UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

November 22, 2016, at 3:00 p.m.

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1. **14-26567-E-13** **SAMUEL TAPIA** **CONTINUED ORDER TO APPEAR**
JGD-4 **John Downing** **7-22-16 [110]**

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.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, Ocwen Loan Servicing, LLC, Consumer Financial Protection Bureau, and Office of the United States Trustee on July 24, 2016. By the court's calculation, 30 days' notice was provided.

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

The hearing on the Order to Appear is concluded.

The court will issue an order to show cause as to why corrective sanctions should not be ordered for the continuing violation of federal law in not disclosing the identity of the principal in federal judicial proceeds, in addition to the court referring this matter to the chief judge of the United States District Court, notifying the chief judge of the Ninth Circuit Court of Appeals, notifying chief bankruptcy judges in each of the other districts in the Ninth and other circuits, and referral of this matter to the U.S. Attorney for the Eastern District of California and federal and state governmental regulatory agencies and departments.

In this bankruptcy case, the court was again presented with a situation where a loan servicer, Ocwen Loan Servicing, LLC, ("Ocwen") was filing, or having filed by a consumer debtor, loan modification agreements, pleadings, claims, and other documents that incorrectly identified the creditor asserting rights in the case. Specifically, this Order to Appear and Show Cause was issued based on a loan modification agreement in which Ocwen induced a (least sophisticated) consumer debtor to enter into a purported contract to modify a residential home loan, with only Ocwen, who is not the "creditor" (as that term is defined in 11 U.S.C. § 101(10) and (5)) or the loan documents.

This is not the first time the court has been forced by Ocwen to address this active misrepresentation of the creditor party appearing in federal court, seeking relief from a federal court, or seeking to have a federal judge exercise federal judicial power pursuant to Article III, Section 2, of the United States Constitution.

As discussed in this ruling, the court has allowed Ocwen years to correct its business practices and correctly identity the real parties whose interests it is purporting to litigate, enforce, and enhance through federal judicial proceeds. In 2015, Ocwen "promised" to correct this misconduct, but because of two employees (out of all the employees of Ocwen) the "efforts" languished and nobody else at Ocwen was "aware" of the need to comply with the law or the "promise" made by Ocwen and its attorneys.

The court concludes, based upon the responses provided by Ocwen; the inability of Ocwen to meet the minimal obligations of a litigant to accurately, truthfully, and honestly disclose the identity of the real party in interest whose rights are the subject of a federal judicial proceeding; and having been given years to meet such minimal obligations, Ocwen is intentionally failing to comply with these basic requirements as part of its business operations built to mislead the court, U.S. Trustee, other parties in interest, and least sophisticated consumer debtors and their counsel.

Therefore, the court has determined that it is now necessary to:

A. Issue an Order to Show Cause for Ocwen Loan Servicing, LLC to appear and show cause why the court does not issue corrective sanctions that may include (but are not limited to):

1. Mandatory order for Ocwen to truthfully, honestly, and accurately identity the real party in interest in all federal judicial proceedings in which it is acting as the agent of, representative of, or pursuant to a power of attorney given by another person.

2. Corrective monetary sanctions computed weekly if Ocwen fails to so comply.

3. Ocwen filing a Notice of Real Party in Interest in every federal judicial proceeding as its first appearance that clearly states: (a) that Ocwen is acting as the representative of another person, (b) the identity of that other person, and (c) copies of all documents upon which such representative is based and identifies the scope of powers given to Ocwen to act for the other party.

B. Refer Ocwen's conduct to the chief district court judge for the Eastern District of California for consideration of the issuance of an order to show cause why the district court judge should not exercise its corrective and punitive sanction power to address this ongoing improper conduct of Ocwen.

C. Inform the chief judge of the Ninth Circuit Court of Appeals, the chief bankruptcy judges in the other districts of all the circuits, and other individual bankruptcy judges in the Ninth Circuit of this order and the conduct of Ocwen in the federal courts.

D. Refer this conduct and the ruling of the court to the:

1. U.S. Attorney for the Eastern District of California,
2. Federal Trade Commission,
3. Consumer Financial Protection Bureau,
4. California Attorney General,
5. California Department of Consumer Affairs,
6. District Attorneys for the Counties of Los Angeles, San Diego, Sacramento, San Francisco, Santa Clara, and Fresno.

HIDING IDENTITY OF AND MISREPRESENTATION OF REAL PARTY IN INTEREST BY OCWEN

The consideration of Ocwen's continuing misconduct begins with the United States Constitution itself. Article III, Section 2 of the United States Constitution provides for the exercise of federal judicial power, stating:

> Sec. 2, Cl 1. Subjects of jurisdiction.
>
> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public Ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to

> Controversies to which the United States shall be a Party;–to Controversies between two or more States;–between a State and Citizens of another State;–between Citizens of different States,–between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

For a federal judge to exercise federal judicial power (even in or related to a bankruptcy proceeding) the real parties in interest whose rights are at issue, being effected, or from whom some relief is sought must be the parties before the court. Standing must be determined to exist before the court can proceed with the case. *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 771. (9th Cir. 2006). One of the first things that a law student learns about American Jurisprudence is that the law does not condone the "officious intermeddler." One is not allowed to assert claims or rights in which he or she has no interest. In the federal courts, this is the Constitutional requirement of "standing."

> Article III of the Constitution confines federal courts to decisions of "Cases" or "Controversies." Standing to sue or defend is an aspect of the case-or-controversy requirement. To qualify as a party with standing to litigate, a person must show, first and foremost, "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent.' . . . Standing to defend on appeal in the place of an original defendant, no less than standing to sue, demands that the litigant possess 'a direct stake in the outcome.'

Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997) (citations omitted).

To fulfill this basic Constitutional requirement for the exercise of federal judicial power, the Supreme Court has adopted Federal Rule of Civil Procedure 17, which is incorporated into federal bankruptcy proceeds by Federal Rules of Bankruptcy Procedure 7017 (for adversary proceedings) and 9014(c) (for motions and other non-adversary proceeding contested matters). Federal Rule of Civil Procedure 17 [emphasis added] provides, as is relevant to a representative appearing for the principal real party in interest:

> Rule 17. Plaintiff and Defendant; Capacity; Public Officers
>
> (a) Real Party in Interest.
>
> (1) Designation in General. An action **must be prosecuted in the name of the real party in interest.** The following may sue in their own names without joining the person for whose benefit the action is brought:
>
> (A) an executor;
> (B) an administrator;
> (C) a guardian;
> (D) a bailee;
> (E) a trustee of an express trust;

(F) a party with whom or in whose name a contract has been made for another's benefit; and

(G) a party authorized by statute.

[Fed. R. Civ. P. 17 does not provide for an agent exercising rights and duties under a power of attorney to sue (prosecute) in its own name, being the proxy litigation placeholder for the undisclosed principal.]

. . .

(b) Capacity to Sue or Be Sued. **Capacity to sue or be sued** is determined as follows:

(1) for an individual who is not acting in a representative capacity, by the law of the individual's domicile;

(2) for a corporation, by the law under which it was organized; and

(3**) for all other parties, by the law of the state** where the court is located,

. . . .

An example of a district court applying this basic federal requirement is shown where an inmate allegedly fell from top bunk while incarcerated and his wife brought an action in her own name for his injuries. Dismissal of wife's claims was warranted because wife lacked standing to sue in her own name because (1) there were no allegations relating to any injury allegedly suffered by wife as result of inmate's fall from top bunk, and (2) although wife could bring suit on inmate's behalf through wife's power of attorney for inmate, wife could not maintain suit in wife's own name or seek relief for herself on this ground. *Nickens v. District of Columbia*, 694 F. Supp. 2d 10, 13 (D.D.C. 2009).

As explained by that District Court:

> FN.3. Mrs. Nickens also states that she has power of attorney for her husband. Rule 17(a) of the Federal Rules of Civil Procedure requires that an action must be prosecuted in the name of the real party in interest. See FED. R. CIV. P. 17(a). As explained by Professor Moore: "An attorney-in-fact is not a real party in interest. **The attorney is merely an agent of the real party in interest and does not possess interests sufficient to qualify for real party in interest status.** Thus, the **attorney-in-fact cannot bring suit in its own name**." 4 MOORE'S FEDERAL PRACTICE § 17.10 (3d ed. 2002). Although Mrs. Nickens may bring suit on her husband's behalf through her power of attorney for him, she may not maintain suit in her own name or seek relief for herself on this ground.

Id. at FN.3.

See also Hispanic Society of New York City Police Department, Inc. v. New York City Police Department, et. al, 806 F.2d 1147 (2d Cir. 1986), *aff'd*, 484 U.S. 301 (1988); *Pyramid Transportation, Inc. v. Greatwide Dallas Mavis, LLC*, 2013 U.S. Dist. 104105, *4–5 (N.D. Tex. 2013) ("A party can bring suit

on behalf of another party pursuant to a power of attorney, but the "action must be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a).);

As directed by Rule 17, the court considers California law as to how an agent properly exercises a power of attorney to commence or participate in judicial proceedings.

In researching this state law requirement that the agent under a power of attorney bring and participate in the name of the principal, disclosing the power of attorney and acting thereunder, California is not "unique" in not allowing for secret, undisclosed real parties in interest. In *Elizondo v. Texas Natural Resource Conservation Commission*, 974 S.W.2d 928, 1998 Tex. App. LEXIS 5026, *5–6 (1998), the Texas Supreme Court stated:

> Nor do we think Mildred Elizondo in her representative capacity is an appellant. First, her **appointment as attorney-in-fact for the Finch heirs did not authorize her to bring suit** on behalf of the Finch heirs i**n her own name** in a representative capacity. A power of attorney simply creates an agency relationship. *See* Black's Law Dictionary 1171 (6th ed. 1990). **It is well settled** in Texas that, with certain exceptions not applicable here, **an agent may not bring a suit in his own name for the benefit of the principal**. *See Tinsley v. Dowell*, 87 Tex. 23, 26 S.W. 946, 948 (Tex. 1894). This is federal law as well:
>
> > An attorney-in-fact is not a real party in interest. The attorney is merely an agent of the real party in interest and does not possess interests sufficient to qualify for real party in interest status. Thus, the attorney-in-fact cannot bring suit in its own name.
>
> 4 MOORE'S FEDERAL PRACTICE § 17.10[4] at 17–33 (3d ed. 1998); *see also Choi v. Kim*, 50 F.3d 244, 247 (3d Cir. 1995).

The Texas Supreme Court continues in addressing the long-standing principle that an agent under a power of attorney must appear, commence, and prosecute judicial proceedings in the name of the principal, stating:

> Mildred Elizondo in her individual capacity is, in law, not the same person as Mildred Elizondo in her capacity as representative of the Finch heirs:
>
> > A person who sues or is sued in his official or representative capacity is, in contemplation of law, regarded as a person distinct from the same person in his individual capacity and is a stranger to his rights or liabilities as an individual. It is equally true that **a person in his individual capacity is a stranger to his rights and liabilities as a fiduciary or in a representative capacity**.
>
> *Alexander v. Todman*, 361 F.2d 744, 746 (3d Cir. 1966); *accord Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 543–44 & n.6, 89 L. Ed. 2d 501, 106 S. Ct. 1326 (1986) ("The fact that Mr. Youngman was sued in his official capacity does

> not give him standing to appeal in his individual capacity. **Acts performed by the same person in two different capacities 'are generally treated as the transactions of two different legal personages**.'"); *Airlines Reporting Corp. v. S & N Travel, Inc.*, 58 F.3d 857, 862 (2d Cir. 1995) ("Where a **party sues or is sued in a representative capacity**, however, **its legal status is** regarded as distinct **from its** position when it operates in an **individual capacity**."); *Northern Trust Co. v. Bunge Corp.*, 899 F.2d 591, 595 (7th Cir. 1990) ("In the eyes of the law **a person who sues or is sued in a representative capacity is distinct from that person in his individual capacity**."); *McGinnis v. McGinnis*, 267 S.W.2d 432, 435 (Tex. Civ. App.–San Antonio 1954, no writ) ("William L. McGinnis, the individual, is not the same party as William L. McGinnis, the next friend of Janie Barr's estate and person.") (Pope, J.). . . .

Id., *7–8 [emphasis added].

See In Sik Choi v. Hyung Soo Him, 50 F.3d 244, 247 (3d Cir. 1995) (finding that complaint named, and that agent had commenced the action pursuant to the power of attorney, in the name of the principal).

Consistent with what has been stated by the Texas Supreme Court (*Elizondo*), examples of other courts apply this rule include: *Southern California Darts Association v. Zaffina*, 762 F.3d 921, 927, (9th Cir. 2014); *Brimhall v. Simmons*, 338 F.2d 702, 704, (6th Cir. 1964); *Grace v. Palm Harbor Homes, Inc.*, 401 F. Supp. 2d 1230, 1233 (N.D. Ala. 2005); *Zee Medical Distributor Association, Inc. v. Zee Medical, Inc.*, 23 F. Supp. 2d 1151 (N.D. Cal. 1998).

The requirement that an agent exercising a power of attorney must sue and assert rights in judicial proceedings in the name of the principal, and not in its own name is addressed in the CALIFORNIA PRACTICE GUIDE – FEDERAL PROCEDURE BEFORE TRIAL, RUTTER GROUP 2012:

> ¶ 7:11.1: Power of attorney does not authorize attorney in fact to commence and prosecute litigation in his/her own name. The power or attorney is not the equivalent of an assignment of the rights.

This ties to MOORE'S FEDERAL PRACTICE, THIRD EDITION, 2012: which provides the following simple discussion:

> § 17.10[4]: Attorney in fact is not a real party in interest, cannot bring suit in his/her own name.

The California Code of Civil Procedure also requires that in state court "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." Cal. C.C.P. § 367. The "except as provided by statute" exception is specified in California Code of Civil Procedure § 369, which does not include an exception for a person acting as a representative pursuant to a power of attorney. Cal. C.C.P. § 369.

ISSUANCE OF ORDER TO APPEAR

On July 22, 2016, the court issued the following Order to Appear, ordering, in relevant part, the following:

> Therefore, upon review of the Motion to Approve Loan Modification between Debtor and Ocwen Loan Servicing, LLC; the lack of testimony or evidence provided my a managing member or employee of Ocwen Loan Servicing, LLC; and the relative simplicity for a person to provide bona fide, good faith testimony to authenticate records and document an interest in the promissory note, the hearing on the Motion for Order Approving a Loan Modification filed by the Debtor having come on for hearing on July 19, 2016; counsel or representative for Ocwen Loan Servicing, LLC not being present and good cause appearing;
>
> **IT IS ORDERED** that Ocwen Loan Servicing, LLC, through a senior manager or managers responsible for the employees of Ocwen Loan Servicing, LLC correctly and completely accurately creating loan modification agreement or pleadings to be filed in federal court, and their respective attorneys of choice, shall appear at 3:00 p.m. on August 23, 2016, in person, in Department E of the United States Bankruptcy Court, 501 I Street, Sixth Floor, Sacramento, California, with no telephonic appearances allowed on this matter.
>
> **IT IS FURTHER ORDERED** that Ocwen Loan Servicing, LLC, address in writing for the court, including properly authenticated and admissible evidence in support thereof, the following:
>
> A. The identify the actual creditor, as that term is defined in 11 U.S.C. § 101(10) of the Debtor in this case for the obligation to be modified by the by the Loan Modification Agreement filed in this case (Dckt. 77);
>
> B. Why, if the creditor is someone other than Ocwen Loan Servicing, LLC, that identify of such creditor has been withheld from the court, Debtor, and other parties in interest in this bankruptcy case;
>
> C. Why the documents presented for approval by this court for the Loan Modification (Dckt. 77) do not have the completed signature blocks for the creditor who (either personally or through an authorized agent) who enters into this Loan Modification Agreement with the Debtor; and
>
> D. If Ocwen Loan Servicing, LLC is the agent for the actual creditor, the good faith basis it has for having the Debtor seek approval of, and authorization for, the Loan Modification Agreement by this

court exercising federal judicial power without Ocwen Loan Servicing, LLC disclosing the identify of the creditor and not providing the court with the identity of the real parties in interest whose rights are to be modified through these federal judicial proceedings.

IT IS FURTHER ORDERED that all written responsive pleadings and supporting evidence ordered to be produced shall be filed and served on the Debtor, Debtor's Counsel, the Chapter 13 Trustee, and the U.S. Trustee, attn: Antonia Darling, Esq., on or before August 12, 2016.

MISIDENTIFICATION OF CREDITOR TO LEAST SOPHISTICATED CONSUMER DEBTOR

On June 28, 2016, the court held a hearing on Samuel Tapia's ("Debtor") Motion for Order Approving a Loan Modification. Dckt. 74. The Debtor named "Ocwen Loan Servicing, LLC" as the "creditor" who would be entering into a loan modification with Debtor. This was Debtor's first attempt at getting court approval for a loan modification, and the court continued the Motion on the grounds that the court could not determine by the evidence presented if "Ocwen Loan Servicing, LLC" is actually the creditor, acting in its own right with respect to interest it personally has, who is modifying the contractual obligations of Ocwen Loan Servicing, LLC with the Debtor or if Ocwen Loan Servicing is actually the agent for an undisclosed principal.

The Loan Modification Agreement identifies Ocwen Loan Servicing, LLC as the entity offering the loan modification, disclosing no other person who could be a principal or that Ocwen Loan Servicing, LLC is executing these documents on behalf of any other person. The Loan Modification contract uses ambiguous language "Lender/Loan Servicer/Agent for Loan Servicer" when creating a contractual defined term to identify Ocwen Loan Servicing, LLC. The court is, and has been, concerned over the representations made by Ocwen Loan Servicing, LLC (and other third-party loan services) to consumers in proofs of claim, loan modification agreements, and stipulations when the documents or pleadings fail to clearly identify the creditor, and whether the "loan servicer" is acting as an agent of a principal or is the actual creditor.

The court has expressed in prior cases its concern of the ambiguous and incomplete statements and representations by Ocwen Loan Servicing, LLC in cases before the court. Ocwen Loan Servicing, LLC has been required to appear in this court and address the failure to identify the actual creditor in contracts and loan modifications it is presenting to consumers.

In addressing the motion to approve the loan modification, the court addressed the prior and continuing misconduct of Ocwen in misidentifying the real parties in interest appearing in federal court, using it's name to hide the identity of the actual creditor (and apparently trying to shield the actual creditor from actually appearing, and being responsible, when one appears in federal court). In the prior Civil Minutes, the court stated:

Ocwen Loan Servicing, LLC has appeared many times in the court and **has been ordered to** appear and **address the failure to identify the actual creditor**

in contracts and loan modifications **it is presenting to consumer debtors**. As in the present case, Ocwen Loan Servicing, LLC would prepare contracts in which it is ambiguously identified as "Lender/Loan Servicer/Agent for Loan Servicer.**" Ocwen Loan Servicing, LLC was preparing and presenting to consumer and consumer attorneys loan modification agreements which were not with the creditor** and for which Ocwen Loan Servicing, LLC was not identified as executing the agreement for a disclosed principal.

Two of the cases in which the court has order[ed] Ocwen Loan Servicing, LLC to appear and address it preparing and presenting contracts to be approved in this federal court which did not include the real parties with a case or controversy are *In re Nissen*, Bankr. E.D. Cal. 11-30546, and *In re Raposo*, Bankr. E.D. Cal. 09-27153.

No Proof of Claim has been filed. There is no indication on the actual Modification Agreement as to who is the real creditor in interest. The balloon payment agreement only identifies Ocwen as "Lender/Servicer or Agent for Lender/Servicer," appearing to be nothing by a "catch-all" in order to cover all possible roles Ocwen may be playing in a certain transaction without stating explicitly and affirmatively who they are in terms of the transaction.

Notably absent from the motion itself is the identity of the creditor. Rather, the Motion remains silent as to what entity the Debtor is attempting to enter a modification. The Debtor, appearing to "hide the ball" instructs the court to search the "Motion, on the Declaration of Samuel Tapia and Exhibit" to discern the parties of the modification; the respective roles of the party (i.e. Ocwen as servicer or creditor); the actual change in mortgage payments and principal balance; etc. The court declines such invitation.

As discussed supra, Ocwen Loan Servicing, LLC has been ordered to appear before and, as the court has emphasized on these occasions, understands the creditor must be identified. However, notwithstanding **Ocwen Loan Servicing, LLC's** prior appearances, it appears that the modification documents in the instant case have been prepared to **intentionally hide the identity from the court and circumvent the obligations of the parties in federal court**.

Civil Minutes, Dckt. 98 [emphasis added].

Survey of Other Cases and Misconduct of Ocwen Loan Servicing, LLC

I. Paul Costa and Karolyn Cole, Chapter 13 Case No. 10-40834.

A. The court's findings and conclusions in the Civil Minutes on the final hearing on the motion to approve a loan modification include the following:

1. "At the June 10, 2014 hearing nothing further was offered by the Debtors or Ocwen Loan Servicing, LLC. The Servicing company offered no evidence other than the previously submitted declaration that which the could [*sic*] found to be less than credible or persuasive. **Ocwen Loan Servicing, LLC's counsel offered explanations qualified with 'Its my understanding,' rather than being able to provide clear unequivocal statements backed up by evidence that her client is actually a creditor** as defined by 11 U.S.C. § 101(10) and not a loan servicing agent (which is a valid status to be and one from which it might well be authorized to execute loan modification documents for the actual creditor)." 10-40834; Civil Minutes, Dckt. 77 at 1.

2. "The Assignment of the Proof of Claim was filed by Ocwen Loan Servicing, LLC's attorneys seven months prior to the June 10, 2014 hearing. Ocwen Loan Servicing, LLC and its attorneys have known of the court's concerns about whether it is the creditor or the bona fide loan servicer since the first hearing on this Motion on January 28, 2014. **Though five months have passed, no copy of an assignment, transfer or negotiation of the note, no copy of a note endorsed in blank, and no declaration of a person with actual knowledge** to testify as to the possession and existence of the note has been provided. Rather, the best is that a new employee at Ocwen Loan Servicing, LLC testifies that he has personal knowledge that records of the Servicer state that the Note is some in its possession." *Id.* at 2.

3. **"The Debtors have been put at great financial peril by Ocwen Loan Servicing, LLC's, and their attorneys, failure** to provide very simple, clear evidence that the Servicer is actually the Creditor (11 U.S.C. § 101(10)). Possibly this Servicer and Onewest Bank, FSB desire the court to deny the modification or hope that the Debtors will tire of the fight, handing the property over to the Creditor pursuant to a preconceived plan." *Id.*

4. "On March 19, 2014, Ocwen Loan Servicing, LLC, filed the Declaration of Joshua Wimbley, a contract management coordinator. Mr. Wimbley states that according to Ocwen Loan Servicing, LLC's business records, it is the holder of the promissory note and is currently in possession of the original Note, which is endorsed and payable to blank (bearer). Declaration, 6, Dckt. 73. Further, the business records reflect that an Assignment was executed on February 13, 2014 showing that the Deed of Trust was assigned to Ocwen Loan Servicing, LLC. *Id.* 8.

    a. **The court does not find this evidence credible. First, Mr. Wimbley states that he has been employed by Ocwen for a period of eight months**. He has provided no explanation as to how in those eight months of experience he has become well versed in the books and records of Ocwen and can determine that notes

endorsed in blank are in the possession of some (unnamed) person at some (unidentified) location for Ocwen." *Id.* at 4.[1]

II. Wayne Wilkinson and Denise Armendariz, Chapter 13 Case No. 11-20868.

A. Ocwen Loan Servicing, LLC filed a brief in support of the requested loan modification in the Wilkinson/Armendariz case, which includes the following statements and representations by counsel for Ocwen Loan Servicing, LLC:

1. "Ocwen is currently the servicer of a loan secured by a deed of trust against the property located at 9925 Valgrande Way, Elk Grove, CA (the "Property"). Declaration of Kevin Flannigan ("Flannigan Decl."), ¶ 3. It is this trust deed obligation that the proposed loan modification seeks to modify. Flannigan Decl., ¶ 3." 11-20868; Brief, Dckt. 191 at 2.

2. "The investor of this loan is U.S. Bank National Association, As Trustee For MASTR Adjustable Rate Mortgages Trust 2007-3 Mortgage Pass-Through Certificates, Series 2007-3 ("US Bank"). Flannigan Decl., ¶ 4." *Id.*

3. "Here, the Power of Attorney provides Ocwen with the authority to modify the loan for Debtors and this Court to rely on the Power of Attorney to provide that authority. Accordingly, the loan modification agreement is binding on US Bank [the undisclosed, unidentified principal in the document]." *Id.* at 4.

4. "Due to the straightforward rules provided by HAMP, the servicer must sign the model agreement as written. Therefore, Ocwen cannot vary from the terms of the agreement already provided to Debtor. Flannigan Decl., ¶ 7. Accordingly, there is no requirement under HAMP, nor can the agreement be modified under HAMP, to disclose the name of the investor." *Id.* at 4.

