for Creditor and its counsel. Creditor appears to rely (inaccurately as discussed) upon the Chapter 13 Trustee's objection and is really informing the court that it concurs with the Chapter 13 Trustee. Federal Rule of Bankruptcy Procedure 9013 requires a moving party to state grounds with particularity because 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. Here, Creditor has presented the court with unsupported conclusions that are not bolstered by any presented facts or legal arguments. While Creditor's assertions may be exactly the same as the Chapter 13 Trustee's and may be correct, they must be presented in a form that complies the Federal Rules of Bankruptcy Procedure.

The Objection is overruled without prejudice. For Creditor, this outcome may be of little moment, though, because the court has sustained the Chapter 13 Trustee's objection has denied confirmation of the Plan.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by First Bank ("Creditor") holding a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is overruled without prejudice.

FINAL RULINGS

31. **17-25903-E-13 DPC-2** | **CHRISTINE MCKAY** **Peter Macaluso** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 10-18-17 [50]**

Final Ruling: No appearance at the November 21, 2017 hearing is required.

David Cusick ("the Chapter 13 Trustee") having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, and the case having been dismissed on November 3, 2017, **the Objection to Confirmation was dismissed without prejudice, and the matter is removed from the calendar.**

32. **17-25903-E-13 JCW-2** | **CHRISTINE MCKAY** **Peter Macaluso** | **OBJECTION TO CONFIRMATION OF PLAN BY U.S. BANK, N.A. 10-19-17 [54]**

Final Ruling: No appearance at the November 21, 2017 hearing is required.

The case having previously been dismissed, the Objection is overruled as moot.

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

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

The Objection to Confirmation having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection is overruled as moot, the case having been dismissed.

33. 17-26813-E-13 FREDDIE/PAMELA SELLS
MRL-1 Mikalah Liviakis

MOTION TO VALUE COLLATERAL OF ALLY FINANCIAL, INC.
10-20-17 [11]

Final Ruling: No appearance at the November 21, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on October 20, 2017. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

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

The Motion to Value Collateral and Secured Claim of Ally Financial, Inc. ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $32,500.00.

The Motion filed by Freddie Sells and Pamela Sells ("Debtor") to value the secured claim of Ally Financial Inc. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2015 Dodge Ram 1500 ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $32,500.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The lien on the Vehicle's title secures a purchase-money loan incurred on March 3, 2015, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $35,500.00. Dckt. 13. 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 $32,500.00, 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 Freddie Sells and Pamela Sells ("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 Ally Financial, Inc. ("Creditor") secured by an asset described as 2015 Dodge Ram 1500 ("Vehicle") is determined to be a secured claim in the amount of $32,500.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is $32,500.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

34. 17-25917-E-13 DPC-1 | **MATTHEW TORST, Tiffany Norman** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK, 10-18-17 [14]**

Final Ruling: No appearance at the November July 21, 2017 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 18, 2017. 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.

Upon review of the Motion and supporting pleadings, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion. The defaults of the non-responding parties in interest are entered.

The Motion to Confirm the Amended Plan is denied as moot.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Subsequent to the filing of this Motion, Matthew Torst ("Debtor") filed a First Amended Plan and corresponding Motion to Confirm on November 7, 2017. Dckts. 21 & 24. Filing a new plan is a de facto withdrawal of the pending plan. The Motion to Confirm the Amended Plan is denied as moot, 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 Motion to Confirm the Amended Chapter 13 Plan filed by Matthew Torst ("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 as moot, and the proposed Chapter 13 Plan is not confirmed.

35. 17-23740-E-13 PGM-3 | **ROBERT J/TENEKA JONES** **Peter Macaluso** | **MOTION TO CONFIRM PLAN 10-10-17 [72]**

Final Ruling: No appearance at the November 21, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 10, 2017. By the court's calculation, 42 days' notice was provided. 42 days' notice is required. FED. R. BANKR. P. 2002(b); LOCAL BANKR. R. 3015-1(d)(1).

The Motion to Confirm the Amended Plan has been set for hearing on the notice required by Local Bankruptcy 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. Robert Jones, Jr. and Teneka Jones ("Debtor") have provided evidence in support of confirmation. David Cusick ("the Chapter 13 Trustee") filed a Non-Opposition on November 2, 2017. Dckt. 82. 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 Robert Jones, Jr. and Teneka Jones ("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 10, 2017, 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.

36.	**17-25947-E-13 DPC-1**	**GARY SCHOPF AND GINGER ARDREY** **David Foyil**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **10-18-17 [24]**

Final Ruling: No appearance at the November 21, 2017 hearing is required.

David Cusick ("the Chapter 13 Trustee") having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Objection to Confirmation was dismissed without prejudice, the matter is removed from the calendar.**

On November 3, 2017, the court entered an order confirming the September 7, 2017 plan. Dckt. 32.

37. **17-25557-E-13** **ERIC FRAZIER** **MOTION FOR DENIAL OF DISCHARGE**
DPC-2 **David Foyil** **OF DEBTOR UNDER 11 U.S.C. SECTION 727(A)**
10-4-17 [24]

Final Ruling: No appearance at the November 21, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on October 4, 2017. By the court's calculation, 48 days' notice was provided. 28 days' notice is required.

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

The Objection to Discharge is sustained.

David Cusick, the Chapter 13 Trustee, ("Objector") filed the instant Objection to Eric Frazier's ("Debtor") discharge on October 4, 2017. Dckt. 24.

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 August 17, 2016. Case No. 16-25439. Debtor received a discharge on April 4, 2017. Case No. 16-25439, Dckt. 31.

The instant case was filed under Chapter 13 on August 22, 2017.