When presented with the contention that HAMP rules and servicing guidelines control, the court has viewed and rejected this argument as one in which the asserted rule or guideline trumps the United States Constitution and dictates that Trojan horse placeholders will appear in federal court in place of the unidentified real party in interest.

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[1] On the totality of the circumstances, it may well be that the Ocwen business model is built as part of a scheme to misrepresent, mislead, and defraud consumers (and possibly its own clients) to enter into purported loan modifications, which can later be disavowed by a later "holder in due course" of the promissory note. Then, when the "blame" is directed back to Ocwen, that entity has been stripped of assets, monies moved to offshore accounts, and the consumer, possible subsequent purchasers of the property, other lenders who made subsequent loan believing that the loan modification, real estate businesses, and others who suffer substantial losses and damages, they are told "sorry, but nobody is responsible for the misrepresentations (and fraud).

B. The court addressed these contentions by Ocwen Loan Servicing, LLC in connection with the motion to approve loan modification, which findings and conclusions stated in the Civil Minutes for the August 5, 2014; 11-20868, Dckt. 202; hearing include the following:

1. "Additionally, Ocwen Loan Servicing, LLC argues that it may not modify a HAMP agreement to disclose the name of the investor. The subject modification agreement was made pursuant to the Home Affordable Modification Program (HAMP). Ocwen Loan Servicing states that, while it is aware of the preference of this Court to disclose the name of the investor in the loan modification agreement, under the terms of HAMP, it may not do so." 11-20868; Civil Minutes, Dckt. 202 at 4.

2. "**Ocwen Loan Servicing, LLC, states that the application of HAMP by servicers is governed by the Handbook** for Servicers of Non-GSE Mortgages, Version 3.3 (the Handbook). *See Graybill v. Wells Fargo Bank, N.A.*, 953 F. Supp. 2d 1091, 1107 (N.D. Cal. 2013). Pursuant to the Handbook, a servicer, with limited non-applicable exceptions, **must use the standard HAMP modification agreement** available at http://www.HMPadmin.com, unless it receives specific permission to modify them. Exhibit B, Handbook for Servicers of Non-GSE Mortgages, Dckt. No. 193 at 9. FN.3." *Id.* (emphasis added).

3. The court quotes in Footnote 3 to the Civil Minutes the actual language [*sic*] of the Handbook, which actually states:

   a. "'Servicers are **strongly encouraged to use the HAMP documents** available on www.HMPadmin.com. A single set of model modification documents is provided for all loans regardless of investor. **These documents may need to be customized** for certain situations that are unique to a particular investors loan program. Should a servicer decide to revise HAMP documents or draft its own HAMP documents, it must obtain prior written approval from the Program Administrator with the exception of the circumstances for document revisions set forth below. To obtain approval, servicers should contact their Servicer Integration Team lead. 10.1 Amending HAMP Documents.

   b. **Servicers must amend the Modification Agreement and TPP Notice as necessary to comply with applicable federal**, state and local **law.** Servicers may, and in some instances must, make the applicable changes to the Modification Agreement as set forth in the Document Summary available on www.HMPadmin.com. In

addition, servicers may amend HAMP documents as follows without prior written approval.'

Contrary to Owen's and its attorneys' prior arguments that HAMP dictates that Ocwen may, and must, violate the U.S. Constitution and federal law (which representations are made subject to the certifications of Federal Rule of Bankruptcy Procedure 9011, which parallels Federal Rule of Civil Procedure 11), Ocwen and its attorneys must comply with federal and state law.

C. Exhibit B, Handbook for Servicers of Non-GSE Mortgages, Dckt. No. 193 at 9." *Id.* (emphasis added).

1. "While Ocwen argues long and hard that it can hide the identify of the party entering into the Loan Modification from the court, its arguments both miss the mark and do not have support in the authorities it has cited." *Id.* at 5.

2. "**What has troubled the court is that Ocwen had insisted on keeping the identity of the principal secret, until that information has been pried out of it by the court.** Additionally, that Ocwen wants this court to authorize the Debtors to enter into a contract [that] does not name the actual party to the contract, but merely a fungible, replaceable, placeholder loan servicer." *Id.*

3. "Contrary to Ocwen's contention that a modification of the HAMP loan modification document is required, rather, Ocwen merely need to type the name of successor to the original lender into the Loan Modification Agreement. Then, Ocwen merely needs to execute the Loan Modification Agreement for that Lender." *Id.* at 6.

4. "The Limited Power of Attorney states that U.S. Bank, National Association appoints Ocwen Loan Servicing, LLC (as "Servicer") as Attorney-In-Fact to execute and acknowledge in writing all documents customarily and reasonably necessary and appropriate for the tasks described. **The Power of Attorney appears to constitute and appoint Ocwen Loan Servicing the ability to in its [U.S. Bank, N.A.'s] name**, aforesaid Attorney-In-Fact, by and through any officer appointed by the Board of Directors of Servicer, to execute and acknowledge in writing or by facsimile stamp all documents customarily and reasonably necessary and appropriate for the tasks described in the items (1) through (11) below. Dckt. No. 193 at 2, Exhibit A." *Id.* (emphasis added).

5. "The court does not read the Power of Attorney for Ocwen Loan Servicing, LLC, to act in its own name, place and stead, but that of U.S. Bank, N.A.'s. Power of Attorney allows one party (here, Ocwen Loan Servicing, LLC) to act in the name of another party (here, U.S. Bank, N.A.'s), not in its own name." *Id.*

It appears that by hiding the identity of the actual creditor from the court, Ocwen may well have been acting in violation of, and outside the powers granted, by the power of attorney. It is clear that U.S. Bank, N.A. did not forfeit all of its rights and power to Ocwen, for Ocwen to act in its own name, for Ocwen to act as the creditor, and for Ocwen to take assets from U.S. Bank, N.A.

6. "**Furthermore, on its face, the Power of Attorney does not provide Ocwen Loan Servicing the authority to modify promissory notes, but only the mortgage or deed of trust**. Note that in Paragraph 4 of the Power of Attorney, U.S. Bank, N.A., clearly distinguishes between mortgages, deeds of trust, and promissory notes. Paragraph 4 empowers Ocwen Loan Servicing, LLC to execute, complete, indorse or file 'bonds, notes, mortgages, deeds of trust and other contracts, agreements and instruments regarding the Borrowers and/or the Property.'" *Id.*

Ocwen's and its attorneys' attempts to overwhelm the court with guidelines, rules, powers of attorney, and business practices arguments to mislead the court actually proved the fallacies of their contentions. Ocwen's own evidence proved that it was not authorized to even enter into the purported loan modification based on the power of attorney presented in the *Wilkinson/Armendariz* case.

III. Amos G. Snell, Chapter 13 Case No. 13-24512.

A. In connection with a Motion for Relief From the Automatic Stay, the court addressed the conduct of Ocwen Loan Servicing, LLC in the Civil Minutes from the May 14, 2013 hearing, which findings and conclusions include the following:

1. "Ms. DeLage testifies under penalty of perjury that she is a contract management coordinator for Ocwen Loan Servicing, LLC. She testifies that Ocwen Loan Servicing, LLC is the loan servicing agent for Deutsche Bank National Trust Company, Trustee." Civil Minutes, Dckt. 29 at 1.

2. "Ms. DeLage further testifies under penalty of perjury that she has personal knowledge of and states that the books and records of Deutsche Bank National Trust Company, Trustee,...." *Id.* at 2.

3. "Based on the testimony of Ms. DeLage, a Contract Management Coordinator for Ocwen Loan Servicing, LLC, the court cannot determine how she has personal knowledge of the business practices, books and records, how the books and records are maintained, and the duties of the employees of Deutsche Bank National Trust Company, Trustee for the books and records for which she provides personal knowledge testimony under penalty of perjury." *Id.*

4. "At the hearing counsel for Movant appeared and stated that **Deutsche Bank National Trust Company did not want to proceed with the Motion because it did not own the property** [notwithstanding the testimony under

penalty of perjury by the Ocwen Loan Servicing, LLC representative] which is the subject of the Motion. It was stated on April 11, 2013, the Property was sold to an unrelated third party. No evidence was presented as to the sale actually occurring, though the court accepted counsel at his word that as of April 11, 2013, Deutsche Bank National Trust Company did not own the property, and therefore did not have standing to bring the present Motion." *Id.* at 3 (emphasis added).

5. "When advised by counsel that as of April 11, 2013, Deutsche Bank National Trust Company did not own the property, the court reviewed the pleadings with counsel. **The Declaration of Ms. DeLage was executed on April 16, 2013. Dckt. 17. This was five days after Deutsche Bank National Trust Company sold the Property**. Ms. **DeLage testifies under penalty of perjury** (though the court cannot see any basis for her having personal knowledge thereof) that on October 24, 2012, **Deutsche Bank National Trust Company obtained title to the Property.** She provides this declaration in support of the Motion." *Id.* (emphasis added).

13-24512; Civil Minutes, Dckt. 29 [emphasis added].

No explanation was provided to the court how Ocwen's personnel could present the court with false testimony as part of its apparent business practices. While Ms. DeLage and Ocwen affirmatively state they have knowledge, they have information, and they have the records, it is clear that Ms. DeLage and Ocwen were not bothered with determining the accuracy of the (mis)representations they were spinning in federal court.

IV. Michael Neumann, Chapter 13 Case No. 11-48095.

A. The court issued an Order to Appear and Show Cause on September 14, 2015, for Ocwen Loan Servicing, LLC to address the issues of identifying itself as the Creditor. The Order includes the following:

1. "On February 28, 2013, a Notice of Mortgage Payment Change was filed by Ocwen Loan Servicing, LLC for the GMAC Mortgage, LLC claim. February 28, 2013 Docket Entry (after Dckt. Entry 61 and also on the Clerk's Registry of Claims in this case for Proof of Claim No. 1). On the Notice in the **'Name of Creditor' field, the following information is provided: 'Ocwen Loan Servicing, LLC***.'" (The asterisk is to a footnote stating that Ocwen Loan Servicing, LLC obtained the loan servicing rights." 11-48095; Order, Dckt. 92 at 2.

2. "On April 16, 2013, Pite Duncan, LLP, [attorneys for Ocwen Loan Servicing, LLC] filed a Notice of Transfer of Claim No. 1, executing the document as the attorney for Ocwen Loan Servicing, LLC. Dckt. 62. That Notice states

that **Proof of Claim No. 1 was transferred from GMAC Mortgage, LLC to Ocwen Loan Servicing, LLC**." *Id.* at 3.

3. "On February 18, 2014, **Ocwen Loan Servicing, LLC, identified as the creditor**, filed a Notice of Mortgage Payment Change, which states that the payment on the debt upon which Proof of Claim No. 1 is based has decreased to $910.78 a month. February 18, 2014 Docket Entry (after Dckt. Entry 70 and also on the Clerk's Registry of Claims in this case for Proof of Claim No. 1) ." *Id.* at 4.

4. "While Ocwen Loan Servicing, LLC's attorneys have filed a document titled "Notice of Assignment," **no document purporting to be an assignment of the promissory note upon which the claim is based has been provided to the court**." *Id.* at 8–9.

11-48095; Order to Appear and Show Cause, Dckt. 92 [emphasis added].

This conduct exemplifies the business approach to federal litigation by Ocwen and its various attorneys. Statements are made, but when required to produce documentation, it does not exist.

5. "The court has addressed **on multiple occasions Ocwen Loan Servicing, LLC misrepresenting that it is the creditor in bankruptcy cases**. One recent case was *In re Guitierrez*, Bankr. E.D. Cal. 12-28547. In that case, Ocwen Loan Servicing, LLC presented itself as a creditor which, in its personal capacity, had the rights which it was modifying with the consumer debtors. Ocwen Loan Servicing, LLC was not purporting to modify the rights of any principal or other person with respect to the debt owned by those consumer debtors." *Id.* at 10.

6. "**The Gutierrez debtors reported to the court that, notwithstanding the discovery requests to identify the actual creditor, Ocwen Loan Servicing, LLC failed to respond as required by the Bankruptcy Rule 2004 subpoena.** Case No. 12-28547; Status Report filed June 1, 2015, Dckt. 128. This lack of voluntary disclosure of the true identity of the creditor forced the Gutierrez debtors to file (and incur the costs and expenses for) a motion to compel discover y and seek compensatory sanctions. *Id.*, Motion, Dckt. 130." *Id.* at 11.

On several occasions Ocwen's various counsel have represented to this judge that this is the only judge in the entire country who requires a real party in interest to appear in federal judicial proceedings (U.S. Const. Art. III, Sec. 1) and who enforces the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and Federal Rules of Evidence. When this judge conducted an inquiry of other federal judges in the Ninth and other Circuits, they unanimously disagreed with Ocwen's contention. The anser may be that Ocwen, and its various attorneys, have been successful in their deception of other federal judges.

7. "Though Ocwen Loan Servicing, LLC failed to respond to the subpoena and identify the creditor, Deutsche Bank Trust Companies Americas, Trustee, appeared in the Gutierrez case and confirmed that it was the creditor and that Ocwen Loan Servicing, LLC was engaged only as the loan servicer for that creditor. *Id.*; Response, Dckt. 124, and Declaration, Dckt. 125." *Id.*

8. "The motion to compel the production of discovery from Ocwen Loan Servicing, LLC was dismissed pursuant to a settlement between Deutsche Bank Trust Companies Americas, Trustee, and the Gutierrez debtors. *Id.*; Stipulation, Dckt. 141. The monetary terms of the settlement were not disclosed, other than that Deutsche Bank Trust Companies Americas, Trustee, agreed to pay the debtors' legal fees relating to the failure of Ocwen Loan Servicing, LLC to comply with the Bankruptcy Rule 2004 subpoena." *Id.*

Another hallmark of Ocwen's, and apparently its attorneys, is a federal court strategy to ignore subpoenas and discovery. In several cases it has been the theretofore undisclosed creditor who was required to come forward, address Ocwen's shortcomings, and the court was told to reimburse the consumer debtor for the legal fees and expenses incurred in Ocwen misrepresenting that it is the creditor when asserting claims in federal court.

9. "A similar situation existed in the *Montelongo* bankruptcy case. Bankr. E.D. Cal. 13-23599. The *Montelongo* debtor filed a motion to approve a loan modification between the debtor and Ocwen Loan Servicing, LLC individually, as the creditor, on February 6, 2015. *Id.*; Motion, Dckt. 131. Again, the loan modification documents identified only Ocwen Loan Servicing, LLC personally (with no designation of acting as the agent or exercising a power of attorney) as the only party with whom the debtor was contracting to modify the loan. *Id.*; Exhibit A, Dckt. 134." *Id.* at 11–12.

10. "On June 1, 2015, the *Montelongo* debtor reported that Ocwen Loan Servicing, LLC had not informally provided the information and had failed to respond to the Bankruptcy Rule 2004 subpoena. *Id.*; Report, Dckt. 170. A motion to compel production of the discovery and for compensatory sanctions was filed by the *Montelongo* debtor. *Id.*; Motion, Dckt. 165." *Id.* at 12.

11. "Though the information was not provided by Ocwen Loan Servicing, LLC in response to the subpoena, U.S. Bank, N.A., Trustee, filed a response identifying itself as the creditor. *Id.*; Response, Dckt. 161, and Declaration, Dckt. 162. Again, it was the creditor who remedied the failure of Ocwen Loan Servicing, LLC to respond to the subpoena and identify the creditor. The creditor in *Montelongo* paid the attorneys' fees and costs relating thereto the failure of Ocwen Loan Servicing, LLC to comply with the subpoena." *Id.*

12. "In a recent adversary proceeding, the consumer debtor was required to sue both OneWest Bank, FSB and Ocwen Loan Servicing, LLC over the failure to reconvey a deed of trust following the completion of the Chapter 13 plan and payment in full of the allowed secured claim for which the deed of trust was collateral. *Gil Raposo and Joanne Raposo v. Ocwen Loan Servicing, LLC and OneWest Bank, FSB*. Bankr. S.D. Cal. Adv. Pro. 15-2095. Neither Ocwen Loan Servicing, LLC nor OneWest Bank, FSB responded to the complaint or filed any opposition to entry of the default judgments against each of them." *Id.* at 13.

13. "In *Raposo v. Ocwen et al.*, the need to sue both Ocwen Loan Servicing, LLC and OneWest Bank, FSB was caused by the documents filed in the *Raposo* bankruptcy case. Bankr. E.D. Cal. 09-27153...On September 4, 2015, a Notice of Transfer of Claim was filed stating that the claim of OneWest Bank, FSB had been transferred to Ocwen Loan Servicing, LLC. *Id.*; Dckt. 96. No copies of any transfer documents were attached to the Notice and no amended Proof of Claim No. 7 setting forth Ocwen Loan Servicing, LLC's standing as a creditor had been filed." *Id.* at 13–14.

B. In ruling on the Order to Appear, the court addressed the contention of Ocwen Loan Servicing, LLC and its attorneys that when Ocwen Loan Servicing, LLC provided documents to its attorneys, and then the attorneys placed the Ocwen Loan Servicing, LLC documents in the attorneys' physical or electronic "file," then the records became the business records of the attorney and the attorney was qualified to give proper, credible, admissible personal knowledge testimony about the record. The findings and conclusions of the court in ruling on the Order include the following:

1. "**The problem identified by the court is that various attorneys at the Pite Duncan, LLP/Aldridge Pite, LLP [attorneys for Ocwen Loan Servicing, LLC] law firms take it upon themselves to make statements under penalty of perjury to the court.** Not only are some of the statements conflicting, but the testimony provided in response to the Order to Show Cause **clearly shows that the attorneys had no personal knowledge of the various 'facts' which they state to be true and correct under penalty of perjury**." 11-48095; Civil Minutes, Dckt. 115 at 21.

Again, Ocwen's misrepresentations drag in their various attorneys who become part of the effort to mislead the federal courts.

2. "At best, the testimony presented is that the attorneys were provided with the electronic transmissions filed as Exhibit 4. These all but completely redacted documents do not state that Ocwen Loan Servicing, LLC is in possession of the note. Even if they did, **the various attorneys have no personal knowledge of such facts, but are merely parroting what some unidentified person at Ocwen Loan Servicing, LLC may have said.**

Testimony or statements under penalty of perjury are more than merely parroting what someone else says." *Id.*

3. "From the record, there **appears to be no person at Ocwen Loan Servicing, LLC who can testify to having been in possession of the Note**, to being in possession of the Note, or to having transferred possession of the Note." *Id.* (emphasis added).

4. "Mr. Montoya's testimony is equally carefully circumscribed. As far as possession of the note, it's limited to 'information and belief testimony.' No grounds are provided for a non-expert witness testifying in federal court under penalty of perjury based solely on 'information and belief.' (As opposed to pleading in a complaint or motion a necessary element based on information and belief.)" *Id.*

5. "Mr. McAllister's testimony is that in 2012 the Pite Duncan, LLP law firm came into possession of the original note, indorsed in blank, and has continued in possession of it since 2014. He offers no testimony as to why Pite Duncan, LLP, and now possibly Aldridge Pite, LLP, has continued possession of this negotiable paper when no evidence has been provided that possession has ceased outside a statement in Mr. McAllister's declaration." *Id.*

6. "**Further, no credible testimony is provided as to why a creditor, such as Fannie Mae, would transfer a negotiable paper out to loan servicers or to the attorneys for loan servicers**. As provided in California Commercial Code §§ 3205(b) and 3301, anyone who gets his or her hands on the negotiable paper can treat is as their own—whether legally or illegally in possession of the paper. Such conduct not only appears highly unlikely, but would be inconsistent with federally insured financial institutions or tax payer underwritten entities such as Fannie Mae." *Id.*

7. Such testimony is in **conflict with the Fannie Mae Servicer Guide** presented by Aldridge Pite, LLP and its attorneys as part of the response. Exhibit 3, Dckt. 98. **Except for extraordinary legal proceedings, the original note is either in Fannie Mae's possession or of a third-party custodian**. In another case, the standard Fannie Mae third-party custodial agreement was presented to the court. On its face, the excerpt of the Fannie Mae Guide does not provide for the Pite Duncan, LLP/Aldridge Pite, LLP law firm to properly be in possession of a note owned by Fannie Mae." *Id.* at 21–22 (emphasis added).

8. "As to the second point, Aldridge Pite, LLP and the attorneys offer no basis for showing that Aldridge Pite, LLP maintains business records relating to the substance of the transactions and facts which these attorney have filed

statements under penalty of perjury and argued "facts." Rather, they are merely parroting documents which their client maintains, without any actual, real, credible knowledge of the documents or facts asserted pursuant thereto." *Id.* at 22.

9. "The Aldridge Pite, LLP argument that every attorney is made a competent witness to attest to business records because a client gives the attorney copies of the record fails. First, for the record to qualify for the Federal Rules of Evidence 803(6) exception it must be a record made at or near the time by, or from information transmitted by, someone with knowledge. No one from Aldridge Pite, LLP asserts that the records were made by anyone at Aldridge Pite, LLP or that Aldridge Pite, LLP has any knowledge that the record was made by someone with knowledge. The testimony and arguments presented are that someone at Ocwen Loan Servicing, LLC (or Ocwen Financial, Inc.) told someone at Aldridge Pite, LLP that these are business records." *Id.* at 24–25.

10. "Second, the business records at issue are not ones that Aldridge Pite, LLP keeps in the course of its regularly conducted activity of a business, organization, occupation, or calling, as a law firm. Instead, these "records" exist only when a client provides copies of the clients business records to Aldridge Pite, LLP. Merely because the State of California has issued law licenses to attorneys at Aldridge Pite, LLP does not imbue that law firm with the status of master business record keeper for all of its clients. Aldridge Pite, LLP, as confirmed at the hearing, has no interest in the business of Ocwen Loan Servicing, LLP or Ocwen Financial, Inc. and has no reason to be provided with copies of the business records of Ocwen Loan Servicing, LLC (or Ocwen Financial, Inc.) except with respect to the litigation or non-ligation legal services to be provided by Aldridge Pite, LLP." *Id.* at 25.

11. "Even more insidious is that this 'testimony for hire' could work to insulate people from misrepresentations. The court could well imagine that if documents provided by a client for which the attorney provided testimony for hire turned out to be false, the attorney would plead innocence and contend that he or she could not be liable for perjury because the attorney had "relief" on the documents provided by the client. Nobody from the client provided any statements under penalty of perjury, so the attorney would then argue that there was nobody at the client who could be brought to the court to answer for providing false documents, information, or testimony." *Id.*

12. "**Though the court does not impose corrective sanctions at this time or recommend that the District Court proceed to address this conduct, it is not a 'free pass' for the conduct to continue.** Each of the attorneys; Aldridge Pite, LLP; Ocwen Loan Servicing, LLC (to the extent it is a separate legal entity); and counsel for Ocwen Loan Servicing, LLC are each fully

> aware of the legal deficiencies in the evidence and arguments advanced to the court, and can be guided accordingly in their future conduct, arguments, and evidence presented in federal court. Continued failure to comply with the law and rules in federal court may well be the basis for sanctions, not only in the nature of corrective sanctions in the bankruptcy courts, but rise to the level of sanctions to be addressed by district courts." *Id.* at 26.

11-48095; Civil Minutes, Dckt. 115 [emphasis added].

Though for more than two years the court has expressed its concern over the representations of Ocwen Loan Servicing, LLC, and Ocwen Loan Servicing, LLC professed to understand and appreciate the need to clearly identify its capacity (whether as an agent and identify the principal, or as the actual creditor) for the court to properly exercise federal judicial power (U.S. Const. Art. III, Sec. 2 - real party in interest, actual case or controversy requirement), this incomplete and inaccurate practice continues. This conduct necessitates the court to order the appearance of Ocwen Loan Servicing, LLC, and its senior management (as the management who have appeared do not appear to be capable of correcting this conduct) again.

FIRST OPPORTUNITY TO PROVIDE SUPPLEMENTAL RESPONSE INFORMATION

The court continued the hearing on Debtor's Motion to Approve the Loan Modification, specifically to allow Debtor's counsel time to contract Ocwen Loan Servicing, LLC and for Ocwen Loan Servicing, LLC to correct this flaw in the Loan Modification Agreement being presented to the court.

On July 13, 2016, John G. Downing filed his declaration in support of the Motion to Approve the Loan Modification. Dckt. 107. Mr. Downing testifies that he made several inquiries of Owen Loan Servicing, LLC, and received an email response on July 12, 2016. The response is attached as Exhibit 1 to the declaration. It states that Ocwen Loan Servicing, LLC obtained the "servicing rights of the loan from Bank of America, N.A. on December 1, 2013." [Emphasis added.] Further, that Ocwen Loan Servicing, LLC, is "[o]bligated to service the loan in accordance with the terms of the Note and Mortgage...." [Emphasis added].

Nowhere in the response does Ocwen Loan Servicing, LLC state that it is the creditor or that it is attempting to collect a debt that is owed to it. Rather, Ocwen Loan Servicing, LLC states that it acquired only the servicing right and that it is obligated to provide the services of a loan servicer.

Mr. Downing filed a second declaration on July 14, 2016, in which he testifies as to a second communication he received from Ocwen Loan Servicing, LLC. Dckt. 108. The document Mr. Downing testifies receiving on July 14, 2016, from Ocwen Loan Servicing is provided as Exhibit 2 (Dckt. 109) and consists of the following:

A. It is titled "Notice of Servicing Transfer (RESPA), Welcome to Ocwen Loan Servicing, LLC."

B. It states that Samuel Tapia, the consumer Debtor in this case, is the "customer" of Ocwen Loan Servicing, LLC.

C. Effective November 30, 2013, Ocwen Loan Servicing, LLC will be servicing Mr. Tapia's mortgage instead of Bank of America.

D. "This communication is from a debt collector attempting to collect a debt; any information obtained will be used be used for that purpose. However, if the debt is in active bankruptcy or has been discharged through bankruptcy, this communication is not intended as and does not constitute an attempt to collect a debt."

E. "At Ocwen Loan Servicing, LLC we understand the importance ,of home ownership. We're dedicated to providing you with assistance and information you need about your mortgage loan, as well as additional products you may need as a homeowner, To get started, visit OcwenCustomers.com, select 'New Customers' and sign up as a new user with your new Ocwen loan number."

In what appears to be a game of minimal information provided to the less-sophisticated consumer, what Ocwen Loan Servicing, LLC tells the consumer is troubling. In addition to not stating anywhere that Ocwen Loan Servicing, LLC is the creditor or owns the obligation that it is trying to collect, Ocwen Loan Servicing, LLC goes further to advise the Debtor that it is the Debtor who is Ocwen Loan Servicing, LLC's customer. This communication does not clearly state that Ocwen Loan Servicing, LLC is a third-party loan servicer/debt collector who owes a contractual duty and fiduciary duty, as a loan servicer, to collect this debt for the actual undisclosed creditor. Ocwen Loan Servicing, LLC goes so far as to assure this Debtor that Ocwen Loan Servicing, LLC is dedicated to provide the Debtor with assistance, as well as to provide information about additional products which Debtor may need as a home owner.

Ocwen First Supplemental Response

Ocwen Loan Servicing, LLC filed a response to the Order to appear on August 12, 2016. Dckt. 133. Ocwen Loan Servicing, LLC also filed the declarations of Craig Markley, Gina Feezer, and Kim Miller. Dckt. 134, 135, and 136.

Ocwen Loan Servicing, LLC states that it is the servicer of Debtor's loan and Ocwen Loan Servicing, LLC is the attorney in fact and servicer for the owner of the loan, HSBC Bank USA, National Association, as Trustee for the Certificateholders of the J.P. Morgan Alternative Loan Trust 2006-A5, Mortgage Pass-Through Certificates ("HSBC").

Ocwen Loan Servicing, LLC asserts that the loan modification agreement used is that which is used in other jurisdictions across the country. Ocwen Loan Servicing, LLC states that HSBC was not identified in the loan modification agreement because Ocwen Loan Servicing, LLC's computer system was inadvertently not set up to make this change automatically because the contacts tasked with assuring

compliance with the court's prior order left Ocwen Loan Servicing, LLC in December 2015, before the necessary updates were implemented.[2]

Ocwen Loan Servicing, LLC argues that following the November 2015 order issued by the court, Ocwen Loan Servicing, LLC held multiple meetings in order to incorporate the requirements of the court into Ocwen Loan Servicing, LLC's preparation of documents. However, the two individuals who were charged with making the necessary computer and loan modification templates adjustments left for unrelated reasons in December 2015.

Ocwen Loan Servicing, LLC does not offer any explanation as what took place during December 2015 and the instant Order to Appear being issued. Ocwen Loan Servicing, LLC does not state why an implementation of the "new system" fell on deaf ears. There has not been any subsequent follow up for a seven-month period. It appears that it was not until the court once again had to issue an Order to Appear that Ocwen Loan Servicing, LLC once again responded with promises to implement, while also noting that "Ocwen is not aware of any other court that required the loan modification agreement templates to identify the beneficiary." Dckt. 133, pg. 2.

As part of the response, Ocwen Loan Servicing, LLC reviews the history of the Note and Deed of Trust. On July 14, 2006, the Debtor executed the $232,000.00 Note in favor of GreenPoint Mortgage Funding, Inc. as the original lender, which was secured by a Deed of Trust on the Property. Dckt. 137, Exhibit 3.

In August 2012, Debtor defaulted on the Loan and attempted to get a loan modification with the prior servicer, Bank of America, N.A. On December 9, 2010, Bank of America, N.A. notified Debtor that he did not qualify for a loan modification. Foreclosure proceedings were commenced by the prior servicer, Bank of America, N.A., wherein the Creditor was identified in the notice.

On April 28, 2012, MERS, as nominee for Greenpoint Mortgage Funding, Inc. executed an assignment of the Deed of Trust to HSBC Bank USA, National Association as Trustee for J.P. Morgan Alternative Loan Trust 2006- A5 pursuant to the Assignment of Deed of Trust. The assignment was stamped with a recorded date of May 7, 2012, in the Placer County Recorders' Office. Dckt. 137, Exhibit 5.

On October 12, 2012, Ocwen Loan Servicing, LLC's records reflect Bank of America sent the Debtor a letter that notified the Debtor the amount to reinstate the loan and that the failure to do so would result in the beneficiary foreclosing the Property. Dckt. 137, Exhibit 8.

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[2] Now having the benefit of reading the most recent further supplemental response by Ocwen and considering the years of alleged "mistakes" and meritless arguments by Ocwen and its attorneys, this statement not only rings hollow, but thunders as an affirmative false statement. The failure to misidentify Ocwen and hide the identity of the creditor did not occur due to an "inadvertent" failure to make the "change automatically," but as part of the intentional business model used by Ocwen to misidentify the real party in interest in federal court proceedings.

On September 4, 2013, HSBC Bank USA, National Association, as Trustee of J.P. Morgan Alternative Loan Trust 2006-A5 by Bank of America, as its attorney in fact, issued a Corporation Assignment of Deed of Trust to memorialize the assignment of the beneficial interests under the Deed of Trust to HSBC Bank USA, National Association as Trustee for the Certificateholders of the J.P. Morgan Alternative Loan Trust 2006-A5, Mortgage Pass-Through Certificates. The Corporation Assignment was stamped with a recorded date of October 4, 2013, in the official records of the Placer County Recorder's Office. Dckt. 137, Exhibit 9.

Ocwen Loan Servicing, LLC began servicing the Loan on November 30, 2013. Declaration of Gina Feezer, Dckt. 134. Ocwen Loan Servicing, LLC states that it was servicing the loan for "HSBC Bank USA, National Association as Trustee for the Certificateholders of the J.P. Morgan Alternative Loan Trust 2006-A5, Mortgage Pass-Through Certificates."

Ocwen Loan Servicing, LLC asserts that it worked with the Debtor to review the possibility of modification and the requirements for trial loan modifications. Ocwen Loan Servicing, LLC states that it was specifically identified as a "loan servicer" in the introductory paragraph of the latter that was sent with the HAMP Trial Period Plan. Dckt. 137, Exhibit 12.

Ocwen Loan Servicing, LLC states that the Debtor made the required three payments and was sent a Home Affordable Modification Agreement, which is the modification filed by the Debtor in the instant case. The loan modification agreement modified the principal balance of the Debtor's Note with a modified principal balance of $311,678.64 of which $75,128.64 was deferred and eligible for forgiveness based on certain conditions. The agreement modified the interest rate to a 2.00% fixed rate loan for the entire duration of the loan, with a maturity date of September 1, 2036.

The Debtor signed the agreement on April 29, 2016, and Ocwen Loan Servicing, LLC states it received the signed copy on May 17, 2016. Dckt. 137, Dckt. 13.

Ocwen Loan Servicing, LLC asserts that on May 24, 2016, Joseph Monaco, a representative of Ocwen Loan Servicing, LLC, with the authority to sign the loan modification agreement, executed the Lender Acknowledgment section of the agreement on Ocwen Loan Servicing, LLC's behalf. Dckt. 137, Exhibit 16.

On June 9, 2016, Ocwen Loan Servicing, LLC states that a Notice of Rescission of Notice of Default was issued by Ocwen Loan Servicing, LLC, where the signature block identified Ocwen Loan Servicing, LLC as agent for beneficiary. The Notice of Rescission was stamped with a recorded date of June 21, 2016. Dckt. 137, Exhibit 15.

Ocwen Loan Servicing, LLC once again reiterates the steps that were taken at Ocwen Loan Servicing, LLC in November and December 2015. Ocwen Loan Servicing, LLC states that from these meetings, Ocwen Loan Servicing, LLC determined that the language to be included either in the loan modification agreement or through an addendum to the loan modification agreement as follows:

> The debtor and {Name of Creditor, Investor or Trust} through the servicer of the underlying mortgage loan agreement, Ocwen Loan Servicing, LLC, have agreed to

> modify the terms of said underlying mortgage loan agreement. {Name of Creditor, Investor or Trust} is the owner of the loan and retains all rights to collect payments as per the underlying mortgage loan agreement. Ocwen Loan Servicing, LLC, remains servicer for said underlying mortgage loan agreement.

Ocwen Loan Servicing, LLC then restates that these changes were not implemented and were not flagged to such until the instant Order to Appear.

Ocwen Loan Servicing, LLC states that the process has been assigned to Craig Markley, Vice President of the Modification Processing Group, located in Ocwen Loan Servicing, LLC's Texas facility.

> On a daily basis, the bankruptcy loss mitigation team will obtain a list of all final loan modification agreement scheduled to go out for the Eastern District of California. . . . The assigned bankruptcy loss mitigation representatives will review each loan and verify through PACER which judge is assigned to the bankruptcy case. If the loan is assigned to this Court, Ocwen will then request that Ocwen's correspondence group hold the final modification agreement from being generated. . . All loans that are requested to be held will then get printed by the bankruptcy loss mitigation representative, and have the necessary addendum completed and added to the final modification agreement. The addendum would include the sample language that was previously proposed.
>
> After the final modification agreement has passed qualify control, the bankruptcy loss mitigation representative will mail the updated final modification to the debtor or debtor's attorney if they have counsel. . . Once the agreement has been confirmed for mailing we will then update our servicing system (REALServicing) with the appropriate comment note indicated the agreement has been sent. . . Additionally, Ocwen will have the revised final modification agreement imaged and sent to our imaging team to be added into the Vault (Ocwen's imaging database) so that all Ocwen business units have access to this revised and final agreement. This process will continue to be in place until we have our technology systems updated to automatically handle this process in the near future.

Motion, Dckt. 133; Declaration of Markley, Dckt. 135.

Ocwen Loan Servicing, LLC asserts that it understands the seriousness of the court's order and will work "expeditiously" to ensure that the procedures are put into place. Ocwen Loan Servicing, LLC requests that the Order be discharged.

CONTINUANCE OF AUGUST 23, 2016 HEARING TO AFFORD OCWEN THE OPPORTUNITY TO PERFORM GOOD FAITH ITS STATED CORRECTIVE ACTIONS

The court conducted a hearing on the Order to Appear on August 23, 2016. The Civil Minutes for that hearing can be found at Docket 142. At the hearing, Ocwen Loan Servicing, LLC represented to the

court that it was in the process of implementing a nationwide system to ensure that the principal on behalf of whom the loan servicer was acting is disclosed within the four corners of the loan modification agreement (even if set forth in the signature block for the servicer acting as the agent for the identified principal).

The court found unpersuasive Ocwen laying the blame on the two apparently so uniquely essential people to Ocwen complying with the basic Constitutional requirements for the exercise of federal judicial power left Ocwen unable to properly act (in good faith) in federal court. If the operation of Ocwen for such a basic requirement to do business fails due to that, it is questionable whether Ocwen can continue to provide *bona fide*, good faith, competent services as a loan servicer in federal court. More significantly, it appears that concerns of the court as to the proper exercise of federal judicial power and shortcoming of Ocwen were of little, if any, concern at Ocwen (both operational and senior management) that no one in any management level was responsible for ensuring that Ocwen did not continue to operate in violation of this basic obligation. Ocwen Loan Servicing, LLC has had years to address this basic requirement, all the while offering excuses and invalid arguments why it can continue to hide the identity of the principal from least sophisticated consumers.

The purported "complexity" of the "solution" which so eludes Ocwen LLC to comply with the basic requirements for federal judicial proceedings is belied by the other loan servicers who easily meet this basic federal requirement. They simply add to the signature block that a loan modification agreement is being executed by "XYZ, Servicer, as the agent for Big Bank, Trustee" (if the agreement itself is not corrected to state the identity of the principal actually contracting with the least sophisticated consumer debtor) or add to the proof of claim, motion, complaint, or answer "Big Bank, Trustee, by XYZ, Servicer, pursuant to power of attorney."

Counsel for the Chapter 13 Trustee opined that the court publishing an opinion on this identification issue would be productive. The issue having been identified, Ocwen and its attorneys affirmatively represented that Ocwen was addressing the situation, Ocwen and its attorneys requested that the court continue the hearing so that any published decision would reflect how Ocwen "corrected" this deficiency (which has been identified and continued for several years now), rather than the court-published decision reflecting Ocwen's continuing non-compliance.

The court continued the hearing to 3:00 p.m. on November 22, 2016, and required Ocwen Loan Servicing, LLC to file a status report relating to its procedures for identifying the creditor on loan modification documents on or before November 8, 2016.

OCWEN SECOND SUPPLEMENTAL RESPONSE
FILED NOVEMBER 8, 2016, Dckt. 155

Seventy-seven days after the August 23, 2016 hearing and assuring the court that Ocwen would in good faith move to be in compliance with basic federal law, the short Status Report filed by Ocwen (Dckt. 155) is to the contrary. Notwithstanding the multiple misrepresentations that Ocwen was the creditor and not merely the agent, the meritless arguments advanced by Ocwen's attorneys, and Ocwen's inability for more than two years to implement a simple procedure by which it identified the real party in interest principal it was purporting to act for in federal court, Ocwen reports that any ability to comply with federal

law eludes it, and that it does not think that the law really applies to it in other divisions, districts, and circuits.

The court hoped that, notwithstanding the long trail of misrepresentations, broken promises, and failure to comply with basic federal judicial proceeding requirements, Ocwen and its current counsel understood that this is the end of the road for Ocwen's misconduct.

Unfortunately, after having almost three months, on top of one year from the court's prior order that Ocwen asserts it worked to diligently implement but was stymied when two employees left the company, and more than two years of being on the wrong end of court orders (and its clients having to pay consumer attorneys' fees for Ocwen's misconduct) identifying Ocwen's failure to comply with federal law, all Ocwen and its attorneys could muster is a twenty-line response (with much of it not being substantive). Ocwen and its counsel explains that Ocwen is incapable of complying with the U.S. Constitution, federal law, the Federal Rules of Civil Procedure, the Federal Rules of Bankruptcy Procedure, and the Federal Rules of Evidence because:

A. "After the hearing on August 23, 2016, the Ocwen team [which may consist of one or more persons, or whose members may have now left Ocwen employment) met again multiple times to review Ocwen's system issues and to ensure a sufficient system was in place to comply."

B. "The Ocwen team has confirmed that the necessary computer logic and system controls are in place in Ocwen's systems to identify the creditor in loan modifications agreements filed with the United States Bankruptcy Court, Eastern District of California, Sacramento division."

This statement exemplifies the bad faith of Ocwen in addressing its failure to comply with basic federal law. Ocwen and its attorneys tried to run this fraud by the court at the prior hearing, promising to "comply" only in Department E for the Eastern District of California. The court rejected that apparent pandering of this one judge, confirming that Ocwen has to comply with the law in every federal court in the Country. Now, the best Ocwen can do, after years of effort, after a year of focused activity to comply (the court continues to remain skeptical that having two employees leave Ocwen caused the whole effort to fail), Ocwen and its attorneys again assert the bad faith assurances that Ocwen will comply, but only for one judge, in one division, in one court in the entire Country.

C. "Ocwen does not yet have a similar system in place for loan modification agreements on a nationwide basis, but Ocwen may do so in the future. **Ocwen believes it is in compliance with other rules and regulations outside of the Eastern District**."

Status Report, Dckt. 155 [emphasis added]. Ocwen offers no legal authorities for such a conclusion, how and why the Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure do not apply to it, or why all of the relevant case law is contrary to Ocwen's contention that in federal judicial proceedings it can hide the identity of its principal and misrepresent to federal judges across the nation that it, Ocwen, is the real party in interest. While not providing the court with legal authority, the statement "Ocwen believes it is in compliance with other rules and regulations outside of the Eastern District" is made with the

certifications (and sanctions for violating) provided under Federal Rule of Bankruptcy Procedure 9011 (which is the bankruptcy version of Federal Rule of Civil Procedure 11 adopted by the United States Supreme Court).

DISCUSSION

Ocwen has now, after years of proceedings, made it clear that it cannot, will not, and does not intend to comply with basic federal law for a person who purports to appear in federal court for another pursuant to a power of attorney. As opposed to other loan servicers and persons utilizing a power of attorney in federal court, Ocwen continues to state that it cannot, and will not, properly identify the real creditor and properly identify itself as the "agent" or "servicer" of the disclosed principal.

Instead, Ocwen, after years of opportunity, is merely trying to put a "band-aid" over the serious problem by assuring this judge that Ocwen will attempt to comply with the law, but it is only able to in this court. This appears to be a willful and deliberate action by Ocwen to misrepresent to the court, other parties, and least sophisticated consumers who the real party in interest is in federal judicial proceedings. While other loan servicers and agents can comply with the law, Ocwen steadfastly refuses to so do.

As this court has stated on many occasions, the fundamental requirement for any federal court to exercise federal court judicial power is that there must be a case or controversy between the parties for whom relief is sought. U.S. Constitution Article III, Sec. 2.

In an attempt to deflect the court from focusing in on Ocwen's failure to comply with federal law, Ocwen attempts to shift the blame onto the least sophisticated consumer debtor, stating that the debtor knew of the agency relationship. However, in making this superficial argument. Ocwen points to five different notices sent by various entities to the least sophisticated consumer debtor, only in which two of the notices appear to be from Ocwen. This includes Ocwen relying on the response to the loan modification, in which Ocwen asserts that it was specifically identified as a "loan servicer" (for some undisclosed principal). A review of the trial loan modification letter shows that it is an eleven-page document, in which Ocwen Loan Servicing, LLC does not identify who the actual creditor is or under what authority Ocwen Loan Servicing, LLC is acting upon. Specifically, the line in which Ocwen Loan Servicing, LLC "hangs its hat" on for the proposition that the Debtor was on notice of Ocwen Loan Servicing, LLC's identity is:

> As your loan servicer, we are committed to working with you to help make your payment more affordable.

Dckt. 137, Exhibit 12. In Ocwen's eyes, this single introductory phrase was sufficient to put Debtor on continued notice that Ocwen Loan Servicing, LLC is not the creditor in fact, but rather the loan servicer, and that the Debtor should have known the difference. The court does not find this argument persuasive.

Ocwen's arguments also fail in that a least sophisticated consumer debtor cannot waive the requirements of the United States Constitution and federal law concerning the requirement that the real parties in interest be the parties appearing in federal court.

This argument also raises red flags as to Ocwen's good faith in addressing this issue and dealing with consumers and consumer counsel. In this very case, the Debtor's attorney requested that Ocwen identify the actual creditor, to which Ocwen responded cryptically:

> We acquired the servicing rights of the loan from Bank, of America on December 1, 2013 with the loan due for July 1, 2010 payment.
>
> Please note that we are servicing regarding the first (1st) lien on the above referenced property. We are obligated to Service the loan in accordance with the terms of the Note and Mortgage signed by the borrower (Samuel Tapia).

Declaration, Dckt. 107. This appears to be an attempt to affirmatively hide the identify of the creditor.

If Ocwen Loan Servicing, LLC was proceeding in good faith, for a note that was traveling from creditor to creditor, servicer to servicer, it would clearly identify the creditor in communicating with the least sophisticated consumer and that consumer's counsel. Trying to blame the Debtor for not knowing based on prior piecemeal correspondence is itself an indictment of Ocwen Loan Servicing, LLC's conduct.

It appears that the significant defects in complying with federal law identified and the shortcoming of Ocwen are of such little concern that no one in any management level was responsible for ensuring that Ocwen did not continue to operate in violation of this basic obligation.

The court having afforded, now on several occasions the opportunity for Ocwen to comply with federal law, as does every other agent under a power of attorney, and it not so correcting its conduct, the court concludes the Order to Appear.

The court will now issue the Order to Show Cause for the imposition of corrective sanctions, refer this matter to the chief judge of the United States District Court for the Eastern District of California for consideration of further civil and punitive sanctions, and notify the other judges and governmental agencies, departments, and offices as addressed above.

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 Order to Appear 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 Order to Appear is concluded.
>
> Ocwen Loan Servicing, LLC having not provided the court with any legal authorities for its failure to disclose the identify of a principal, failing to file pleadings in the name of the principal by Ocwen Loan Servicing, LLC as its agent, the failure to disclose serving to deceive federal courts in exercising federal judicial

power, and failing to correct this misconduct though afforded at least two year to so do, this court will issue an Order to Show Cause for the imposition of corrective sanctions, refer this matter to the chief judge of the United States District Court for the Eastern District of California for consideration of further civil and punitive sanctions, and notify the other judges and governmental agencies, departments, and offices as addressed in this court's ruling stated in the Civil Minutes for the November 22, 2016 hearing.

2. 16-22100-E-13 SJS-4 | **DAVID/DEANNA TIBBETT** | **Matthew DeCaminada** | **MOTION TO CONFIRM PLAN** | **9-30-16 [73]**

Final Ruling: No appearance at the November 22, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 30, 2016. By the court's calculation, 53 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). 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. The Debtor has provided evidence in support of confirmation. The Chapter 13 Trustee has filed a statement of non-opposition November 3, 2016. The Amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

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

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

IT IS ORDERED that the Motion is granted, and Debtor's Chapter 13 Plan filed on September 30, 2016, is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

3. 15-22301-E-13 WSS-2 | **GAIL/ROBERT STEVENS** | **W. Steven Shumway** | **MOTION TO APPROVE LOAN MODIFICATION** | **10-6-16 [30]**

Final Ruling: No appearance at the November 22, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 6, 2016. By the court's calculation, 47 days' notice was provided. 28 days' notice is required.

The Motion to Approve Loan Modification has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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 Approve Loan Modification is granted.

The Motion to Approve Loan Modification filed by Gail Stevens and Robert Stevens ("Debtor") seeks court approval for Debtor to incur post-petition credit. The Bank of New York Mellon Trust Company, N.A. as trustee on behalf of the FDIC 2013-RS Asset Trust ("Creditor"), whose claim the Plan

provides for in Class 1, has agreed to a loan modification that will reduce Debtor's mortgage payment from the current $3,820.00 per month to $2,788.25 per month. FN.1 The modification will fix the interest rate at 2.00% for the next five years, then 3.00% for year six, and finally 3.50% for the remaining term of the loan.

FN.1. Class 1 lists Residential Credit Solutions, Inc., who assigned the first Deed of Trust to Creditor on October 27, 2015. Exhibit D, Proof of Claim 5.

The Motion is supported by the Declaration of Robert Stevens. Dckt. 32. The Declaration affirms Debtor's desire to obtain the post-petition financing and provides evidence of the modified terms.

TRUSTEE'S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a statement of non-opposition on November 8, 2016. Dckt. 36.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve the Loan Modification filed by Gail Stevens and Robert Stevens having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the court authorizes Gail Stevens and Robert Stevens ("Debtor") to amend the terms of the loan with The Bank of New York Mellon Trust Company, N.A. as trustee on behalf of the FDIC 2013-RS Asset Trust ("Creditor"), which is secured by the real property commonly known as 1077 Berkshire Drive, El Dorado Hills, California, on such terms as stated in the Modification Agreement filed as Exhibit in support of the Motion (Dckt. 33).

4. **16-24701-E-13 DPC-1** | **KHAMMAY/KHAMMAI PHOMMAVONGSA** Timothy Walsh | **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **8-30-16 [14]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors and Debtors' Attorney on August 30, 2016. 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). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Objection to Confirmation of Plan is sustained.

The Debtor's Chapter 13 Plan in this case caught the Objection of the Chapter 13 Trustee. The initial hearing on the Objection was conducted on October 4, 2016. As shown in the Civil Minutes for that hearing (Dckt. 26), when the court reviewed the Objection and this file, additional serious concerns were identified.

The court includes in this Ruling the analysis from the October 4, 2016 Civil Minutes in Part II of this Ruling. In Part I of this Ruling the court addresses the Debtor's response to the court's concerns and whether the Plan can be confirmed.