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

Here, Debtor received a discharge under 11 U.S.C. § 727 on April 4, 2017, which is less than four years preceding the date of the filing of the instant case. Case No. 16-25439, Dckt. 31. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), Debtor is not eligible for a discharge in the instant case.

Therefore, the Objection is sustained. Upon successful completion of the instant case (Case No.17-25557), the case shall be closed without the entry of a discharge, and Debtor shall receive no discharge in the instant case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Discharge filed by David Cusick ("the Chapter 13 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to Discharge is sustained, and upon successful completion of the instant case, Case No. 17-25557, the case shall be closed without the entry of a discharge.

38. 17-26462-E-13 DEF-1 | **ABRAHAM RUELAS** **David Foyil** | **MOTION TO VALUE COLLATERAL OF CARMAX BUSINESS SERVICES, LLC 10-20-17 [13]**

Final Ruling: No appearance at the November 21, 2017 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, Creditor, and Office of the United States Trustee on October 20, 2017. By the court's calculation, 32 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 Carmax Business Services, LLC ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $8,350.00.

The Motion filed by Abraham Ruelas ("Debtor") to value the secured claim of Carmax Business Services, LLC ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2010 Chevrolet Avalanche ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $8,350.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

CHAPTER 13 TRUSTEE'S RESPONSE

David Cusick ("the Chapter 13 Trustee") filed a Response on November 7, 2017. Dckt. 18. The Chapter 13 Trustee notes that the Vehicle is reported on Schedule A/B with 199,986 miles in fair condition. Creditor is listed on Schedule D with a claim amount of $14,919.09 and a value of $8,350.00. Creditor is included in Class 2 of the Plan. The Chapter 13 Trustee states that Creditor has filed Claim No. 1-1 in a secured amount of $15,216.79.

DISCUSSION

The lien on the Vehicle's title secures a purchase-money loan incurred on November 15, 2014, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $15,216.79. While Debtor's opinion of value is the most ephemeral of evidence, her 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).

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 $8,350.00, 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 Abraham Ruelas ("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 Carmax Business Services, LLC ("Creditor") secured by an asset described as a 2010 Chevrolet Avalanche ("Vehicle") is determined to be a secured claim in the amount of $8,350.00, 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 $8,350.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

39. 16-25182-E-13 ALF-1 — VERNON DAVIS AND KATHRYN DRULINER — MOTION TO MODIFY PLAN 10-9-17 [25]

Final Ruling: No appearance at the November 21, 2017 hearing is required.

The Motion to Confirm Modified Plan is dismissed without prejudice.

Vernon Davis and Kathryrn Kohlman ("Debtor") having filed a Notice of "Withdrawal of Motion", which the court construes to be an Ex Parte Motion to Dismiss the pending Motion on November 6, 2017, Dckt. 33; no prejudice to the responding party appearing by the dismissal of the Motion; Debtor having the right to request dismissal of the motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041; and the dismissal not conflicting with the non-opposition filed by David Cusick ("the Chapter 13 Trustee"); the Ex Parte Motion is granted, Debtor's Motion is dismissed without prejudice, and the court removes this Motion from the calendar.

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 Modified Plan filed by Vernon Davis and Kathryrn Kohlman ("Debtor") having been presented to the court, Debtor having requested that the Motion itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, Dckt. 33, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Confirm Modified Plan is dismissed without prejudice.

40. 16-20289-E-13 TOG-1 | **ROGELIO/CATALINA VENTURA** **Thomas Gillis** | **CONTINUED MOTION TO MODIFY PLAN** **8-29-17 [29]**

Final Ruling: No appearance at the November 21, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, Creditors, and Office of the United States Trustee on August 29, 2017. By the court's calculation, 49 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(g) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

The Motion to Confirm the Modified Plan is granted.

Rogelio Ventura and Catalina Ventura ("Debtor") seek confirmation of the Modified Plan because unsecured claims were filed $34,098.00 higher than anticipated. Dckt. 32. The Modified Plan proposes that Debtor self-pay student loans, and the plan payment was increased by $70.00. 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 October 3, 2017. Dckt. 37. The Chapter 13 Trustee argues that the Modified Plan may not have been filed in good faith and that Debtor may not be able to pay. Specifically, he argues that Schedule J does not reflect expenses for Debtor paying student loans directly, instead of through the Modified Plan. Debtor has not provided details for two student loan claims regarding their monthly payment amounts or if the payments are suspended under the terms of the loans. The Chapter 13 Trustee argues that Debtor has not explained how paying them directly is *not* preferential treatment.

OCTOBER 17, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on November 21, 2017. Dckt. 44. The court ordered Debtor to file and serve supplemental pleadings with proposed amendments by October 27, 2017. Dckt. 45.

CHAPTER 13 TRUSTEE'S AMENDED RESPONSE

The Chapter 13 Trustee filed an Amended Response on November 3, 2017. Dckt. 46. He states that the grounds for opposing confirmation have been resolved. The Chapter 13 Trustee does not oppose the Motion with the changes indicated in the modified plan attached as Exhibit A and mentioned by Debtor in a declaration. *See* Dckts. 41 & 42. Namely, the Chapter 13 Trustee does not oppose because the supplemental pleadings state that Debtor's children will pay their student loans directly when they become due.

RULING

With Debtor's clarification that children's student loans will be paid by the children directly, and with the Chapter 13 Trustee indicating that grounds for opposing confirmation have been resolved, the Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Modified Chapter 13 Plan filed by Rogelio Ventura and Catalina Ventura ("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 Modified Chapter 13 Plan filed on August 29, 2017, and as amended in Exhibit A (Dckt. 30) to reflect that plan payments for months 1–19 are $616.00 and that Debtor's issue shall pay student loans when they become due and payable, 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.