As addressed below, confirmation of the Chapter 13 Plan is denied. Debtor has not provided credible testimony as to the misstatements under penalty of perjury being in error. Rather, it appears that the best case made by Debtor and Debtor's counsel is that nobody cared about the accuracy of the statements and just signed the Schedules and Statement of Financial Affairs to get the bankruptcy done.

Debtor is not prosecuting this bankruptcy case in good faith, and the court concludes did not file this bankruptcy case in good faith. Debtor has been living non-productively since December 2010 in bankruptcy cases. It appears that the hiatus between the May 2013 dismissal of the prior case and the July 2016 filing of the current case was to allow the Debtor to liquidate assets and divert the proceeds.

Debtor's financial information continues to contain inconsistences, including paying vehicle insurance when Debtor owns (at least as stated under penalty of perjury on Schedule B) no vehicles. Debtor continues to list a twenty-three-year-old and twenty-seven-year-old child as dependents, giving no reason why these two adults are dependents. Debtor also admits to diverting proceeds from the liquidation of assets (sale of the business) to pay expenses to assist their adult "college children." As discussed below, while it is good for a parent to support the higher education of children, it loses its luster when the parent fails to perform a plan in bankruptcy, does not pay creditors, and then diverts proceeds from liquidating assets to transfer monies to their children.

The Debtor's Chapter 13 Plan is not confirmed.

PART I
Discussion and Ruling

Debtor filed two Supplemental Declarations on October 18, 2016. Dckts. 29 and 30. The first is Debtor's Supplemental Declaration ("Dbt. Dec."), Dckt. 29, in which each of the debtors now state under penalty of perjury:

A. "The truth is that we, and our attorney did not carefully review the schedules." Dbt. Dec. ¶ 2.

B. "Since we had filed a case prior to this one, and the data was still in the computer, we all presumed the data was similar, and or changed, and that our attorney had carefully changed the data to reflect the current circumstance." *Id.*

C. "Apparently, our attorney did not carefully review the changes, either." *Id.*

D. "Our review was more of a skim than a thorough review." *Id.*

E. "In addition, we failed to note that the two children who were age 17 and 21 when the initial petition was filed many years ago, were represented as having the same age in 2016." Dbt. Dec. ¶ 3.

F. "This Asian Market was sold on January 19, 2015. The purchase price was $40,000. The buyer is named Marilou Abadilla. She is not a relative. The buyer paid $20,000 down, on January 19, 2015, which we were required to apply to the past due rent and utilities." Dbt. Dec. Second ¶ 1 in the Declaration. FN.1.

FN.1. It appears that this is a cut and paste paragraph placed after the paragraph numbered "B]" which is placed after the paragraph numbered "3]." It appears that the review of this Declaration, by both Debtor and counsel, have again been "more of a skim rather than a thorough review."

With respect to this testimony, the court had previously expressed concern over the payment being made to an unidentified "landlord." Under penalty of perjury Debtor previously stated that there were no unexpired leases. See discussion in Part II of this Ruling.

G. "In addition the buyer paid another $20,000 in payments, $6,000 on January 22, $7,000 on January, the last payment of $5000 was received Jan 27, 2016. This money was used to pay some home bills, help our college children, used for living expenses, etc. A full statement was provided to the trustee." Dbt. Dec. Unnumbered Paragraph on page 3.

While saying that $20,000.00 was paid on January 19, 2015, which was passed through to the unidentified landlord, it appears that $18,000.00 was received in January 2016. However, on the Original and Amended Statement of Financial Affairs filed on August 31, 2016, (no amended Statement has been filed), Debtor states under penalty of perjury that no income other than wages and commissions were received in 2016, 2015, or 2014. Statement of Financial Affairs Part 2, Question 5; Dckts. 1 at 46, and 18 at 15. Whether received in 2015 or 2016, this income other than wages is required to be disclosed on the Statement of Financial Affairs.

H. "We have no other reason for not filing accurate statements the first time, than that the information was copied, in part from a previous petition, we and our attorney assumed the data to be correct, so we were not as careful as we would have been the first time the data was entered and printed, which was many years ago. We did not carefully review the new data." Dbt. Dec. Unnumbered "Conclusion" paragraph.

Debtor's counsel adds his declaration in attempting to explain how such grossly inaccurate information (which has not been corrected by filing amended schedules and statement of financial affairs) was attested to by the two debtors under penalty of perjury. Debtor's counsel testifies in his declaration ("Atty. Dec."), Dckt. 30:

A. "I helped my staff prepare the petition, and reviewed it with the debtors while they signed." Atty. Dec., p. 1: 21.5–22.5.

As presented in this declaration, the attorney oversaw the two debtors while they reviewed the "petition" before they signed it. This may be an oversight, and the attorney meant to say "petition, schedules, and statement of financial affairs," but has not so testified.

B. "I did not notice that the information in the petition was outdated." Atty. Dec., p. 1: 23.5.

First, the attorney's testimony only relates to the information in the "petition." Second, even if the attorney was intending to state the "petition, schedules, and statement of financial affairs," the court would not expect the attorney to know that the information in the schedules and statement of financial affairs is out of date, but would rely on the information provided, and carefully reviewed, by his clients. Though present, it appears that neither Debtor nor counsel were concerned about the information and making sure that it was accurate.

C. "I know that our process of refilling is to utilize the information already in the software, if there had been a case already prepared and filed, so I assumed that the data was suitably updated, and did not require extensive review." Atty. Dec. p. 1:23.5-26.5.

As discussed in Part II of this Ruling, Debtor has bankruptcy cases filed with this counsel dating back to December 2010. The most recent prior case was filed September 14, 2011—more than fifty-four months prior to the commencement of the current case. It is not a credible contention that the two debtors and counsel in good faith "assumed" that utilizing the prior data did not require "extensive" (or possibly any) review.

D. "I am responsible, of course, for the content of what is filed with my name on it." Atty. Dec. p. 2:1.

While the attorney does have responsibility for pleadings filed and testimony procured, it is the actual witness or person making the statement under penalty of perjury who has a duty and is responsible for the testimony. Merely trying to blame the attorney for inaccurate or false testimony under penalty of perjury is not an effective dodge of personal responsibility.

Lack of Disclosure of the Landlord Who Was Paid $20,000.00

The court clearly expressed its concerns that in January 2015 Debtor diverted $20,000.00 from the proceeds from the sale of the business to an unidentified landlord. That landlord still has not been identified. As the court reviewed the cryptic supplemental declarations and "explanations," the court's concern as to the truthfulness of the testimony has grown. The court now wonders if the landlord is not related, possibly an insider guaranteed the lease and the $20,000.00 was paid for the benefit of the insider guarantor.

Chapter 13 Trustee's Status Update

The Trustee filed a Status Update on November 7, 2016. Dckt. 32. The Trustee states that his objection to confirmation is resolved so long as the Order Confirming provides for:

A. Plan payments commencing with the November 25, 2016 payment will be $139.15, and

B. The Debtor will pay in any tax refunds received during the course of the Plan.

The Trustee states that the Debtor has resolved the majority of the issues raised. For instance, the disposable income listed on Schedule J was ($160.85) and the plan payment was $100.00 per month, but

Amended Schedule J fixed the disposable income to show $139.15 per month (Dckt. 18). Debtor failing the liquidation analysis was resolved by the filing of Amended Schedules B and C (Dckt. 18). Debtor has not put all disposable income in the Plan yet but have proposed to resolve this issue by adding language to the order confirming the Plan. Finally, the Debtor resolved the Trustee's concerns about the plan not being the best efforts and about there being no business budget by filing Amended Schedule J (Dckt. 18).

At this time, the Trustee requests that the court the objection to confirmation provided that provisions in the Order Confirming resolve the issues with the Debtor's plan payments and tax refunds.

The Trustee's Status Update does not address who is the mysterious landlord.

Discussion

Though the court gives the Trustee's objections and supplemental pleadings, and the Debtor's supplemental pleadings due weight, the court has an independent duty to make certain that the requirements for confirmation have been met. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2011); *see also In re Dynamic Brokers, Inc.*, 293 B.R. 489, 499 (B.A.P. 9th Cir. 2003) (citing *Everett v. Perez (In re Perez)*, 30 F.3d 1209, 1213 (9th Cir. 1994)).

Debtor's conduct raises a more fundamental problem for them in this, and possibly any bankruptcy case under any Chapter. While Debtor now files Amended Schedules purporting to state truthfully under penalty of perjury their assets, liabilities, income, and expenses, this information is grossly different from the prior truthful statements made under penalty of perjury of their assets, liabilities, income, and expenses upon which they have sought to have the court, creditors, the Chapter 13 Trustee, and U.S. Trustee rely on as Debtor obtained all of the protections and benefits under the Bankruptcy Code.

The court reviews these grossly conflicting statements under penalty of perjury and the reasonable, credible testimony under penalty of perjury why and how such grossly false statements could have innocently been made by Debtor.

	Original Schedules Dckt. 1	**Amended Schedules Dckt. 18**
Schedules A/B		
Cash	None	None
Wells Fargo Bank Account	$73	$73
Vehicles	None	None
Household Goods	$2,200	$2,200
Clothing	$300	$300
Jewelry	$400	$400

401k	$14,000	$14,000
Interest in Asian Market, Inventory Subject to $25,000 lien	$19,338	None
Schedule C - Exempt Assets		
Household Furnishings	$2,200	$2,200
Clothing	$300	$300
Jewelry	$400	$400
Retirement 401k	$14,000	$14,000
Wells Fargo Bank Account	$73	$73
Interest in Asian Market - $19,338 Value	$2,200	None
Schedule I - Income		
Debtor 1 Employed 31 Years Automatic Bar Control	$4,128	No Amended Schedule I Filed
Debtor 2 IHSS Care Provider	$828	
Schedule J - Expenses 2 Dependents, Ages 17 and 21 Total	($3,866)	($3,566)
Rent	($1,500)	($1,500)
Home Maintenance	$0	$0
Electricity/Gas	($250)	($250)
Water, Sewer, Garbage	($160)	($160)
Cell Phones	($200)	($200)

Phone/Cable/Internet	($123)	($123)
Food and Housekeeping Supplies	($500)	($700)
Childcare/Education	$0	$0
Clothing, Laundry, Cleaning	($100)	($50)
Personal Care Products	$0	$0
Medical/Dental Expenses	$0	$0
Transportation	($200)	($200)
Entertainment	($50)	($50)
Life Insurance	($450)	$0
Vehicle Insurance	($333)	($333)

A review of these two statements submitted under penalty of perjury raises serious questions concerning the truthfulness and good faith of Debtor. It is unreasonable that Debtor can have no Home Maintenance and Upkeep Expenses. Even in a rental, there are normal use, wear, and tear expenses incurred by the tenant (such as light bulbs, air filters, cleaning the house, and the like).

Debtor then lists only $200.00 per month for transportation expenses (bus fare, gas, repairs, maintenance) for four persons. On Schedule B, Debtor twice states under penalty of perjury that Debtor does not own any vehicles, but twice states under penalty of perjury that Debtor has a ($333.00) per month vehicle insurance expense.

When questioned by the Trustee as to the validity of certain expenses, Debtor has changed them. Though originally stating under penalty of perjury that the reasonable and necessary food and housekeeping expenses were ($500.00), for Amended Schedule J (apparently to achieve the pre-determined amount Debtor wants to manufacture as the Net Monthly Income) Debtor increases this expense to ($700.00), 140% of the original expense stated under penalty of perjury.

On Original Schedule J, Debtor also stated under penalty of perjury that there was also a ($450.00) per month life insurance expense. This expense disappears on Amended Schedule J, with ($200.00) of the disappeared expense shifted to the new higher food expense.

The Debtor's response that the original Schedules and the Statement of Financial Affairs were just "skimmed," while in part appearing true, indicates a willingness to just put whatever lets Debtor win on what is filed with the court. Even the Supplemental Declaration appears to have merely been "skimmed" instead of carefully reviewed for accuracy.

Assuming in December 2010 when the first bankruptcy case was filed the Debtor's two children were seventeen and twenty-one years of age, in 2016 they are now twenty-three and twenty-seven years old. However, Debtor continues to claim them as "dependents" on Amended Schedule J. While these adult "dependents" are listed for purposes of justifying expenses, no income is stated for these two adults.

Additionally, the court cannot tell what vehicles are being insured for $333.33 a month—which totals $4,000.00 annually. Clearly, Debtor's twenty-three-year-old adult child and twenty-seven-year-old adult child can pay their own vehicle expenses. (No evidence has been provided that either adult child has special needs or is unable to care for him or herself.)

On Schedule B Debtor states under penalty of perjury that no vehicles are owned by Debtor. Dckt. 1 at 12. Yet, Debtor purports to be paying $4,000.00 a year for vehicle insurance. Schedule J and Amended Schedule J, Dckts. 1 at 43 and 18 at 13. It appears that based on the Schedules J, Debtor has an additional $333.33 a month to fund the Plan.

As address earlier, these two debtors assert that their food expense should be increased now over what was stated before because they apparently had been taking food from the business to feed the then family of four. No "food under the table" was disclosed as income from the business in the prior cases. Additionally, Debtor's family now consists of two persons, not four. Debtor's twenty-three-year-old and twenty-seven-year-old children are adults, not "wards of the creditors" as Debtor seeks to make them.

Diversion of Asset Sale Proceeds

In the Supplemental Declaration, Debtor admits to having diverted monies from the liquidation of assets (sale of the business) to their adult children—"This money [sale of business proceeds] was used ot pay some home bills, help our college children, used for living expenses, etc." Dbt. Dec., Second ¶ 1, p. 3:2–3.

As this court has said before, parents supporting their children's higher education is laudable. However, when the parent chooses to be magnanimous at the expense of creditors who are going unpaid, it just becomes a vehicle to improperly transfer money from Debtor to the children. While the parents, and their children, may feel good having diverted monies away from creditors to the Debtor's adult children, such diversion is not indicative of good faith in connection with a bankruptcy case.

On Original Schedule A/B, Debtor states under penalty of perjury an interest in an Asian Market, and on Original Schedule C, Debtor exempts a portion of that value. On Amended Schedules A/B and C, this asset and exemption disappear. Debtor has since explained that the business was sold prior to filing this bankruptcy case.

Finally, on both Original Schedules A/B and Amended Schedule A/B, Debtor states under penalty of perjury not having any cash. It is difficult to believe that two adult debtors did not have even two nickels rubbing together in their pockets and purse. It appears that Debtor takes an "I will only tell the court what I think is significant, and not provide complete, truthful, and accurate information under penalty of perjury" approach, possibly because such information would not yield the outcome sought by Debtor, irrespective of whether that outcome is permitted under the Bankruptcy Code.

When Debtor responded to the Trustee's Opposition, Debtor failed (or refused) to provide any testimony under penalty of perjury. Instead, Debtor merely instructed their attorney to file a reply making arguments. These arguments consisted merely of stating that the Debtor had filed amended schedules. The Reply carefully avoids addressing any explanation for how Debtor could be making the original statements under penalty of perjury, which they were now stating to be false under penalty of perjury on the amended schedules.

When the Trustee pointed this out, Debtor very belatedly filed a declaration on the eve of the October 4, 2016 hearing. Dckt. 24. A review of the Declaration provides the following information:

A. The Declaration is signed by each Debtor, stating that the information in this Declaration (as with the prior schedules) is true and correct.

B. On Original Schedule J, "it appears that items left over from a previous case reflected expenses that do not exist."

Debtor offers no testimony as to how and when they carefully reviewed Original Schedule J they innocently and honestly made a mistake in leaving non-existent expenses on Schedule J.

C. Debtor states that due to financial conditions, they stopped paying the life insurance (but offer no testimony as to when) and the fact that they closed the Asian Market (at some unstated time) they had to increase their food bill. But Debtor offers no reason as to why or how owning the Asian Market reduced their food expenses—unless they were stealing (taking undisclosed in kind distributions of food) from the market, which would then artificially decrease the profit of the market.

D. Later in the Declaration, Debtor states that the Asian Market was sold in 2015 but fails to provide any specific date or terms of such sale. Debtor does disclose on the Statement of Financial Affairs that the Asian Market was sold in January 2015 to an unnamed person (disclosure of the name is required) for $40,000.00, with proceeds of $20,000.00 (no explanation is provided for where the other $20,000.00 of the $40,000.00 sales price was diverted) was paid to PG&E and an unidentified landlord.

The Statement of Financial Affairs also fails to disclose the relationship of the purchaser (in addition to failing to disclose the identity). Rather, it merely states, "Third Party." That provides no meaningful disclosure, as transferring it to anyone other than either of the two debtors is a transfer to a third-party.

Statement of Financial Affairs Question 16, Dckt. 1 at 48.

E. Debtor asserts that the 2015 tax refund is "unusual" and speculates that it may be due to having sold the business. Presumably, Debtor has the information from the tax return and do not need to speculate. However, Debtor fails to provide the court with such testimony.

Declaration, Dckt. 24.

REVIEW OF PRIOR BANKRUPTCIES

Debtor, with the assistance of current counsel, has unsuccessfully prosecuted two prior Chapter 13 cases. These cases are summarized as follows:

I. Chapter 13 Case 11-42249

A. Filed.....September 14, 2011

B. Dismissed.....May 10, 2013

C. Dismissal of Case

1. The case was dismissed due to Debtor's failure to provide for a modest Employment Development Department Claim ($1,447.92). This resulted in the plan being over extended to 103 months. 11-42249; Civil Minutes, Dckt. 42.

D. Schedules

1. On Original Schedule B, Debtor lists having a Retirement 401k, which had a value of exactly $14,000.00. *Id.*, Dckt. 1 at 14. This is the same amount stated under penalty of perjury five years later in this bankruptcy case. Unless the 401k investment is made in a tin can buried in the back yard, it appears inconceivable that there has been no change in this 401k account.

2. Debtor also lists owning four vehicles on Schedule B. *Id.* at 15.

3. On Schedule F, Debtor stated under penalty of perjury that they had no creditors with general unsecured claims. *Id.* at 19.

4. On Schedule I,

a. Monthly Income for Debtor 1 was stated to be $3,884 (Automatic Bar Control), and

b. Monthly Income for Debtor 2 was stated to be $97,185 (Asian Market). *Id.* at 22.

c. Debtor states under penalty of perjury that their two children are 17 and 21 years of age in September 2011. *Id.* (On Schedule J filed in the current case on July 19, 2016, Debtor states under penalty of

perjury that their two children, five years later, are still just 17 and 21 years old.)

While Debtor and counsel may argue, "really, it is just a small typo that Debtor states under penalty of perjury that their children are 17 and 21 years of age in 2016, not a big deal . . . ," it is a big deal. If Debtor can make an error on such a simple fact (which is a critical issue in determining reasonable expenses and who are bona fide dependents), all of Debtor's statements are suspect.

d. On the business attachment to Schedules I and J, Debtor discloses gross monthly income of $97,185.00 and expenses of ($92,250.00). Thus, Debtor reports having monthly net business income of $4,934.00. *Id.* at 25.

(1) For the expenses:
- (a) Nothing is listed for income taxes
- (b) Nothing is listed for self-employment taxes
- (c) Nothing is listed for unemployment taxes
- (d) No expense or distribution in kind for food to the Debtor, in addition to the net monthly income, is listed.

On Schedule J, no provision is made for payment of income taxes, self-employment taxes, or other taxes, which a self-employed person is required to make. *Id.* at 23–25. No explanation is provided for how and why this Debtor is exempted from the federal and state self-employment tax laws.

II. Chapter 13 Case No. 11-34967

A. Filed.....June 15, 2011

B. Dismissed.....September 6, 2016.

C. Dismissal of Case. 11-34967; Civil Minutes, Dckt. 21.

1. Debtor failed to provide business records to Trustee.

2. Debtor failed to provide copies of employer payment advices.

3. Debtor failed to properly deduct business expenses on Form 22C, as an over-median income debtor.

III. Chapter 7 Case No. 10-52307

A. Filed.....December 10, 2010

B. Discharge.....March 22, 2011

C. Schedules. 10-52307, Dckt. 1.

1. Schedule B lists the 401(k) retirement account having a value of exactly $14,000.00 in December 2010—the same as Debtor now states under penalty of perjury in 2016.

2. Lists interest in Asian Market, value of $19,338.00.

3. Schedule I; *Id.* at 27.

a. Debtor 1 income of $3,649 (Automatic Bar Control), and

b. Debtor 2, $95,439 income from business.

c. Debtor states under penalty of perjury that in 2010 their two children were 17 and 21 years of age (the same age as Debtors state under penalty of perjury in 2016).

4. Schedule J (No Business Attachment), *Id.* at 28–29.

a. For Expenses, Debtor lists ($93,708.00) for the business, which would result in approximately a $1,900.00 monthly net income from the business. No income or expense is shown for "in kind food taken by Debtor from business."

b. On Schedule B, Debtor lists four vehicles (one listed as co-signed for father) and on Schedule J for the three other vehicles the insurance expense is ($333.00), exactly the same as stated under penalty of perjury in 2016 with Debtor stating under penalty of perjury having no interests in any vehicles.

In reviewing Schedule G filed by Debtor in each of the prior bankruptcy cases, while saying that Debtor is making monthly lease payments for the Asian Market Property, as well as saying that a portion of the sale proceeds of the market were diverted to a landlord:

A. Case No. 10-52307

1. Debtor states under penalty of perjury that there are no executory contracts or unexpired leases. Schedule G, Dckt. 1

B. Case No. 11-34967

1. Debtor states under penalty of perjury that there are no executory contracts or unexpired leases. Schedule G, Dckt. 1

C. Case No. 11-42249

1. Debtor states under penalty of perjury that there are no executory contracts or unexpired leases. Schedule G, Dckt. 1

Even though stating under penalty of perjury that Debtor has no interests in any unexpired leases, a monthly lease expense is listed of $2,200.00.

On Schedule G in the current case, Debtor states that there are no unexpired leases. Dckt. 1 at 38. That would not be unexpected if the business were sold and the lease transferred. While having no general unsecured claims in the prior Chapter 13 cases, Debtor's Schedule F has now ballooned to seventeen pages. Dckt. 1 at 20–36. In reviewing the listed claims, Debtor now states that some of these debts were incurred in:

A. 2014.....Three Claims

B. 2013.....Four Claims

C. 2012.....Seven Claims

D. 2010.....Twelve Claims

E. 2008.....Four Claims

F. 2005.....One Claim

G. 2000.....Three Claims

H. Unstated date.....Ten Claims

I. 1995.....Three Claims

J. 1994.....One Claim

Either Debtor failed to accurately list claims in the prior cases, has hidden creditors from the court and the bankruptcy from creditors, is listing false debts in this case, or chooses not to read the Schedules before signing them under penalty of perjury. None of these conclusions bode well for Debtor.

Debtor's Supplemental Pleading offers only marginal support for the deplorable handling of this case. Debtor finally identifies the buyer for the Asian market business and the date and amount of the purchase. While describing the installment payments made by the buyer, though, Debtor casually omits certain dates and overlooks where the remaining $2,000.00 payment is located. By the court's calculation, only $38,000.00 of the $40,000.00 purchase price has been tendered.

Worse still is that Debtor offers no good explanation for how the filings in this case were so incorrect. Debtor and Debtor's Attorney each filed statements with the court that coincidentally were declared to be true but were not sworn under penalty of perjury. The best that any party in this case could come up with is to say that everyone assumed the old data from cases filed and pursued several years ago (the last case closed in 2013, Case No. 11-42249) had been updated by someone else or was still true.

The Trustee may state that all of his objections have been addressed such as to overrule this Objection, but the court's independent duty to review the matters reveals that Debtor has not addressed all of the issues hindering confirmation.

At the end of the day, Debtor fails to provide credible testimony in support of confirmation. Debtor fails to provide credible testimony and schedules executed under penalty of perjury in this case. Each Debtor has demonstrated that they sign whatever is put in front of them or are willing to give inaccurate information to their attorney under penalty of perjury to mislead the court. Debtor's repeated false, inaccurate, and always-favorable-to-the-Debtor statements demonstrate that they have not filed this case in good faith. It further demonstrates that Debtor has not proposed the current plan in good faith. It further demonstrates that Debtor is not prosecuting this case in good faith.

Mere denial of confirmation of this plan does not appear to be the end of the story. The court refers this matter to the Chapter 13 Trustee and U.S. Trustee for review of the current case and statements under penalty of perjury, and each of the prior cases and statements under penalty of perjury, for consideration of further action. The bankruptcy process is not one in which parties (be they creditors or debtors) can repeatedly file petitions, documents, motions, or complaints, make repeated misrepresentations to the court, have cases and actions dismissed, and then repeatedly re-file with impunity. Just as complaints can be dismissed with prejudice, so can bankruptcy cases (which results in the debtor never being able to obtain a discharge of the debts in any subsequent case). Injunctions can be entered barring the refiling of actions, as well as future bankruptcy cases.

PART II
Ruling from October 4, 2016 Hearing
Identifying Issues for Debtor to Address at Continued Hearing on November 22, 2016

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

A. Khammay Phommavongsa and Khammai Phommavongsa ("Debtor") appear to be unable to make plan payments. Debtor's projected monthly disposable income listed on Schedule J is negative $160.85, and the Debtor proposes plan payments of $100.00;

B. The Debtor's Plan fails the Chapter 7 liquidation analysis. Debtor's non-exempt equity totals $17,211.59, but the Debtor is proposing a 0% dividend to unsecured creditors;

C. The Plan does not appear to provide all of the Debtor's projected disposable income for the applicable commitment period. Debtor received a combined state and federal

tax refund for 2015 of $5,364.00. Debtor can increase the dividend paid to creditors by turning over tax refunds each year; and

D. The Plan is not the Debtor's best efforts:

1. Debtor earns below-median income;

2. Debtor deducts $450.00 per month for life insurance premiums but admitted no longer having any life insurance expenses at the 341 Meeting of Creditors. This expense greatly affects the budget and disposable income. Debtor's Plan should be increased to pay $289.15 per month for thirty-six months, plus a turnover of the tax refunds; and

3. Debtor attached a business budget to Schedules I & J that report $95,439.50 per month in gross receipts. Debtor stated at the 341 Meeting of Creditors that the business closed in 2013 and that the budget was erroneously attached from a previous bankruptcy filing.

DEBTOR'S OPPOSITION

Debtor filed an opposition on September 21, 2016, requesting a hearing and stating that Debtor has amended the schedules to resolve the Trustee's concerns. Dckt. 19. Below is a summary of the Amended Schedules (Dckt. 18):

A. *Amended Schedule A/B:* #53 (other property) and #61 (total other property not listed): Debtor removed the prior-listed interest in "Asian Market; Inventory subject to lien of $25,000.00" with a value of $19,338.59. This reduced #63 (total of all property on Schedule A/B) to $16,973.00. (Debtor also amended Schedule C to remove the C.C.P. § 703.140(b)(6) exemption for this prior-listed asset, although Debtor failed to check this box on the Amendment Cover Sheet).

B. *Amended Schedule J*: Debtor increased their childcare and children's education costs (#8) from $500.00 to $700.00. Debtor reduced their clothing, laundry, and dry cleaning cost (#9) from $100.00 to $50.00. Debtor removed the $450.00 life insurance expense (#15a). These changes result in a new net monthly disposable income of $139.15 (#23c). Debtor did not file an Amended Plan to reflect this increase in disposable income.

C. *Amended Statement of Financial Affairs*: Debtor amended #4 to include Debtor's sources of income for the current year ($29,492.49 combined), 2015 ($59,951.00 combined), and 2014 ($449,167.00 combined).

TRUSTEE'S REPLY

The Trustee filed a Reply on September 27, 2016. Dckt. 21. The Trustee objects to confirmation on the same grounds still, described below:

A. The Trustee believes that Debtor's changes to the budget are reasonable, but he objects that the plan payment should be $139.00 per month.

B. Debtor removed listing an interest in Asian Market from Schedule B. Unless a declaration is filed by the Debtor explaining that matter to the court, the Trustee does not believe that there is sufficient evidence for the court to conclude that the liquidation analysis has been met.

C. Not all of Debtor's disposable income is in the Plan, and this concern has not been addressed by the Debtor.

D. The objection about the Plan not being Debtor's best efforts has been satisfied.

E. The Trustee's objection about the Debtor filing a business budget with $95,439.50 per month listed in gross receipts will be resolved if Debtor files a declaration explaining why that budget was removed from the schedules.

OCTOBER 4, 2016 HEARING

At the October 4, 2016 hearing, the court expressed several concerns in the Schedules and Statement of Financial Affairs and with the accuracy of Debtor's disclosures. Dckt. 26. The parties addressed many of the court's issues and concurred that continuing the hearing to allow the parties to file supplemental pleadings could resolve all of the issues. The court agreed and continued the hearing to 3:00 p.m. on November 22, 2016, with supplemental pleadings to be served on or before October 28, 2016.

APPLICABLE LAW REGARDING PERJURY

In signing the Schedules and Statement of Financial Affairs, each Debtor has certified under penalty of perjury that the information therein is true and correct. *See* Statement of Financial Affairs, Part 12, Dckt. 1 at 44, 51. The forms themselves make this clear, stating with respect to the Statement of Financial Affairs:

> "I [each person signing] have read the answers on this Statement of Financial Affairs and any attachments, and I declare under penalty of perjury that the answers are true and correct. I understand that making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $250,000, or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571."

Id. at 51. As clearly stated, the consequences of false statements, concealing assets, or fraud can be significant. 18 U.S.C. § 152(3) states that a crime is committed by a person who: "knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11 . . . ." According to 18 U.S.C. § 3559(a)(4), the crime is a Class D felony and is punishable by up to five years in prison, a fine of up to $250,000.00, or both.

In civil proceedings, such misrepresentations are a basis for denying or revoking a discharge. "In order to prove a violation of Section 727(a)(4)(A), the plaintiff must show that the debtor (1) made a false oath in connection with the case; (2) related to a material fact; (3) knowingly; and (4) fraudulently. *Jones v. U.S. Trustee*, 736 F.3d 897, 900 (9th Cir. 2013) (citing *In re Retz*, 606 F.3d 1189, 1197 (9th Cir. 2010)). In the civil bankruptcy proceeding, the preponderance of evidence standard applies to the bankruptcy court's factual determination if such false statements were made by Debtor. *Grogan v. Garner*, 498 U.S. 279, 288–89 (1991).

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

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

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

5. **16-21305-E-13 PGM-3** | **RODERICK/ROSEMARIE TAPNIO** **Peter Macaluso** | **MOTION TO CONFIRM PLAN 10-4-16 [107]**

Final Ruling: No appearance at the November 22, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 4, 2016. By the court's calculation, 49 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy 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 hearing on the Motion to Confirm the Amended Plan is continued to 3:00 p.m. on January 24, 2017. Debtor shall file and serve a supplemental pleading with any proposed plan amendments on or before December 23, 2016, and Responses, if any, to the proposed amendments filed and served on or before January 14, 2017.

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

NOVEMBER 22, 2016 HEARING

Debtor has pending an Adversary Proceeding in which Debtor asserts that a nonjudicial foreclosure sale conducted during the period after this case was dismissed and before the order vacating the dismissal. As summarized by the court in the Civil Minutes for the November 16, 2016 Status Conference in the Adversary Proceeding:

> "Roderick Tapnio and Rosemarie Tapnio, the Plaintiff-Debtors, filed their Amended Complaint on October 20, 2016. It was served on October 25, 2016. Certificate of Service, Dckt. 31. The Amended Complaint recounts the travails of the

> Plaintiff-Debtor in their Chapter 13 case that was filed on March 2, 2016. The case was dismissed on March 31, 2016, for failure to file documents. On April 4, 2016, a Trustees Deed Upon Sale was conducted on the Plaintiff-Debtors residence, and on April 5, 2016, the court vacated the order dismissing the bankruptcy case.
>
> The Amended Complaint states that on April 5, 2016, the proper was sold in foreclosure. It appears that this allegation is that the trustees deed under the deed of trust was delivered on April 5, 2016, the sale having been conducted on April 4, 2016. It is asserted that the issuance, delivery, and acceptance of the trustees deed on April 5, 2016, violated the automatic stay in the Plaintiff-Debtors bankruptcy case once the dismissal order was vacated on April 5, 2016."

Adv. 16-2155; Civil Minutes, Dckt. 34.

The Plan provides in the Additional Provisions for the asserted ownership rights of the buyer at the foreclosure sale to be adjudicated in the adversary proceeding, with the Debtor intending to then treat the secured claim as having $0.00 value. No order determining the value of such secured claim has been entered.

The court has granted relief from the automatic stay to allow the person claiming to have purchased the property at the alleged void foreclosure sale to proceed to exercise its rights to obtain possession thereof. Order, Dckt. 96. That order does not constitute a determination of whether the foreclosure sale was valid, only that the purported purchaser had presented a colorable right to be enforced in state court. FN.1.

FN.1. The bankruptcy judge acknowledges that when filing bankruptcy becomes a viable option for many debtors, they will not have sufficient assets to obtain a bond to support an injunction in state or federal court. Debtors turn to the bankruptcy court and automatic stay in place of an injunction. As in the Plaintiffs' bankruptcy case, this court allows debtors to self-fund a bond with what would be the monthly mortgage payment, with such monies held by the Chapter 13 Trustee. If the debtor is correct and the foreclosure sale is invalid, then a fund exists to make the post-petition mortgage payments. If the debtor fails and the foreclosing creditor or third party purchaser at the foreclosure sale has been wrongly detained by the injunction (the automatic stay), then this fund constitutes a bond from which the Rule 65(c) damages may be compensated.

Though the Adversary Proceeding was filed in August 2016, an Amended Complaint was filed and served on October 25, 2016. The Status Conference in that Adversary is set for February 22, 2017.

The court continues the hearing on this Motion to 3:00 p.m. on January 24, 2017. This will allow Debtor to communicate with the Defendant in the Adversary Proceeding and determine the extent of any such litigation. Additionally, if Debtor intends to use the confirmed plan as a "stay" to prevent the purported purchaser from proceeding to enforce its rights as permitted by the order modifying the automatic stay, Debtor can file proposed amendments for the "stay bond" under the Plan.

TRUSTEE'S OPPOSITION

David Cusick, Chapter 13 Trustee, filed an opposition on November 2, 2016. Dckt. 120. Trustee asserts that the Plan exceeds sixty months. That is caused by the FCI Lender's second deed of trust in the amount of $150,000.00. An adversary proceeding has been filed against the second deed of trust to void the sale and determine the extent and validity of the lien. FCI Lenders failed to file a claim, and the bar date has passed. Further, the plan proposes a payment of $450.00 for two months, then $270.00 for fifty-eight months with a 100% dividend to unsecured creditors for a total of $16,560.00. The Trustee requests that the Motion be denied.

DEBTOR'S REPLY

Roderick Tapnio and Rosemarie Tapnio ("Debtor") filed a Reply on November 15, 2016. Dckt. 123. Debtor appears to argue two contradictory points, but the court interprets the Reply to state that the Plan will be over-extended only if property that is the subject of an adversary proceeding against FCI Lenders (No. 16-02155) is reconveyed. Even then, though, Debtor states that there will not be a problem because Debtor will pursue a Motion to Value Lien.

Debtor requests that the Plan be confirmed, or alternatively, that the confirmation hearing be continued ninety days to trail the adversary proceeding.

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 Confirmation of the Chapter 13 Plan Roderick and Rosemarie Tapnio, the Debtors, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion to Confirm the Amended Plan is continued to 3:00 p.m. on January 24, 2017. Debtor shall file and serve a supplemental pleading with any proposed plan amendments on or before December 23, 2016, and Responses, if any, to the proposed amendments filed and served on or before January 14, 2017.

6. **12-21207-E-13** **JIM LEDESMA** **CONTINUED MOTION FOR SANCTIONS FOR VIOLATION OF THE AUTOMATIC STAY**
PGM-3 **Peter Macaluso** **8-26-16 [155]**

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.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on August 26, 2016. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

The Motion for Sanctions for Violation of the Automatic Stay 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 Sanctions for Violation of the Automatic Stay is xxxxx.

The present Motion for Sanctions for Violation of the Automatic Stay provided by 11 U.S.C. § 362(a) and for damages pursuant to 11 U.S.C. § 362(k) and the inherent power of this court has been filed by Debtor Jim Ledesma ("Movant"). The Claims are asserted against Capital One, N.A. ("Respondent").

LEGAL STANDARD

A request for an order of contempt by the Debtor, United States Trustee, or another party in interest is made by motion governed by Federal Rule of Bankruptcy Procedure 9014. Fed. R. Bankr. P. 9020. A bankruptcy judge has the authority to issue a civil contempt order. *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine)*, 77 F.3d 278, 283–85 (9th Cir. 1996). The statutory basis for recovery of damages by an individual debtor is limited to willful violations of the stay, and then typically to actual damages, including attorneys' fees; punitive damages may be awarded in "appropriate circumstances." 11 U.S.C. § 362(k)(1). The court may also award damages for violation of the automatic stay (a Congressionally created injunction) pursuant to its inherent power as a federal court. *Sternberg v. Johnston*, 595 F.3d 937, 946 (9th Cir. 2009). FN.1.

FN.1. Bankruptcy courts have jurisdiction and authority to impose sanctions, even when the bankruptcy case itself has been dismissed. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990); *Miller v. Cardinale (In re DeVille)*, 631 F.3d 539, 548–49 (9th Cir. 2004). The bankruptcy court judge also has the inherent civil contempt power to enforce compliance with its lawful judicial orders. *Price v. Lehtinen (In re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009); *see* 11 U.S.C. § 105(a). A bankruptcy judge is also empowered to regulate the practice of law in the bankruptcy court. *Peugeot v. U.S. Trustee (In re Crayton)*, 192 B.R. 970, 976 (B.A.P. 9th Cir. 1996). The authority to regulate the practice of law includes the right and power to discipline attorneys who appear before the court. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); *see In re Lehtinen*, 564 F. 3d at 1058.

Attorneys' fees may be recovered for work involved in bringing about an end to the stay violation and for pursuing an award of damages. *America's Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard)*, 803 F.3d 1095, 1101 (9th Cir. 2015). A monetary penalty may not be imposed on a creditor unless the conduct occurred after the creditor receives notice of the order for relief as provided by § 342. 11 U.S.C. § 342(g)(2).

The automatic stay imposes an affirmative duty of compliance on the nondebtor. *State of Cal. Emp't Dev. Dep't v. Taxel (In re Del Mission Ltd.)*, 98 F.2d 1147, 1151–52 (9th Cir. 1996). A party who takes an action in violation of the stay has an affirmative duty to remedy the violation. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1191–92 (9th Cir. 2003).

In addition Congress provides in 11 U.S.C. § 362(k) additional relief for violation of the automatic stay, which may be requested by an individual debtor. In asserting this claim pursuant to 11 U.S.C. § 362(a) & (k), Movant states with particularity (Fed. R. Bankr. P. 9013) the following grounds for relief:

A. "After the Debtor made the payments, Capital One did send a denial letter claiming the application was incomplete, and has kept the trial loan modification payments, and not returned, nor accounted for them in the bankruptcy case."

B. "That on 4/11/16, Capital One did send a loan modification instructing the debtor to 'Act by April 28, 2016' which the Debtor did."

C. "After making said payments, the Debtor was informed the application was 'incomplete'."

D. "Thereafter, Capital One did not honor the loan modification, nor has it accounted for, nor returned the post-petition collection of $2,767.92."

E. "On 1/22/12, the Debtor filed a Chapter 13 to reorganize his debts."

F. "On 2/29/12, Capital One did file Proof of Claim #3."

G. "Here, an actual controversy now exists between the Debtor and Capital One in that the loan modification was arbitrarily denied and Capital One remains in the possession of the post-petition trial loan modification payments."

H. "The Debtor seeks to cease of harassment by Capital One and a return of the funds paid to complete the Chapter 13 plan, the stopping of this continued unlawful conduct, which is causing, and does continue to cause harm, and separate injuries each and every day that Capital One refuses to return the funds, and as it engages in false, unfair, deceptive and unconscionable conduct to perpetrate or conceal their unlawful conduct."

I. "Here, Capital One has actual knowledge of Debtor's Chapter 13 case, the actions as described above have been done with actual knowledge of the bankruptcy, the actions as described above have been done intentionally, and the actions as described above have been done willfully in violation of 11 U.S.C. § 362."

J. "These intentional acts continue after repeated notice by Plaintiff's counsel to cease and desist, and as a proximate cause of Defendants' intentional actions in violation of the automatic stay."

K. "Here, the trial loan modification payments paid directly to lender are vital to the completion of the plan, to prevent the motion to dismiss that is now pending."

L. "Here, the Debtor has sustained emotional distress and attorney fees, as a proximate cause of Defendants' intentional actions in violation of the automatic stay."

M. "Here, the Debtor continues to sustain damages and will continue to incur attorney fees to pursue resolution of this issue, including but not limited to this motion and continued motions to modify this plan."

Movant has provided the Declaration of Debtor Jim Ledesma in support of the Motion. Dckt. 157. The Declaration affirms that Movant had been paying $2,675.00 per month to the Trustee, but when Respondent offered a trial loan modification to Movant, Movant accepted and made the payments as required by May 1, 2016; June 1, 2016; and July 1, 2016. Movant paid the difference of $1,752.36 per month to the Trustee. On August 4, 2016, Movant received a letter from Respondent that denied his loan modification because the "application was incomplete." Exhibit B, Dckt. 158.

TRUSTEE'S RESPONSE

The Trustee filed a response on September 13, 2016. Dckt. 163. The Trustee notes that Movant's motion is based on the denial of an offered post-petition loan modification, the receipt of voluntary payments made by Movant pursuant to the offer, and the retention of those payments without accounting for them in the bankruptcy case by Respondent. The Trustee states that the automatic stay may have been violated.

Respondent's Letters to Movant

The Trustee states that all parties, including Movant and Respondent, are bound by the terms of the confirmed Plan (Dckt. 40) according to 11 U.S.C. § 1327, and presently, no motion has been filed seeking to approve a loan modification. In Respondent's first letter (Exhibit A, Dckt. 158), the Trustee notes that the letter's purpose may have been to propose a trial loan modification, but the letter includes other language, such as:

A. "Act by April 8, 2016"

B. "Option 1: Stay in Your Home"

C. "Option 2: Leave Your Home"

The Trustee believes that such above language may be a violation of the automatic stay—in addition to ignoring the binding effect of a confirmed plan—because the letter attempts to force Movant to pay Respondent directly or surrender the property. FN.2.

FN.2. As an aside, the Trustee states that he is not aware whether Respondent sends letters like Exhibit A (Dckt. 158) to Chapter 13 debtors regularly, and the Trustee requests that Respondent's counsel advise the Trustee and the U.S. Trustee.

The Trustee notes that the actual terms of the proposed trial loan modification allow Movant to accept by either contacting Respondent by April 28, 2016, or by making the first trial period payment by April 28, 2016. The trial period requires three payments, and Respondent can revoke the offer if:

A. The first payment is not made by the due date,

B. There are liens on the property that cannot be corrected timely,

C. There are insurance issues,

D. Any trial period payment is late, or

E. Movant does not fulfill "all other terms." FN.3.

FN.3. The Trustee notes that "all other terms" are not specified in the proposal.

The Trustee states that according to the offer, if the offer is not revoked, and if Movant makes all trial period payments on time, then a loan modification would be sent by Respondent to Movant.

Regarding Exhibit B (Dckt. 158), the Trustee emphasizes that the "rejection" letter actually states that the "request for loss mitigation assistance for your Home Loan was closed because: Your application

was incomplete." The Trustee notes that an incomplete application (unclear from Movant's Motion whether one was submitted) was not a basis to revoke the offer and that a trial loan modification seems to be pending still despite the request being closed. Alternatively, the Trustee believes that Movant may be able to sue Respondent for breach of contract.

Payments Under the Confirmed Plan

The Trustee notes that Movant paid $79,945.61 in total through month forty-five (45) of the Plan. After that point, monthly payments owed have been $2,675.00 for the balance of the Plan. Through month fifty-five (55), Movant has paid $103,927.69 in plan payments and is delinquent by $2,767.92, which represents Movant's reductions for the trial period payment months of May, June, and July of 2016. During those three (3) months, Movant paid $1,752.36 per month. The Trustee believes that Movant paid $922.64 to Respondent directly during those months.

The Trustee was unaware of a trial loan modification and continued to disburse payments to Respondent during the trial period months. Respondent holds a Class 1 secured claim under the confirmed Plan and receives $1,237.43 per month. The Trustee has disbursed $67,301.72 to Respondent, including $23,526.70 for pre-petition arrears and $154.04 in post-petition arrears. The Trustee's records show that mortgage payments to Respondent are current under the Plan.

The Trustee notes that Movant has not explained how accepting payments from Movant is a violation of the automatic stay.

Return of Funds

The Trustee points to the Frequently Asked Questions section of Respondent's first letter (Exhibit A, Dckt. 158) and emphasizes that Respondent is supposed to maintain a "suspense account" whose provisions appear to provide that the balance of the account will be deducted from amounts that would otherwise be added to the modified principal balance if a loan modification is approved. That implies that the funds would remain in the suspense account if a loan modification were to be denied.

Accordingly, the Trustee requests that Respondent provide the current balance of the suspense account and the balance that creditor has been paid.

OPPOSITION TO THE MOTION

Respondent filed an Opposition on September 21, 2016. Dckt. 166. FN.4

FN.4. Due to an e-filing system error, the Opposition and supporting documents were filed twice. The court refers to the documents submitted as Docket Nos. 166–173.

Respondent counters, opposing the Motion on the following grounds:

A. Movant's Plan was modified twice, most recently on October 30, 2015 (Dckt. 92).

B. "The Second Modified Chapter 13 Plan provides in relevant part that post-petition monthly payments on the Loan would be made in the amount of $1,752.96, when due, in accordance with the terms of the Loan. The post-petition payments would be made by the Chapter 13 trustee."

C. "Additionally, the Second Modified Chapter 13 Plan provides that Property of the estate revested in Debtor upon confirmation of the plan."

D. "On March 23, 2016, the Court entered an order confirming the Second Modified Chapter 13 plan" (Dckt. 140).

E. "Subsequently, Capital One sent the Debtor a letter, dated April 11, 2016, offering a loan modification . . . ."

F. "Pursuant to the terms of the Modification Letter, the Debtor, among other required actions, was to (I) make three trial payments in the amount of $922.64; (ii) if all of the trial payments were made, complete the Modification Agreement and any additional requirements Capital One sends to the Debtor; and (iii) obtain court approval of the terms of the Loan Modification."

G. "The Debtor made the three required trial payments."

H. "Based upon Capital One's preliminary investigation, the Debtor was required to provide additional documentation to complete the application for the loan modification, and Capital One provided these documents to the Debtor. . . . However, the Debtor did not provide all of the requisite documentation. . . . As a result, Capital One terminated the modification as incomplete and sent the Debtor a letter dated August 4, 2016, informing him that his application for the loan modification was denied because his application was incomplete."

I. "The Debtor's loan modification request was properly denied by Capital One. Because the Debtor did not provide all of the requisite documentation."

The Opposition also addresses that Trustee filed a Response. The Opposition states that Respondent "continues to investigate" the facts and legal issues raised by the Trustee.

The Opposition states that before filing opposition, Respondent's counsel contacted counsel for both the Chapter 13 Trustee and for Movant and asked them to consent to a continuance to allow Respondent time to investigate issues by the Trustee in his Response. The Opposition states that counsel for the Chapter 13 Trustee agreed, but Movant's counsel refused to agree unless and until Respondent filed an opposition.

Respondent requests a continuance to November 22, 2016, to provide additional time to investigate the issues raised in the Trustee's Response.

REPLY TO THE OPPOSITION

Movant filed a Reply on September 27, 2016. Dckt. 182. Movant asserts the following points in the Reply:

A. "CAPITAL ONE HAD KNOWLEDGE OF BANKRUPTCY"

1. "The Creditor, Capital One, N.A. . . . filed it's proof of claim #3, on 2/29/12, and has noticed no less than (8) eight Notice of Mortgage Payment Changes; 5/24/12, 11/28/12, 1/4/13, 5/16/13, 6/17/13, 6/1/15, 11/24/15, and 6/1/16)."

2. "Capital One has been denied a Motion for Relief from Automatic Stay on 4/8/14, docket #71."

3. "The bankruptcy docket reflects that the a Motion to Substitute Attorney from C. Anthony Hughes to Peter G. Macaluso on 8/10/15, AND GRANTED 12/15/15."

4. "On 1/22/16, Capital One filed a Request for Special notice, docket #122."

B. "Knowledge of the Bankruptcy is Non-disputed."

C. "CAPITAL ONE ACTED WILLFULLY"

1. "On 4/11/16, Capital One mailed directly to debtor, and former counsel, what is listed as Capital One's Exhibit B, which states **'ACT BY APRIL 28, 2016 . . . OPTION 1 STAY IN YOUR HOME . . . . OPTION 2 LEAVE YOUR HOME' . . . IF YOU'RE UNABLE OR UNWILLING TO PAY THE MONTHLY PAYMENTS, YOU HAVE TWO OPTIONS (A SHORT SALE OR A DEED-IN-LIEU) BUT YOU MUST CONTACT US NOW . . . REMEMBER, YOU MUST RESPOND BY APRIL 28, 2016.**"

2. "On 8/4/16, Capital One acknowledges the bankruptcy proceeding and mailed directly to debtor, and not counsel a denial letter as incomplete, as Capital One's Exhibit C states."

D. "Capital One intentionally sent these communications to debtor, did not communicate it to the debtor's counsel, nor the Trustee, and did not seek relief from the automatic stay, nor amend the Notice of Mortgage Payment Change"

E. "Capital One's actions are deemed willful."

F. "CAPITAL ONE WILLFULLY VIOLATED PLAN TERMS"

1. "Capital One received disbursement via the Trustee."

2. "Capital One received disbursement directly from the debtor."

G. "Whether Capital One believes in good faith that it had a right to the property is not relevant to whether the act was 'willful' or whether compensation must be awarded."

H. "DEBTOR HAS SUFFERED DAMAGES AS A RESULT VIOLATION"

1. "The debtor's plan was confirmed."

2. "The debtor's Trustee made payments to Capital One."

3. "The debtor made payments to Capital One."

4. "No payments have been returned either to debtor nor Trustee."

I. "Capital One is liable for violation of 11 U.S.C. 362(k)."

J. "FUNDS USED TO MAKE TRIAL PAYMENTS ARE ESTATE PROPERTY"

1. "The debtor paid said payments with funds authorized to be paid to the Trustee, and Capital One received duel payments additionally pursuant to the proof of claim filed in this case" (citations omitted).

Movant requests that the hearing be continued.

OCTOBER 4, 2016 HEARING

At the hearing, the parties stated that they were reviewing the matter, and they requested a continuance. Dckt. 193. The court noted that the parties were acting diligently and continued the hearing to 3:00 p.m. on November 22, 2016.

SUPPLEMENTAL DECLARATION

On November 10, 2016, Lori Yonkovich, who is employed by the Trustee, filed a Supplemental Declaration and supporting Exhibits. Dckts. 197 & 198. On October 14, 2016, the Trustee received a settlement letter and a check for $2,767.92 in full reimbursement of the trial loan payments. The Trustee has placed a permanent hold on those funds pending resolution of the Motion for Sanctions.

DISCUSSION

Debtor has raised an interesting, and heretofore undisclosed, conduct of a creditor in connection with a secured claim that was the subject of a confirmed Chapter 13 Plan. The first part of Debtor's Motion seeks damages for "violation" of the automatic stay for the failure to process the final loan modification. Debtor states,

> "Here, an actual controversy now exists between the Debtor and Capital One in that the loan modification was arbitrarily denied and Capital One remains in the possession of the post-petition trial loan modification payments."

Motion, p. 2:22–25; Dckt. 155.

Initially, it appears that Debtor's contention sounds in breach of contract—an offer to modify, completion of modification terms, and then Respondent breaching the contract by failing to complete the modification. If so, Debtor fails to "connect the dots" how that failure would be a violation of the automatic stay. But Debtor hints at the more significant, and insidious, conduct upon which relief is sought, stating, "[a]nd Capital One remains in possession of the post-petition trial loan modification payments." In the next paragraph of the Motion, Debtor begins fleshing out the alleged violation:

> "The Debtor seeks to cease of harassment by Capital One and a return of the funds paid to complete the Chapter 13 plan, the stopping of this continued unlawful conduct, which is causing, and does continue to cause harm, and separate injuries each and every day that Capital One refuses to return the funds, and as it engages in false, unfair, deceptive and unconscionable conduct to perpetrate or conceal their unlawful conduct."

Id., p.2:26, 3:1–6.

The ground stated in the Motion is that Respondent, knowing that a confirmed Chapter 13 Plan was in place and Respondent's debt the subject of the Plan, acted in violation of the Plan. Further, Respondent made demand, and threatened Debtor, with either capitulating to the terms dictated by Respondent or lose the house to foreclosure. Respondent ignored the confirmed Plan, which worked to cure any default and block any foreclosure by Respondent.

The Chapter 13 Trustee punctuates the conduct of Respondent by directing the court to two of the exhibits filed by Debtor. Exhibit 1, Dckt. 158, is a letter from Respondent to Debtor dated April 11, 2016. This letter makes the following affirmative statements by Respondent:

A. "As a result of a bankruptcy proceeding, you may not be personally liable for the unpaid balance of this loan...."

In the confirmed Chapter 13 Plan, Debtor did not seek to discharge the debt, but has provided for curing any arrearage thereon. What bona fide, good faith reason might exist for this sophisticated creditor taking the step of advising a least-sophisticated consumer debtor that he or she may not be "liable" (whatever that term may mean to a least-sophisticated consumer) is unclear.

B. The property is "subject to foreclosure in accordance with the laws of the state where located..."

How the property, which is the subject of the confirmed plan that provides for curing the arrearage and all current payments being made under the plan, is "subject to foreclosure" is unclear. It appears to be a clear misstatement of California and Federal law.

C. "[t]his is not an attempt to collect a debt, but is intended for informational purposes."

By this statement, it appears that Respondent admits that the communication would appear to these consumer debtors as an attempt to collect a debt. Further, the substance of the letter, as noted below, telling the Debtor to either do the loan modification or lose the property to foreclosure is an attempt to collect the debt—either by the modification payments from Debtor or by taking the property to pay the debt.

D. "Your Home Loan is seriously delinquent. We've tried to contact you to discuss options available to you, but your time to act is running out."

Debtor is in the fifth year of the Chapter 13 Plan, nearing completion. There is no indication that the payments as required under the Plan to Respondent are delinquent. To the contrary, as confirmed by the Chapter 13 Trustee, by this loan modification demand, Respondent has doubled up on the payments, taking the plan payments from the trustee (current monthly payment and arrearage payment), pocketing more money than it is entitled to receive under the confirmed Chapter 13 Plan (as a matter of federal law).

E. Respondent tells Debtor, who is performing a confirmed Chapter 13 Plan pursuant to the applicable federal law, that Debtor has only two alternatives:

1. Stay in the home by making the trial loan modification payments. Even if made, Debtor has to submit a "Borrower Assistance Package" so that Respondent can evaluate Debtor's eligibility for the modification.

or

2. **Leave Your Home** (emphasis in original). For this only other option, Debtor is told if Debtor is unable or unwilling to make the payments demanded by Respondent, Debtor must either agree to a "Short Sale or a Deed-in-Lieu."

As is obvious, this statement demanding action and threatening foreclosure misses another obvious alternative—just continue to perform your confirmed Chapter 13 Plan, finish curing the arrearage, and keep the existing financial arrangement in place.

Respondent's Opposition ignores these letters, but merely argues that the loan modification was properly denied. It does admit that Respondent did receive the direct payments from the Debtor of the Trial Loan Modification Payments (which were in addition to the payments Respondent was receiving from the Chapter 13 Trustee under the confirmed Chapter 13 Plan that bound Respondent).

Disgorgement of Payments Received From Debtor
In Excess of Plan Distributions

It is undisputed that the confirmed Second Modified Chapter 13 Plan requires that Capital One, N.A. be paid $1,752.96 per month through the Chapter 13 Trustee. Statement of Undisputed Facts, Opposition ¶ 7; Dckt. 174. In addition, Capital One, N.A. has obtained three additional payments of $922.64 each from the Debtor pursuant to the Trial Loan Modification. *Id.* ¶ ¶ 11, 12.

The Second Modified Plan actually provides for Capital One, N.A. to receive payments of $1,752.96 for the current monthly installment, plus an additional $638.93 for the arrearage cure. The Chapter 13 Trustee continued to make the $2,391.89 plan payment to Capital One, N.A. Trustee's Response, Dckt. 163; Declaration of Lori Yonkovich, Dckt. 164. The Trustee was unaware that Capital One, N.A. was also receiving an additional payment of $922.64 per month directly from the Debtor pursuant to the unauthorized Trial Loan Modification.

The effect of the undisclosed, unauthorized Trial Loan Modification implemented by Capital One, N.A. was to improperly boost the monthly payments made on the Class One Claim under the confirmed Second Modified Plan to $3,214.63, a monthly overpayment of more than 34% of the amount authorized under the confirmed Plan.

Capital One, N.A. received unauthorized payments of $2,767.92 directly from the Debtor for payment on its pre-petition claim for which payment is provided for, and authorized to be made, only through the Chapter 13 Plan. Capital One, N.A. improperly obtained such payment and continues to improperly hold such monies in continuing violation of the automatic stay. 11 U.S.C. § 362(a)(1), (3) [until the plan is completed, the bankruptcy estate retains an interest in the property, including conversion of this case to one under Chapter 7], (4), and (6).

On October 10, 2016, Capital One, N.A., through its attorney, paid back the full $2,767.92 to the Trustee. The Chapter 13 Trustee shall disburse the monies as otherwise provided under the Chapter 13 Plan.

ORAL ARGUMENT

At the hearing, **xxxxxxxxxxxxxxxxxxx**.

DECISION

Xxxxxxxxxxxxxxxxxxx

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 Sanctions for Violation of the Automatic Stay filed by Jim Ledesma ("Movant") the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion for Sanctions for Violation of the Automatic Stay is **xxxxxxxxxxxxxxxxxxxx**.

7. 16-23407-E-13 HLG-1 | **IRMA QUIAMBAO** | **Kristy Hernandez** | **MOTION TO APPROVE LOAN MODIFICATION** | **10-13-16 [23]**

Final Ruling: No appearance at the November 22, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 13, 2016. By the court's calculation, 40 days' notice was provided. 28 days' notice is required.

The Motion to Approve Loan Modification has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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 Approve Loan Modification is granted.

The Motion to Approve Loan Modification filed by Irma Quiambao ("Debtor") seeks court approval for Debtor to incur post-petition credit. Carrington Mortgage Services ("Creditor"), whose claim the plan provides for in Class 4, has agreed to a loan modification that will reduce Debtor's mortgage payment from the current $1,894.00 per month to $1,891.08 per month. The modification will capitalize the pre-petition arrears, provide for an interest rate of 2% over the next five years, set a new principal balance of $532,048.89, and include a balloon payment of $185,167.58 plus all accrued interest remaining unpaid (amounting to approximately $299,272.36 altogether) to be paid on or before August 1, 2036.

The Motion is supported by the Declaration of Irma Quiambao. Dckt. 25. The Declaration affirms Debtor's desire to obtain the post-petition financing and provides evidence of Debtor's ability to pay this claim on the modified terms.

TRUSTEE'S NON-OPPOSITION

David Cusick, Chapter 13 Trustee, filed a statement of non-opposition on November 8, 2016. Dckt. 52.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve the Loan Modification filed by Irma Quiambao having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the court authorizes Irma Quiambao ("Debtor") to amend the terms of the loan with Carrington Mortgage Services, which is secured by the real property commonly known as 4886 Heritage Court, Fairfield, California, on such terms as stated in the Modification Agreement filed as Exhibit C in support of the Motion (Dckt. 26).

8. **16-25208-E-13** **WILLIAM MARKLEY AND SANDRA GORDON-MARKLEY** **MOTION TO SELL**
LRR-2 **Len ReidReynoso** **10-20-16 [39]**

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. FN.1.

FN.1. The Notice of Hearing (Dckt. 40) sets hearing according to either (somehow) Local Bankruptcy Rule 9014-1(f)(1) or (2), but the body of that Notice references that any opposition must be filed at least fourteen days before the hearing, which is consistent with Local Bankruptcy Rule 9014-1(f)(1). The Motion (Dckt. 39) states that the hearing is set according to Local Bankruptcy Rule 9014-1(f)(2). Despite Debtor's confusing statements, and because the end result is the same under either Local Rule, the court determines that the hearing was noticed pursuant to Local Bankruptcy Rule 9014-1(f)(1).

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 20, 2016. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

The Motion to Sell Property 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 Sell Property is granted.

The Bankruptcy Code permits William Markley and Sandra Gordon-Markley, the Chapter 13 Debtor ("Movant"), to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movant proposes to sell the real property commonly known as 815 Buttercup Lane, Galt, California ("Property").

The proposed purchaser of the Property is Charles Hartje and Charyle Hartje, and the terms of the sale are:

A. The purchase price is $348,000.00.

1. The payment will be used to pay all encumbrances (including a first mortgage of $249,167.00 held by Reverse Mortgage Solutions), pay off the Plan, and any remaining funds will be paid directly to Debtor

B. Seller shall pay for smoke alarm and carbon monoxide device installation and water heater bracing. Seller shall pay the cost of compliance with any mandatory government inspections and retrofit standards. Seller pays for owner's title insurance policy. Seller shall pay the county and city transfer tax or fee. Seller shall pay for the cost of a standard one-year home warranty plan with the optional coverage of the air conditioner.

C. Buyer and Seller shall split the cost of the escrow fee.

D. The sale includes the stove, office furniture in the office, and a free standing Big Ben clock.

TRUSTEE'S NON-OPPOSITION

David Cusick, Chapter 13 Trustee, filed a statement of non-opposition on October 25, 2016. Dckt. 44. Trustee does not oppose the Motion to Sell, but he states that demands will be made for all net proceeds because the bar date for creditors to file a claim has not passed. The Trustee expects the creditor claims will be less than the net proceeds.

DISCUSSION

At the time of the hearing the court announced the proposed sale and requested that all other persons interested in submitting overbids present them in open court. At the hearing, the following overbids were presented in open court: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Sell Property filed by William Markley and Sandra Gordon-Markley, the Chapter 13 Debtor, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the seller, William Markley and Sandra Gordon-Markley, the Chapter 13 Debtor, is authorized to sell pursuant to 11 U.S.C. § 363(b) and 1303 to Charles Hartje and Charyle Hartje or nominee ("Buyer"), the Property commonly known as 815 Buttercup Lane, Galt, California ("Property"), on the following terms:

A. The Property shall be sold to Buyer for $348,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 41, and as further provided in this Order.

B. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.

C. The Chapter 13 Debtor be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.

D. The Chapter 13 Debtor be and hereby is authorized to pay a real estate broker's commission in an amount equal to six percent (6%) of the actual purchase price upon consummation of the sale. The six percent (6%) commission shall be paid to the Chapter 13 Debtor's agent, Johnny Morales from White House Real Estate.

E. No proceeds of the sale, including any commissions, fees, or other amounts, shall be paid directly or indirectly to the Chapter 13 Debtor. Within fourteen days of the close of escrow, the Chapter 13 Debtor shall provide the Chapter 13 Trustee with a copy of the Escrow Closing Statement. Any monies not disbursed to creditors holding claims secured by the property being sold or paying the fees and costs as allowed by this order, shall be disbursed to the Chapter 13 Trustee directly from escrow.

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

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

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

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

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

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

The Objection to Confirmation of Plan is sustained.

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

OCTOBER 18, 2016 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on October 25, 2016. Dckt. 31.

TRUSTEE'S STATUS REPORT

The Trustee filed a Status Report on October 20, 2016. Dckt. 36. The Trustee states that Debtor appeared and resolved the Trustee's original objection, but after the Meeting of Creditors, the Trustee has new objections to confirmation.

The additional provisions of Debtor's plan state that the residence located at 815 Buttercup Circle, Galt, California, shall be sold as soon as possible and unexempt proceeds from the sale will be provided to the Trustee to satisfy as much as possible to Class 7 creditors and to administrative fees. The provisions do not provide a sale date or a dollar amount that will be paid into the plan, and the Trustee is not aware of a Motion to Sell for the property.

The Trustee also objects that a $200.00 monthly expense on Schedule J for student loans was not listed in the additional provisions of the plan as an expense to be paid directly.

OCTOBER 25, 2016 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on November 22, 2016. Dckt. 49.

DISCUSSION

The Trustee filed a report on October 17, 2016, stating that Debtor appeared at the Continued First Meeting of Creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. Accordingly, the Trustee's original objection was satisfied, but he has raised additional objections since then.

The Trustee objects that the additional provisions of the plan call for the sale of real property, but they do not state a sale date or an amount from the sale that will be paid into the Plan. A review of the docket shows that a Motion to Sell the property was filed on October 20, 2016 (Dckt. 39), and that the Trustee has filed a statement declaring no basis to oppose the Motion to Sell (Dckt. 44). Therefore, that portion of the Trustee's supplemental objection is overruled.

Lastly, though, the Trustee opposes confirmation on the ground that there is a $200.00 per month expense for student loan repayment listed on Schedule J that is not listed in the Plan's additional provisions as an expense that will be paid directly. Debtor's Plan calls for a 100% dividend to all unsecured claims. No supplemental pleadings have been filed by the Debtor to address this issue, and it remains outstanding.

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

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

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

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

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

10. 13-24610-E-13 PGM-3 | **DAX/TINA CHAVEZ** Peter Macaluso | **MOTION TO MODIFY PLAN** 10-13-16 [108]

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.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on October 13, 2016. By the court's calculation, 40 days' notice was provided. 35 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy 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 xxxxxxxxxxxxx.

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

CREDITOR'S OPPOSITION

AJX Mortgage Trust I ("Creditor") filed an Opposition on November 3, 2016. Dckt. 114. Creditor opposes confirmation of the Plan on the basis that:

A. The Modified Plan is not proposed in good faith and is an improper modification of a claim secured only by a security interest in real property that is Dax Chavez and Tina Chavez's ("Debtor") principal residence.

B. Debtor's alleged business income and expenses are speculative, meaning that the Plan may not be feasible.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on November 8, 2016. Dckt. 116. The Trustee opposes confirmation on the basis that:

A. Debtor may not be able to make payments under the Plan.

1. Debtor's declaration indicates that Profit & Loss Statements contain living expenses of one debtor. While the Trustee has received the Profit & Loss Statements by e-mail, they have not been filed with the court. The Debtor was not in business according to the original Schedule I, which conflicts with what the declaration states.

2. There is no budget for the separate household. According to the Supporting Exhibit filed on October 13, 2016, #1 of the Amended Schedule J is marked "No" in reference to living in separate households.

3. The amounts spent on a car are not clear. Debtor's declaration states, "Car for my daughter paid for outright from a friend of the family for approximately $2,600.00, but then used another $2,500.00 to repair the car and the balance for towing and misc items totaling $6,972.00." Debtor states that a family friend purchased the car, but then states repairs and towing total $6,972.00. It is unclear what amount Debtor spent on the purchase of a vehicle, repairs, towing, and miscellaneous items (including what those items are).

DEBTOR'S RESPONSE

On November 15, 2016, Debtor filed the response to the AJX and Trustee Oppositions. Dckt. 119. Debtor provides a Profit and Loss Statement as Exhibit A to the Reply. This statement lists in detail the following information: "3 Mos" of Gross Receipts of $14,453.57 and costs consisting of "material and supplies" of ($584.47). The Gross income is shown to be $13,869.10. Debtor then lists a "Total Expenses" of ($8,197.50), for which detail is not provided. Attached to this exhibit are Profit and Loss Statements for April, May, and June 2016, which do not provide detailed information.

Debtor argues that because Debtor receives $2,000.00 per month in Social Security, "the amount spent (on expenses) is not material." Response, p. 2:10–11. Actually, it is material, in that while Debtor

may elect to use the Social Security to fund extras, it does not create carte blanche authority to spend whatever the Debtor wants.

DISCUSSION

The Creditor's objections are well-taken.

The Creditor argues that Debtor's Modified Plan is was not filed in good faith and is an improper modification of a claim secured only by a security interest in real property that is the Debtor's principal residence. The Creditor has filed Proof of Claim No. 7 on July 8, 2013, stating a secured claim in the amount of $300,234.01. The Collateral for the obligation is listed as a deed of trust against the property commonly known as 7226 Bonita Way, Citrus Heights, California. Debtor's Schedules indicate that this is Debtor's primary residence. The Modified Plan provides for paying the secured claim of Gregory Funding as a Class 1 Claim (to cure a pre-petition arrearage of $24,073.63 and a one month post-petition arrearage of $1,700.05). Modified Plan, Dckt. 110. This is the AJX Claim.

In the Opposition, AJX asserts that two post-petition payments have been missed, which total $5,763.00. If two plan payments were missed, then it would appear that two regular monthly post-petition payments due AJX were not made, which would then total $3,400.10 to be cured. However, AJX does not make this clear in the Opposition and provides no evidence as to what it asserts the post-petition default on its claim is to be.

Debtor has made substantial payments into this Chapter 13 Plan—$91,694.00 as of September 30, 2016, by the Debtor's calculation. Motion, Dckt. 108.

For the nineteen remaining months of the Plan, Debtor is to pay $2,780.00 a month, which will total an additional $52,820.00. Allowing for nineteen additional monthly current mortgage payments totaling $32,300.95 and the two post-petition payments of $3,500 (rounding up for post-petition cure interest), there will be $17,019.05 of monies for further disbursement through the Plan. Deducting another $3,697.40 for Chapter 13 Trustee's fees, the monies are reduced to $16,650.00. For the pre-petition arrearage there will be nineteen payments of $525.00 each, which total another $9,975.00 in payments to AJX.

Creditor also argues that Debtor's business income and expenses are speculative, but provides no reasoning or further argument beyond that statement. Debtor's Schedules filed under penalty of perjury indicate business expenses of $8,197.50. That ground is not reason to deny confirmation.

After providing for AJX and the Trustee, there is $6,675.00 of "cushion" in the proposed plan payments.

The Trustee's objects to Debtor not providing the profit and loss statements. While the supplemental pleadings by Debtor are without any testimony or proper authentication, they indicate that Debtor might possibly have credible evidence and testimony to provide. However, if such testimony existed, Debtor would have provided it rather than merely having Debtor's attorney argue from unauthenticated documents.

At the hearing, **xxxxxxxxxxxxxxxxxxxxxx**.

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

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

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

11. 16-25610-E-13 PAUSL FERNANDES
PPR-1 Kristy Hernandez

OBJECTION TO CONFIRMATION OF PLAN BY WELLS FARGO BANK, N.A. 9-28-16 [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.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Chapter 13 Trustee on October 11, 2016. By the court's calculation, 42 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

Wells Fargo Bank, National Association ("Creditor"), opposes confirmation of the Plan on the basis that:

A. Delayed Payment: The Debtor's plan anticipates arrearage payments beginning in month thirteen, which is over a year post-petition. Creditor seeks ongoing monthly payments in equal amounts over the entire life of the Plan. This will avoid unfair disadvantage and delay if the Debtor defaults on the plan payments.

1. The Plan provides for a step-up in month thirteen, when Debtor anticipates his non-filing spouse and adult son will obtain employment and contribute to the income of the household. Currently, neither the wife nor the adult son contributes any income to the household.

2. Schedule J does not include the ongoing monthly payment to Creditor. This causes the disposable income to appear greater than it actually is. Creditor is concerned about Debtor's ability to fund the plan.

3. The mortgage payment is an escrowed loan that will fluctuate over time. The amount indicated in the Plan needs to accurately reflect that. The Proof of Claim will provide for that amount as well.

The Creditor's objections are well-taken.

11 U.S.C. § 1325(a)(5)(B)(iii)(I) requires that the Plan provide equal monthly payments with respect to each secured claim provided for in the Plan. Debtor's Plan proposes making unequal payments, however, because the Plan delays payment to Creditor until month thirteen.

Additionally, the Debtor's Schedule J, filed on September 8, 2016, lists a $2,902.42 monthly net income, while the Plan provides for a $2,900.00 monthly payment with a 100% dividend to Class 7 unsecured claims. However, Debtor fails to list his mortgage payment on Schedule J. Taken together, this suggests the plan may not be feasible. *See* 11 U.S.C. § 1325(a)(6).

The court has an independent duty to make certain that the requirements for confirmation have been met. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 1381 n.14, 176 L. Ed. 2d 158, 173 n.14 (2011); *see also In re Dynamic Brokers, Inc.*, 293 B.R. 489, 499 (B.A.P. 9th Cir. 2003) (citing *Everett v. Perez (In re Perez)*, 30 F.3d 1209, 1213 (9th Cir. 1994)).

On November 11, 2016, Debtor filed a First Amended Plan which provides for $2,900.00 payments for twelve months, a $10,000.00 lump sum payment in October 2016 (month two of the Plan) and then $5,933.00 for forty-eight months. A hearing for confirmation of that Plan is set for January 10, 2016.

The court deems the filing of the Amended Plan and Motion to Confirm as a dismissal of the prior Plan. Therefore, the court sustains the Objection to confirmation.

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

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

12. **16-24712-E-13 BLG-1** | **MITCHELL/CANDICE SITTINGER** | **MOTION TO CONFIRM PLAN 9-21-16 [25]**

Chad Johnson

Final Ruling: No appearance at the November 22, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on September 21, 2016. By the court's calculation, 62 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). 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. The Debtor has provided evidence in support of confirmation. The Chapter 13 Trustee filed a Response on November 8, 2016, stating no opposition and noting that Debtor has not identified the name of the listing agent for the sale of the real property, despite indicating that one has been retained. Dckt.48. The amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

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

IT IS ORDERED that the Motion is granted, and Debtor's Chapter 13 Plan filed on September 21, 2016, is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

13. 16-22614-E-13 PGM-3 | **PAULA GREER** | **Peter Macaluso** | **MOTION TO CONFIRM PLAN** | **10-11-16 [51]**

Final Ruling: No appearance at the November 22, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 11, 2016. By the court's calculation, 42 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). 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. The Debtor has provided evidence in support of confirmation. The Chapter 13 Trustee filed a statement of non-opposition on October 24, 2016. The Amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

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

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

IT IS ORDERED that the Motion is granted, and Debtor's Chapter 13 Plan filed on October 11, 2016 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

14. 15-28617-E-13 EJS-1 MATTHEW/HANNAH REVEILE Eric Schwab MOTION TO MODIFY PLAN 10-4-16 [23]

Final Ruling: No appearance at the November 22, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 4, 2016. By the court's calculation, 49 days' notice was provided. 35 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Modified Plan is granted.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtor has filed evidence in support of confirmation. The Chapter 13 Trustee filed a statement of non-opposition on November 7, 2016. Dckt. 29. The Trustee notes that Debtor is current under the proposed plan, and the plan is feasible because it is only a one percentage point reduction in dividend to unsecured claims. The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Debtor's Chapter 13 Plan filed on October 4, 2016, is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

15. 16-26217-E-13 DPC-1 | **ROSANA/ARTURO BUSTOS** **Scott Hughes** | **OBJECTION TO DISCHARGE BY DAVID P. CUSICK** **10-6-16 [23]**

Final Ruling: No appearance at the November 22, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on October 6, 2016. By the court's calculation, 47 days' notice was provided. 28 days' notice is required.

The Objection to Discharge has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen 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"), argues that Rosana Bustos and Arturo Bustos ("Debtor") are not entitled to a discharge in the instant bankruptcy case because the Debtor previously received a discharge in a Chapter 7 case.

The Debtor filed a Chapter 13 bankruptcy case on March 13, 2014. Case No. 14-22508. That case was converted to Chapter 7 on July 29, 2014. The Debtor received a discharge in the Chapter 7 case on October 28, 2014. Case No. 14-22508, Dckt. 55.

The instant case was filed under Chapter 13 on September 19, 2016.

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

Here, the Debtor received a discharge under 11 U.S.C. § 727 on October 28, 2014, which is less than four years preceding the date of the filing of the instant case. Case No. 14-22508, Dckt. 55. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), the Debtor is not eligible for a discharge in the instant case.

Therefore, the objection is sustained. Upon successful completion of the instant case (Case No. 16-26217), the case shall be closed without the entry of a discharge, and Debtor shall receive no discharge in the instant case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Discharge filed by David Cusick, the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to Discharge is sustained.
>
> **IT IS ORDERED** that, upon successful completion of the instant case, Case No. 16-26217, the case shall be closed without the entry of a discharge.

16. 16-26217-E-13 DPC-2 | **ROSANA/ARTURO BUSTOS** **Scott Hughes** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **10-24-16 [31]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on October 24, 2016. By the court's calculation, 29 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). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Objection to Confirmation of Plan is sustained.

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

A. Debtor failed to appear at the First Meeting of Creditors held on October 20, 2016. The Meeting has been continued to 1:30 p.m. on November 17, 2016.

B. The Debtor has failed to provide the Trustee with:

1. Proof of income for the sixty days preceding the filing of the bankruptcy, and

2. A tax transcript or a copy of Debtor's Federal Income Tax Return with attachments for the most recent pre-petition tax year for which a return was required, specifically, the 2015 Tax Return, or written statement that no such documentation exists.

The Trustee's objections are well-taken.

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

Also, the Trustee argues that the Debtor has failed to provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required, or a written statement that no such documentation exists. *See* 11 U.S.C. § 521(e)(2)(A); Fed. R. Bankr. P. 4002(b)(3). The Debtor also has not provided the Trustee with employer payment advices for the sixty-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv). That is cause to deny confirmation.

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

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

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

17. 16-21719-E-13 JANEE FARRIS — MOTION TO MODIFY PLAN
PSB-1 Paul Bains — 10-4-16 [16]

Final Ruling: No appearance at the November 22, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 4, 2016. By the court's calculation, 49 days' notice was provided. 35 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Modified Plan is granted.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtor has filed evidence in support of confirmation. The Chapter 13 Trustee filed a Response on November 8, 2016, in which he asserts no opposition while noting that Debtor proposes plan payments of $883.00 and a 100% dividend to unsecured creditors. Dckt. 25. The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

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

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

IT IS ORDERED that the Motion is granted, and Debtor's Chapter 13 Plan filed on October 4, 2016, is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

18. 16-25321-E-13 JAY COHEN
LA-1 Steele Lanphier

MOTION TO CONFIRM PLAN
10-10-16 [26]

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 11, 2016. By the court's calculation, 42 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy 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 without prejudice.

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

TRUSTEE'S OPPOSITION

David Cusick, Chapter 13 Trustee, filed an opposition on November 3, 2016. Dckt. 48. Trustee asserts that Jay Cohen ("Debtor") has not clearly provided for the amount Debtor's Attorney was paid prior to filing and what amount will be paid through the Plan. Debtor's Disclosure of Compensation of Attorney for Debtor lists attorney fees of $6,000.00, of which $2,000.00 was paid prior to filing. That leaves a remaining balance of $4,000.00 owed. Those same figures are reflected in Debtor's Rights and

Responsibilities (Dckt. 9). However, Debtor's Plan provides that Debtor does not have an outstanding balance owed to his attorney, but instead paid $4,000.00 prior to the filing of the bankruptcy. The Plan conflicts with other documents.

Trustee further provides that Debtor failed to file a Business Budget detailing the business income and expenses. Debtor further confuses Trustee with regard to his middle name. Debtor lists Jay Gary Cohen on his voluntary petition, but lists Jay Stuart Cohen on his Class 1 Checklist. Trustee wants to be informed of any additional known names not reported on the petition. Trustee requests that the Motion be denied.

DISCUSSION

Trustee objects on a basis that Debtor's various documents filed in this case are not consistent and clear as to what amount has been paid to Debtor's Attorney as compensation and as to what is Debtor's legal middle name. The Trustee is unsure how much, if any, remains to be paid in attorney's fees, and the Trustee has noted that Debtor has used two different middle names already in this case. Accordingly, the Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Without an accurate picture of the Debtor's financial reality and identity, the court cannot determine whether the Plan is confirmable.

Additionally, the Debtor has failed to provide the Trustee with a Business Budget that details the business income and expenses. 11 U.S.C. § 521(e)(2)(A); Fed. R. Bankr. P. 4002(b)(3). That document is required seven days before the date set for the first meeting, 11 U.S.C. § 521(e)(2)(A)(I). Without the Debtor submitting the Business Budget, the court and the Trustee are unable to determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325. Therefore, the Motion is denied without prejudice, 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 Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

19. 16-26224-E-13 JOYCE BUCK
DPC-1 Lucas Garcia

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
10-24-16 [14]

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on October 24, 2016. By the court's calculation, 29 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). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing ----------.

The Objection to Confirmation of Plan is sustained.

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

A. The Debtor did not appear at the meeting of creditors, which has been continued to 1:30 p.m. on November 17, 2016.

B. The Debtor did not provide either a tax transcript or a federal income tax return for 2015.

C. Debtor failed to provide a dividend to administrative expenses such as attorney fees in Section 2.06 of the Plan, despite listing $4,000.00 in attorney fees.

The Trustee's objections are well-taken. The Debtor did not appear at the meeting of creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. To attempt to confirm

a plan while failing to appear and be questioned by the Trustee and any creditors that 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 Trustee also argues that the Debtor did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required, specifically the 2015 tax return. *See* 11 U.S.C. § 521(e)(2)(A); 11 U.S.C. § 1325(a)(9); Fed. R. Bankr. P. 4002(b)(3). These are independent grounds to deny confirmation. 11 U.S.C. § 1325(a)(1).

Debtor may not be able to comply with the Plan because the Plan calls for payment of attorney's fees, but the Plan does not propose a monthly dividend. *See* 11 U.S.C. § 1325.

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

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

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

20. 16-26225-E-13 MARIE GARY
EWV-106 Eric Vandermey

MOTION TO VALUE COLLATERAL OF HOMECOMING FINANCIAL
10-7-16 [15]

Final Ruling: No appearance at the November 22, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, and Office of the United States Trustee on October 7, 2016. By the court's calculation, 46 days' notice was provided. 28 days' notice is required.

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

The Motion to Value Secured Claim of Homecoming Financial is granted, and the secured claim is determined to have a value of $0.00.

The Motion to Value filed by Marie Gary ("Debtor") to value the secured claim of Homecoming Financial c/o Ocwen Mortgage Servicing, Inc. Serviced by Green Tree Financial, LLC ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 603 Woodlark Drive, Suisun City, California ("Property"). Debtor seeks to value the Property at a fair market value of $337,286.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

TRUSTEE'S RESPONSE

The Trustee filed a Response on November 8, 2016, in which he asserts no basis to oppose the Motion. Dckt. 28.

APPLICABLE LAW

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

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

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

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

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $351,444.00. Creditor's second deed of trust secures a claim with a balance of approximately $37,469.00. FN.1. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

FN.1. Debtor's Motion lists two values for Creditor's claim: $37,369.00 and $37,469.00. The court presumes that this is a scrivener's error and continues its analysis with the larger amount.

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

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

The Motion for Valuation of Collateral filed by Marie Gary ("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 Homecoming Financial c/o Ocwen Mortgage Servicing, Inc. Serviced by Green Tree Financial, LLC secured by a second in priority deed of trust recorded against the real property commonly known as 603 Woodlark Drive, Suisun City, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $337,286.00 and is encumbered by a senior lien securing a claim in the amount of $351,444.00, which exceeds the value of the Property that is subject to Creditor's lien.

21. 16-26225-E-13 MARIE GARY
EWV-107 Eric Vandermey

MOTION TO VALUE COLLATERAL OF SYNCHRONY BANK
10-7-16 [19]

Final Ruling: No appearance at the November 22, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, and Office of the United States Trustee on October 7, 2016. By the court's calculation, 46 days' notice was provided. 28 days' notice is required.

The Motion to Value Collateral 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 Secured Claim of Synchrony Bank is granted, and the secured claim is determined to have a value of $0.00.

The Motion to Value filed by Marie Gary ("Debtor") to value the secured claim of Synchrony Bank Serviced by Green Tree Financial, LLC ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 603 Woodlark Drive, Suisun City, California ("Property"). Debtor seeks to value the Property at a fair market value of $337,286.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

TRUSTEE'S RESPONSE

The Trustee filed a Response on November 8, 2016, in which he asserts no basis to oppose the Motion. Dckt. 30.

APPLICABLE LAW

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

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

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

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

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $351,444.00 and the senior in priority second deed of trust secures a claim with a value of $37,469.00. Creditor's third deed of trust secures a claim with a balance of approximately $93,518.00. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir.

1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Marie Gary ("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 Synchrony Bank Serviced by Green Tree Financial, LLC secured by a third in priority deed of trust recorded against the real property commonly known as 603 Woodlark Drive, Suisun City, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $337,286.00 and is encumbered by senior liens securing claims in the amount of $388,888.00, which exceeds the value of the Property that is subject to Creditor's lien.

22. 16-26225-E-13 DPC-1 | **MARIE GARY** **Eric Vandermey** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 10-24-16 [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 motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on October 24, 2016. By the court's calculation, 29 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). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. 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 will complete in more than the permitted sixty months.

B. The Plan is inconsistent with regard to curing a mortgage arrears of $14,300.00 listed in Class 1 of the plan. In Class 1, the arrearages are to be paid $405.00 per month, but in Section 6.01, $238.33 per month is provided until paid in full.

C. The Debtor has failed to provide documents including:

1. Business questionnaire,

2. Tax returns,

3. Profit and loss statements,

4. Bank account statements,

5. Proof of license and insurance or written statement of no such documentation exists, and

6. Business budget.

D. The Plan relies on the court valuing two secured claims of Green Tree Servicing.

The Trustee's objections are well-taken. The Plan will complete in more than the permitted sixty months. According to the Trustee, the Plan will complete in sixty-nine months due to the priority claim of IRS (Claim No. 1, October 7, 2016) that indicates the Debtor owes $11,814.19 in priority tax debt. The proposed plan only provides for $6,358.00. This exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

The Trustee further asserts that the Plan is inconsistent with regard to curing the mortgage arrears of $14,300.00 listed in Class 1 of the Plan. In Class 1, the arrearages are to be paid $405.00 per month, but in Section 6.01, the Debtor provides that the creditor will receive $238.33 per month until paid in full. The Trustee is uncertain what dividend the Debtor intends for the arrears. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments. *See* 11 U.S.C. §§ 1322(b)(2), (b)(5), and 1325(a)(5)(B). Because it is unclear whether the Plan will provide for the full payment of arrearages, the Plan cannot be confirmed.

The Debtor has failed to timely provide the Trustee with business documents including: questionnaire; tax returns, profit and loss statements, bank account statements; proof of license and insurance or written statement that no such documentation exists. Debtor did provide the Trustee with her 2015 tax return, the business questionnaire, and three months of profit and loss statements on October 19, 2016 (one day before the Meeting of Creditors). Debtor has failed to provide the 2014 tax return, six months of bank statements, business license and insurance, the remaining profit and loss statements, and a list of inventory, and the business budget attachment to Schedule I. 11 U.S.C. § 521(e)(2)(A); Fed. R. Bankr. P. 4002(b)(3). These documents are required seven days before the date set for the first meeting. 11 U.S.C. § 521(e)(2)(A)(I). Without the Debtor submitting the required documents, the court and the Trustee are unable to determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325.

A review of the Debtor's Plan shows that it relies on the court valuing the secured claims of Green Tree Servicing (DCNs EWV-106 and EWV-107). Those motions are set for hearing on November 22, 2016, as well. Without the court valuing the claims, the Plan is not feasible. 11 U.S.C. § 1325(a)(6). Therefore, the Trustee's objection is sustained.

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

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

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

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

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

23. 16-22732-E-13 DANNY RUE — MOTION TO CONFIRM PLAN
DWR-4 Pro Se 9-28-16 [63]

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on September 28, 2016. By the court's calculation, 55 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy 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.

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

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition on November 3, 2016. Dckt. The Trustee states that Debtor is delinquent under the proposed Plan. Debtor's last payment was May 27, 2016,

and he has not made a payment since then. The case was filed on April 28, 2016, and the monthly payments are $1,324.00 under the Plan. Debtor's additional provisions are unclear, and the Trustee believes that Debtor is requesting not to pay for May, June, July, and August of 2016. If that is the case, Debtor must pay the September and October payments, totaling $2,648.00. The Debtor is currently $414.00 delinquent in plan payments, and the next payment is scheduled for November 25, 2016.

Further, Trustee asserts that Debtor's Plan will complete in 459 months opposed to 56 months, which exceeds the maximum time allowed. The Plan provides a 100% dividend to general unsecured creditors for a total of $36,025.00, including the unsecured portion of the second deed of trust.

Lastly, Debtor does not identify the creditor for Plan Provisions 3 and 6. The Trustee further does not believe the court can confirm the Plan because the creditor does not appear to acknowledge a loan modification, despite Debtor's indication that one is in the works. There is no evidence that a loan modification is being pursued or will be obtained successfully.

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

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

24. **16-23034-E-13** **GREG SHOOK** **MOTION TO CONFIRM PLAN**
GWS-1 **Pro Se** **10-7-16 [74]**

CASE DISMISSED: 10/18/2016

Final Ruling: No appearance at the November 22, 2016 hearing is required.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm Plan 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 dismissed as moot, the case having been dismissed.

25. **13-27835-E-13** **JEFFREY/MONICA JACKSON** **MOTION TO MODIFY PLAN**
HLG-3 **Kristy Hernandez** **10-17-16 [155]**

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 18, 2016. By the court's calculation, 35 days' notice was provided. 35 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). 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.

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

David Cusick, the Chapter 13 Trustee, filed an Opposition on November 7, 2016. Dckt. 162. The Trustee opposes confirmation on the grounds that:

A. Debtor is delinquent $35.00 under the terms of the proposed Modified Plan. Debtor has paid a total of $89,149.26 to the Trustee with the last payment posted on November 2, 2016, in the amount of $2,344.00 rather than the $2,379.00 called for under the proposed Modified Plan.

B. Debtor's business income may now be higher, but the earlier business expenses may have been overstated. Debtor's prior Schedule I states, "Please note that Joint Debtor's business income is so consistent becasue [*sic*] she earns a commission from client orders. She has several clients that orders the same thing every month consistently. She has no business expenses becasue [*sic*] she works from home."

The Profit and Loss Statement attached to Debtor's prior Schedule I, which covers a period of time from February 2016 to July 2016, reflects Debtor's total expenses over that period of time was $37.00 with no tax expense and gross income of $14,723.12, which works out to $2,453.86 of monthly gross business income. Debtor's current Schedule I shows $2,921.81 gross business income, a $467.95 increase since August, and has various changed expenses including $438.00 added for taxes and gross income of $2,921.81, a $467.95 difference.

DEBTOR'S SUPPLEMENTAL DECLARATION

Debtor filed a Supplemental Declaration on November 16, 2016. Dckt. 165. Debtor states that the $35.00 delinquency was a mistake on Debtor's part that has now been corrected. Debtor claims to be current under the Plan.

Regarding discrepancies between a prior motion to modify a plan and the current one, Debtor claims to have spent extra time with the present Motion to ensure that all information about income and expenses has been stated. Debtor states that the discrepancy in business expenses exists because "we portioned out the business use of our home utilities in our profit and loss statement, and we made sure to show the taxes for our business income in the expenses."

DISCUSSION

The Trustee's objections were properly raised. The Trustee opposes confirmation offering evidence that the Debtor is $35.00 delinquent in plan payments. Debtor has countered with a declaration sworn under penalty of perjury that the delinquency has been cured. This portion of the Trustee's objection appears to be resolved.

The Trustee also notes that Debtor's prior Schedule I seems to contradict Debtor's Profit and Loss Statement. Debtor's prior Schedule I indicates that Debtor has "no business expenses;" however, Debtor's Profit and Loss Statement shows expenses of $37.00 (with no tax expense) for the period of time covered by the Statement. Debtor's current Schedule I reflects a $467.95 increase in gross business income since August and changes in expenses, such as $438.00 added for taxes. These inconsistencies between the Debtor's original and amended Schedules could indicate to the court that the latest filings may not have been made in good faith.

Debtor has responded to the Trustee's Opposition with a declaration, providing testimony under penalty of perjury rather than having the attorney just argue "facts." While there are some inconsistencies, they have been adequately addressed. Though not perfect, three and one-half years into the case, it is "close enough" for the court given the explanation, which would not have been provided but for the Trustee's diligence.

The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

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

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

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

IT IS ORDERED that Motion to Confirm the Plan is granted, and the proposed Chapter 13 Plan is confirmed. Counsel for the Debtor shall prepare and forward to the Chapter 13 Trustee a proposed order confirming the Plan, which upon approval by the Trustee shall be lodged with the court.

26. 16-24437-E-13 SJS-1 | **ANTHONY BARCELLOS** **Matthew DeCaminada** | **MOTION TO CONFIRM PLAN** **10-3-16 [24]**

Final Ruling: No appearance at the November 22, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on October 3, 2016. By the court's calculation, 50 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). 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. The Debtor has provided evidence in support of confirmation. The Chapter 13 Trustee filed a statement of non-opposition on November 1, 2016. The Amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Debtor's Chapter 13 Plan filed on October 3, 2016, is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

27. **13-31140-E-13 PGM-3** | **JOE/MELISSA PORTO** **Peter Macaluso** | **MOTION TO APPROVE LOAN MODIFICATION** **10-20-16 [74]**

Final Ruling: No appearance at the November 22, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on October 20, 2016. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

The Motion to Approve Loan Modification has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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 Approve Loan Modification is granted.

The Motion to Approve Loan Modification filed by Joe Porto and Melissa Porto ("Debtor") seeks court approval for Debtor to incur post-petition credit. BSI Financial Services ("Creditor"), whose claim the Plan provides for in Class 4, has agreed to a loan modification that will increase Debtor's mortgage payment from the current $1,454.76 per month to $1,787.76 per month. The modification will capitalize the pre-petition arrears and provide for stepped increases in the interest rate from 3.81% to 4.25% over the next thirty-seven years. The agreement includes $111,200.00 listed as a deferred principal balance upon which no monthly payments or interest will be made.

TRUSTEE'S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a statement of non-opposition on November 7, 2016. Dckt. 79. The Trustee notes that the agreement renders $111,200.00 non-interest bearing, although there is a question of whether the deferred principal balance will be due at the end of the loan. Additionally, the agreement caps interest at a fixed 4.25% amount, whereas it previously was variable and began at 6.875%.

DISCUSSION

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

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve the Loan Modification filed by Joe Porto and Melissa Porto having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the court authorizes Joe Porto and Melissa Porto ("Debtor") to amend the terms of the loan with BSI Financial Services ("Creditor"), which is secured by the real property commonly known as 8568 Derwood Court, Elk Grove, California, on such terms as stated in the Modification Agreement filed as Exhibit A in support of the Motion (Dckt. 77).

28. **13-31140-E-13** **JOE/MELISSA PORTO** **CONTINUED MOTION TO MODIFY PLAN**
PGM-1 **Peter Macaluso** **8-5-16 [41]**

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, creditors, and Office of the United States Trustee on August 5, 2016. By the court's calculation, 39 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is denied.

Joe Porto and Melissa Porto ("Debtor") filed the instant Motion to Confirm Debtors' Modified Plan on August 5, 2016. Dckt. 41.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition to the Instant Motion on August 30, 2016. Dckt. 55. The Trustee opposes confirmation on the following grounds.

A. The Debtor's Plan is not in compliance with Section 2.08 of the Plan.

1. The Debtor is proposing to change creditor BSI Financial Services, Inc. from Class 1 to Class 4 based on a trial loan modification letter. Debtor has filed and set for hearing a Motion for Order Approving Trial Loan Modification, but no details have been provided other than a payment amount and due date.

2. Under the currently Confirmed Plan, Class 1 includes a pre-petition arrears claim to be paid through the plan of which $6,712.41 remains to be paid. No information has been provided in the trial loan letter regarding the arrears claim filed by the creditor or if the proposed payment includes escrow.

3. It is not known whether the Debtor will receive a permanent loan modification and what the terms of it might be.

4. The Trial Loan letter is offered by BSI Financial Services, Inc. The letter gives notice that BSI Financial Services, Inc. is a licensed mortgage servicer and debt collector. Court claim #5 indicates the actual creditor is Ventures Trust 2013-I. A Notice of Mortgage Payment Change was filed July 5, 2016, indicating that the payment effective as of August 1, 2016, is $2,566.22.

B. The Trustee is uncertain of the Debtor's ability to pay. The Debtor filed as Exhibits Amended Schedules I and J, however, the Debtor has not provided current information regarding income and expenses. Additionally, if the Amended Schedules were treated as a supplement, Debtor has not provided any explanation of changes in their declaration. The Debtor reported a salary increase from $3,851.82 to $5,904.09. Debtor also reports a mandatory contribution for retirement plan on Amended Schedule I that was not disclosed on the previous Schedule I. Amended Schedule I also reports repayment of retirement loans of $198.78, but Debtor has not provided any supporting information, such as pay advices.

DEBTOR'S REPLY

The Debtor filed a Reply to the Trustee's Opposition on September 6, 2016. Dckt. 61. The Debtor's Reply indicates that the Debtor made all payments in the Trial Loan Modification and expects a permanent loan modification to be presented for approval. Additionally, the Reply states that the Debtor will provide recent pay advices to the Trustee for review in support of the Amendment.

SEPTEMBER 13, 2016 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on November 22, 2016. Dckt. 66.

TRUSTEE'S STATUS REPORT

The Trustee filed a Status Report on November 7, 2016. Dckt. 81. The Trustee notes that Debtor has a Motion for Order Approving Loan Modification set for hearing on November 22, 2016 (Dckt. 74), Debtor having withdrawn the Motion for Order Approving Trial Loan Modification (Dckt. 72). The Trustee comments that he has no opposition to the Motion for Order Approving Loan Modification.

Debtor's Motion for Authorization to enter into a trial loan modification was dismissed by Debtor. Dckt. 72.

The Trustee states that he has received pay advices for the period of May 2016 to July 2016, but the Debtor has not filed a declaration addressing changes to income and expenses. Debtor Melissa Porto's income increased from $3,851.82 to $5,904.09. *Compare* Dckt. 1, p.26, *with* Exhibit 1, Dckt. 44. Debtor Joe Porto's income decreased from $1,950.00 to $1,825.00. *Compare* Dckt. 1, p.26, *with* Exhibit 1, Dckt. 44. Additionally, expenses increased from $3,081.68 to $5,029.35, but the Trustee no longer objects where

the expense changes appear over several categories (Food +$150, Transportation +$50, Personal Care Products +$40, Car Registration +$35).

The Trustee requests that the Motion be denied unless the Motion for Order Approving Loan Modification is granted.

DISCUSSION

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

The Trustee's objections are well-taken.

A review of the Debtor's plan shows that it relies on the court granting a Motion for Order Approving Loan Modification. While the court has granted that motion, the Trustee raises another concern about the unexplained changes to income and expenses. Debtor attached "Updated" (i.e., Amended) Schedules I & J as exhibits to Docket 44. The filings show changes to income and expenses, but absent any explanation from the Debtor as to why the changes have occurred, the court does not believe that the projections have been made in good faith. This is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(3).

There is also a serious good faith prosecution issue in this case for Debtor and Debtor's counsel. It appears that Debtor and Debtor's counsel have intentionally circumvented the Bankruptcy Code and made disbursements outside of a Chapter 13 Plan to the BSI creditor on its pre-petition claim that was in default.

Debtor's "scheme" to circumvent the Bankruptcy Code is demonstrated by the facts that once they completed the unauthorized trial loan payments to BSI, they quickly dismissed the motion to have those authorized (even retroactively). Dckt. 72. Debtor, and Debtor's counsel, then boldly filed the motion to approve the final loan modification, ignoring the ongoing violation of the Bankruptcy Code and the mandatory Chapter 13 Plan in this case.

This demonstrates a bad faith in the prosecution of this case that goes to the core of these bankruptcy proceedings. Having elected not to even attempt to obtain retroactive authorization for the improper conduct, Debtor and counsel show that they deem themselves above the law that governs every other debtor and every other attorney.

It is unfortunate that three-plus years into the bankruptcy case Debtor has elected to so pollute it with bad faith that Debtor cannot confirm a Plan. Though the court authorizes the modification so that Debtor does not lose this opportunity, it appears that Debtor may well have to pursue a new Chapter 13 case, new Chapter 13 Plan, and provide for another sixty months of plan payments.

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

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

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

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

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

29. 16-25441-E-13 BLG-2 | **AVELINO SANTOS** **Chad Johnson** | **MOTION TO CONFIRM PLAN** **10-7-16 [42]**

Final Ruling: No appearance at the November 22, 2016 hearing is required.

Movant having filed a "Request the Motion to Confirm Amended Plan Be Withdrawn," which the court construes to be an Ex Parte Motion to Dismiss the pending Motion on November 15, 2016, Dckt. 70; no prejudice to the responding party appearing by the dismissal of the Motion; Movant 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 being consistent with the opposition filed by the Trustee; the Ex Parte motion is granted, the Movant'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 Plan filed by the Debtor having been presented to the court, the 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. 70, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Movant's Motion to Confirm Plan is dismissed without prejudice, and the bankruptcy case shall proceed.

30. **16-25741-E-13** **DESIREE ARBOLEDA** **OBJECTION TO CONFIRMATION OF**
DPC-1 **Pro Se** **PLAN BY DAVID P. CUSICK**
10-20-16 [26]

Final Ruling: No appearance at the November 22, 2016 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 of Plan 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.

31. **16-25741-E-13** **DESIREE ARBOLEDA** **OBJECTION TO CONFIRMATION OF**
ETL-1 **Pro Se** **PLAN BY U.S. ROF III LEGAL**
TITLE TRUST 2015-1
10-20-16 [30]

Final Ruling: No appearance at the November 22, 2016 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 of Plan 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.

32. **16-26741-E-13 MET-1** **EDNA JAVIER** **Mary Ellen Terranella** **MOTION TO VALUE COLLATERAL OF ONEMAIN FINANCIAL** **10-28-16 [14]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, and Office of the United States Trustee on October 28, 2016. By the court's calculation, 25 days' notice was provided. 14 days' notice is required.

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

The Motion to Value Secured Claim of OneMain Financial is granted, and the secured claim is determined to have a value of $1,000.00.

The Motion filed by Edna Javier ("Debtor") to value the secured claim of OneMain Financial ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2000 Toyota Celica GT with approximately 250,000 miles ("Vehicle"). The Debtor seeks to value the Vehicle at a replacement value of $1,000.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on November 7, 2016. Dckt. 19. The Trustee states that he does not oppose the Motion.

DISCUSSION

The lien on the Vehicle's title secures a non-purchase-money loan incurred on March 3, 2016, to secure a debt owed to Creditor with a balance of approximately $8,026.00. The lien did not secure a purchase-money loan, and therefore, it is not subject to the 910-day requirement set forth in the hanging paragraph of 11 U.S.C. § 1325(a)(9). The Creditor's claim secured by a lien on the asset's title is under-collateralized. The creditor's secured claim is determined to be in the amount of $1,000.00. The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Edna Javier ("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 OneMain Financial ("Creditor"), secured by an asset described as a 2000 Toyota Celica GT with approximately 250,0000 miles ("Vehicle"), is determined to be a secured claim in the amount of $1,000.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan.

33. 12-38242-E-13 JOSE/APRIL OSEGUERA MOTION TO MODIFY PLAN
HLG-1 Kristy Hernandez 10-11-16 [49]

Final Ruling: No appearance at the November 22, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on October 11, 2016. By the court's calculation, 42 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Modified Plan is granted.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtor has filed evidence in support of confirmation. The Chapter 13 Trustee filed a statement of non-opposition on November 7, 2016, and noted that the Modified Plan cures a delinquency of $3,900.00 and increases plan payments by $647.00. Dckt. 58. The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Debtor's Chapter 13 Plan filed on October 11, 2016, is confirmed. Counsel for the Debtor shall prepare an

appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

34. 16-26043-E-13 DPC-1 | **SUSAN GEDNEY** **Aubrey Jacobsen** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **10-24-16 [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.

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on October 24, 2016. By the court's calculation, 29 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). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. 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 is not Susan Gedney's ("Debtor") best efforts. Debtor is above median income.

1. The applicable commitment period for an above median income debtor is sixty months. Debtor is currently proposing to pay $230 per month for thirty-six months at 0%. If the Debtor's Plan were proposed at sixty months, unsecured creditors would receive no less than 100%.

2. Debtor lists $2,000.00 on Schedule J for rental or home ownership. Debtor lists her residence in Class 1 of the Plan, but she proposes no payments to the lender pending her selling the property. The expense reported on Schedule J is a projected expense upon the Debtor selling the residence and moving into a rental. The Trustee objects to the Debtor's proposal of retaining $2,000.00 per month for an unspecified amount of time and requests that the Debtor file amended Schedules I and J at the point that she moves pending providing actual rent expense, utilities, and other household expenses and evidence supporting her rental agreement providing expenses related to moving in and rental payment amount.

B. The Plan may not comply with applicable law. Debtor classified Carrington Mortgage in Class 1 of the Plan but refers to Section 6 of the Plan. In Section 6 of the Plan, Debtor explains that she is in the process of a short-sale on her real property commonly known as 16560 Leafwood Court, Meadow Vista, California. Debtor proposes to make no payments to the Class 1 mortgage, but lists the secured claim there to "allow the automatic stay to remain in effect." Debtor proposes that the claim of Carrington Mortgage be shifted to Class 3 if the short-sale has not been completed within four months of confirmation of the Plan.

The Plan lacks specificity as to the sale of real property. The Plan should specify the terms under which Debtor proposes to market the property, including the listing price and length and commencement date of the listing agreement. The Plan should also incorporate a default remedy to relieve any effected mortgagees from the automatic stay if the sale does not close by the end of the proposed cure period. If an effected mortgagee objects to confirmation, Debtor must produce evidence as to past marketing efforts, the state of the market for the subject asset, current sales prospects, the existence and maintenance of any equity cushion in the property, and all other circumstances that bear on whether the creditor will be made whole financially.

C. Section 6 of Debtor's Plan proposes to sell real property within four months of confirmation of the Plan. At the Meeting of Creditors held on October 20, 2016, Debtor admitted that there is a pending offer on her residence and that she hopes to be moved out of her home by November 1, 2016. Debtor also reported to the Trustee that she has a real estate agent currently employed to assist her in the sale of her residence. Debtor has not filed a Motion to Employ Real Estate Agent. Without the court's permission for employment, the real estate agent may not be eligible for payment for service from the proceeds of the sale.

D. Section 6 of Debtor's Plan proposes to sell real property within four months of confirmation of the Plan, but Debtor has failed to file a motion to approve a pending sale of property.

Deutsche Bank National Trust Company, as Trustee for Carrington Mortgage Loan Trust, a creditor holding a secured claim, filed a Joinder to Trustee's Objections to Confirmation on November 7, 2016. Dckt. 36. The Creditor opposes confirmation on the grounds that:

A. The Plan is not adequately funded. The Proof of Claim to be filed by Creditor requires ongoing payments, which are not provided for in the Plan. The Plan provides for no payments during the period in which Debtor will seek a short sale. There is over $100,000.00 in arrears, and thus, the Plan does not provide adequate protection of Creditor's interests and does not meet the feasibility requirement. It appears that Debtor is circumventing the requirement to pay on the Secured Claim by having a plan term that pays nothing during the period of time in which she will continue to reside in the property while attempting a short sale that would be subject to the consent of Creditor in order to proceed.

B. Debtor's proposed Plan attempts to modify Creditor's original Note and Trust Deed/Mortgage. Creditor objects to any modification of the secured claim.

DEBTOR'S RESPONSE

Susan Gedney ("Debtor") filed a Response to the Trustee's Objection to Confirmation on November 7, 2016, indicating that Debtor will file a First Amended Chapter 13 Plan that she believes will cure all of the Trustee's concerns. Dckt. 34. A review of the docket shows that no Amended Plan has been filed.

In preparing an amended plan, Debtor should note that by the court's calculations Debtor should have in excess of $2,500.00 of projected disposable income for the months of September, October, November, and December to fund the first several months of the plan. Debtor is not paying a mortgage. Debtor is not paying property taxes. In light of Debtor's $8,500.00 per month income, it is likely even higher.

DISCUSSION

The Trustee's objections are well-taken.

The Trustee offers evidence that the Plan is not Debtor's best effort. Debtor's current Plan proposes to pay $230.00 per month for thirty-six months, providing unsecured creditors with a 0% dividend. Debtor could pay unsecured creditors a 100% dividend if the Plan were proposed at sixty months. This is reason to deny confirmation. 11 U.S.C. § 1325(b)(4).

Debtor also lists $2,000.00 for rental or home ownership on Schedule J. Debtor's residence is listed in Class 1 of the Plan, but no payments are proposed to the lender pending Debtor's sale of the property. This expense is a projected expense that will be incurred upon the Debtor selling the residence and moving into a rental. This expense is too speculative for the Debtor to retain as is. If and when the Debtor is able to sell the property and move into a rental, amended Schedules I and J should be filed

providing actual expenses for rent, utilities, and other household expenses, as well as evidence supporting Debtor's rental agreement and moving expenses.

Debtor's Plan also lacks specificity regarding the sale of the real property. The Plan fails to specify the terms under which Debtor proposes to market the property, such as the listing price, length of the listing agreement, commencement date of the listing agreement, and proposed default remedy to relieve any effected mortgagees from the automatic stay if the sale does not close by the end of the proposed cure period. Debtor has not produced evidence as to past marketing efforts, the state of the market for the subject asset, current sales prospects, the existence and maintenance of any equity cushion in the property, or any other material information that creditors, the Trustee, or the court can rely on.

Debtor reported to the Trustee that she has a real estate agent currently employed to assist her with the sale of her residence. Debtor has not filed a Motion to Employ Real Estate Agent. Debtor has also failed to file a Motion to Approve Sale of her real property. Without the Debtor filing and the court granting these motions, the Plan is not feasible. 11 U.S.C. § 1325(a)(6).

Deutsche Bank National Trust Company, as Trustee for Carrington Mortgage Loan Trust's objections are well-taken too.

Creditor holds a deed of trust secured by the Debtor's residence. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments. *See* 11 U.S.C. §§ 1322(b)(2), (b)(5) & 1325(a)(5)(B). The Plan cannot be confirmed because it fails to provide for payments during the period in which Debtor will seek a short sale.

The Creditor also objects on the basis that Debtor's proposed Plan attempts to modify Creditor's original Note and Deed of Trust/Mortgage that secures a claim secured only by Debtor's security interest in Debtor's principal residence. While Creditor has not filed a Proof of Claim, Debtor's Schedule D indicates that Creditor holds a first deed of trust on the property. Thus, the Plan may not modify the rights of this creditor. This is cause to deny confirmation. 11 U.S.C. § 1322(b)(2).

As discussed above, the delay in proposing a proper plan is not a device to avoid properly funding the plan with projected disposable income. Debtor has substantial funds for the October, November, and December payments, which may total close to $10,000.00.

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

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

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

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

35. **15-29147-E-13** **JOHN QUIROZ**
RK-2 **Richard Kwun**

CONTINUED STATUS CONFERENCE RE: OBJECTION TO CLAIM OF PATRICIA COSTLEY, CLAIM NUMBER 2
2-20-16 [51]

Debtor's Atty: Richard Kwun

Notes:
Continued from 9/20/16 to permit time for the further settlement agreement negotiation.

The Status Conference is xxxxxxxxxxxxxxxxxx.

On October 2, 2016 Notices of Withdrawals of Claims were filed. A stipulation was filed on October 3, 2016 (Dckt. 121) which indicates that this dispute has been resolved.

36. **15-29147-E-13** **JOHN QUIROZ**
RK-3 **Richard Kwun**

CONTINUED STATUS CONFERENCE RE: OMNIBUS OBJECTION TO CLAIMS
2-27-16 [66]

Debtor's Atty: Richard Kwun

Notes:
Continued from 9/30/16.

The Status Conference is xxxxxxxxxxxxxxxxxxx.

On October 2, 2016 Notices of Withdrawals of Claims were filed. A stipulation was filed on October 3, 2016 (Dckt. 121) which indicates that this dispute has been resolved.

37. 16-24147-E-13 KATHLEEN MCKELVIE MOTION TO CONFIRM PLAN
PGM-1 Peter Macaluso 9-30-16 [27]

Final Ruling: No appearance at the November 22, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on September 30, 2016. By the court's calculation, 53 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). 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. Kathleen McKelvie ("Debtor") has provided evidence in support of the Motion.

DEBTOR'S SUPPLEMENTAL DECLARATION

Debtor filed a Supplemental Declaration on November 1, 2016. Dckt. 43. Debtor believes that her home's value has increased because of rising values in her neighborhood. She believes that the house could be listed at $180,000.00, with an approximate profit of $165,000.00 after a realtor commission and fees.

Debtor believes that the value of her vehicle has decreased from $2,000.00 to $1,800.00 because of recent issues with overheating and repairs. At filing, Debtor had four bank accounts, but now, she has only one with Golden 1 Credit Union.

Debtor claims to work twenty-four hours per day and seven days per week as a self-employed child care provider and preschool teacher. She states that she can increase her income by increasing her number of clients. Debtor references a food-cost reimbursement program sponsored by the United States

Department of Agriculture, but Debtor does not state explicitly that she receives funds from that program (although the court notes that Original and Amended Schedules I in this case list $650.00 as "Food Supplemental" that may come from the referenced program). Debtor states that she spent money on new supplies for her business during the first month of the Plan in efforts to increase the value of her services.

Debtor asserts that her business expenses change based upon the needs of her wards. She has children ranging from an infant to a three-year-old to an autistic child to school-age children.

TRUSTEE'S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a statement of non-opposition on November 2, 2016.

DISCUSSION

The court has an independent duty to make certain that the requirements for confirmation have been met. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 1381 n.14, 176 L. Ed. 2d 158, 173 n.14 (2011); *see also In re Dynamic Brokers, Inc.*, 293 B.R. 489, 499 (B.A.P. 9th Cir. 2003) (citing *Everett v. Perez (In re Perez)*, 30 F.3d 1209, 1213 (9th Cir. 1994)). The Trustee does not oppose the Motion, but the court is concerned by two matters: the rapid increase in property value and Debtor's ability to make plan payments.

Increase in Property Value

On Original Schedule A filed on June 27, 2016, Debtor listed an interest in real property commonly known as 7712 Teekay Way, Sacramento, California ("Property"). Dckt. 1. Debtor provided information that the Property had been appraised for $145,000.00, and Debtor listed that value as the current value of the Property. Not even five months later, Debtor now claims that the Property has increased in value drastically because of rising neighborhood values. Dckt. 43. Debtor asserts that $180,000.00 is the fair market value of the Property, but Debtor has not provided any evidence of this increase other than Debtor's own opinion testimony.

Debtor filed Amended Schedule A on September 30, 2016, and listed $165,000.00 as the value for the Property. Dckt. 35. In notes to the Schedule, Debtor lists a fair market value of $180,000.00 less an estimated 8% cost of sale for a total of $165,000.00. Not only is Debtor's valuation questionable, but it is also an incorrect statement of valuation on Amended Schedule A. Debtor has declared that she values the Property at $180,000.00. *See* Dckts. 35 & 43. Debtor cannot unilaterally list a property value that includes estimated costs of sale—a sale by the way that may never happen. Schedule A asks for the Debtor to list the *current value* of the Property. This seemingly unwarranted change in the listed Property value indicates that the Plan was not proposed in good faith and is cause to deny the Motion. *See* 11 U.S.C. § 1325(a)(3).

Ability to Make Plan Payments

The Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). This is Debtor's third bankruptcy under Chapter 13. In the immediately prior case, Debtor's

case was dismissed on April 26, 2016, for being in material default. Case No. 13-28663, Dckt. 31. Debtor had paid $52,570 with another $54,720 due, and the monthly payment was $1,710.00.

The proposed Amended Plan calls for monthly plan payments of $2,210.00 through August 2016 and then fifty-eight monthly payments of $1,940.00 beginning in September 2016. Dckt. 32. Original Schedule I lists monthly income of $3,850.00, and Original Schedule J lists expenses of $1,740.00. Dckt. 1. Amended Schedules I and J increase both income and expenses. Income increases to $5,188.32, and expenses increase to $3,248.32. Dckt. 35. Debtor explains these increases as all being related essentially to the expansion of her child care business, but the court is concerned that Debtor will not be able to make the plan payments given the apparent sharp fluctuation in Debtor's income based upon how many children she supervises. Additionally, and while not determinative of the court's decision here, the court notes that Debtor proposes to pay more per month now than the plan under which Debtor defaulted previously. Without an accurate picture of the Debtor's financial reality, it is difficult for the court to determine whether the Plan is confirmable.

Though the court does not abdicate judicial rulings to the parties, the court recognizes that the Chapter 13 Trustee has a more-detailed knowledge of the facts and circumstances. Additionally, the Chapter 13 Trustee is not reluctant to raise feasibility issues when it appears questionable, leaving it to the court to make the final call. That the Chapter 13 Trustee has no opposition indicates that this Debtor and counsel have been working to show a colorable feasibility in this case.

The court grants the Motion. The Amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and the Amended Chapter 13 Plan filed on September 30, 2016 (Dckt. 32), is confirmed. Counsel for the Debtor shall prepare and forward to the Chapter 13 Trustee a proposed order confirming the Plan, which upon approval by the Trustee shall be lodged with the court.

38. 16-26051-E-13 DPC-1 | **OLEKSANDR ZHDANYUK** Mark Shmorgon | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** 10-20-16 [14]

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on October 20, 2016. By the court's calculation, 33 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). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. 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 Oleksandr Zhdanyuk ("Debtor") cannot make the plan payments or comply with the Plan. The income listed on Schedule I in the amount of $479.92 is listed as "Pro Rated Tax Refund." According to Schedule B, Debtor has a total of $739.20 in his bank accounts. The Debtor listed $10.00 to Question 16 as to any cash he may have had on hand when the voluntary petition was filed.

DEBTOR'S RESPONSE

Debtor filed a Response to the Trustee's Objection on October 20, 2016. Dckt. 18. The Debtor states that he can make his plan payments and remain compliant under the Plan. Debtor anticipates receiving his lump sum refund that he is committing toward his budget in the amount of $5,759.00. Debtor typically receives the refund in February of each year. Debtor indicates that he would normally have the funds to properly budget himself through the year, but had spent $1,500.00 on attorney's fees and filing fees to file

this case. The Debtor states that his father-in-law has offered to help Debtor and his family financially until he receives his tax refund once again in February.

DISCUSSION

The Trustee's objections are well-taken.

While Debtor indicates in the Motion and his Declaration that he anticipates receiving a lump sum tax refund in the amount of $5,759.00, Debtor has provided no evidence to support that $5,759.00 will actually be received and put into the Plan. Further, Debtor's father-in-law, Leonid Yarema, states in his Declaration the he "will be supporting [Debtor] and his family in the amount of $479.92 per month." Dckt. 20. The Declaration fails, however, to provide any supporting facts to show that Debtor's father-in-law is able to support Debtor in the amount of $479.92 per month until Debtor receives a 2017 tax refund. Given the speculative nature of the income as well as the lack of evidence to support Debtor's income, the feasibility of the Debtor being able to make plan payment is questionable.

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

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

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

39. 11-35060-E-13 RCB-1 — ANTONETTE TIN, Robert Bowman — CONTINUED MOTION TO AVOID LIEN OF CITIBANK (SOUTH DAKOTA) N.A. 9-28-16 [178]

Final Ruling: No appearance at the November 22, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, creditors, parties requesting special notice, and Office of the United States Trustee on September 23, 2016. By the court's calculation, 39 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of CITIBANK (SOUTH DAKOTA), N.A. ("Creditor") against property of Antonette Tin ("Debtor") commonly known as 8983 Richborough Way, Elk Grove, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $1,513.62. An abstract of judgment was recorded on June 24, 2010, with Sacramento County, which encumbers the Property. Dckt. 188.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $194,493.00 as of the date of the petition. The unavoidable consensual liens that total $430,448.00 as of the commencement of this case are stated on Debtor's Schedule D.

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

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of CITIBANK (SOUTH DAKOTA), N.A., California Superior Court for Sacramento County Case No. 34-2009-00047165, recorded on June 24, 2010, Book 20100624 and Page 1160 with the Sacramento County Recorder, against the real property commonly known as 8983 Richborough Way, Elk Grove, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

40. **16-22360-E-13** **DERRICK NOBLES** **MOTION TO CONFIRM PLAN**
NUU-2 **Chinonye Ugorji** **9-27-16 [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.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on September 27, 2016. By the court's calculation, 56 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy 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.

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

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition to Debtor's Motion to Confirm Amended Plan on November 8, 2016. Dckt. 51. The Trustee opposes confirmation on the grounds that:

A. Debtor's Plan may fail the Chapter 7 liquidation analysis. The Trustee filed an Objection to Exemptions that is scheduled for hearing on December 6, 2016. Debtor's Amended Plan proposes a 4% dividend to general unsecured claims that will pay approximately $1,245.93.

1. Debtor's scheduled non-exempt assets currently total $2,350.00, including $550.00 in equity in a 1975 Dodge Executive Motorhome and $1,800.00 in a 2001 Pontiac Grand Am. If the Trustee's Objection to Exemptions is sustained, the Debtor will have at least an additional $1,650.00 in non-exempt bank balances, for a total of $4,000.00. The Trustee also objected to

the exemption claimed by the Debtor on interest in a personal injury claim with an estimated value of $20,000.00

2. On Schedule A, Debtor lists interest in real property described as a rental property at 5629 Hesper Way, Carmichael, California. Interest in the property is provided for in Class 3 of the Plan. On Schedule B, Debtor lists household goods valued at $4,000.00. On October 21, 2016, this property was destroyed in a fire.

   The Trustee has been advised that the property was insured by Farmers Insurance, and the policy now has three pending claims of approximately: $90,000 property damage to the house; $8,000–9,000 loss for personal furnishings and appliances; and $27,930 for six months' lost rent. Based on this information, it appears Debtor may have additional assets not disclosed at the time of filing. Debtor has not provided the Trustee with any information relating to the property damage or the pending claims.

B. The Trustee is uncertain if the Debtor's Plan has been proposed in good faith. The Motion to Confirm, Amended Plan, and supporting pleadings were not served on Kaiser Foundation Health Plan Inc. and UC Davis Health Systems as required by Federal Rule of Bankruptcy Procedure 2002(b).

   On April 14, 2016, Debtor filed the Voluntary Petition and Master Address List. On the same date, the court issued Notice of Incomplete Filing and Notice of Intent to Dismiss giving the Debtor until April 28, 2016, to file his Schedules, Plan, and any other missing documents. On May 2, 2016, the Court issued an Order Dismissing Case, and Debtor filed Schedules A–J, Statements of Financial Affairs, Means Test, Plan, and Rights and Responsibilities. Debtor's Schedule F included claims not originally listed on Debtor's mailing matrix filed on April 14, 2016.

   On May 4, 2016, Debtor filed a Motion to Vacate Dismissal that was heard and granted on May 24, 2016. On May 26, 2016, the court filed BNC Certificate of Notice serving the Civil Minute Order Vacating Dismissal, which was served on all parties listed on the Master Mailing List filed on April 14, 2016. The Order Vacating Dismissal was not served on all parties as the Debtor has not filed an Amended Master Mailing List to Date.

C. The Debtor's Plan is not the Debtor's best efforts, and the Plan is not filed in good faith or may not comply with applicable law. Debtor may have income not disclosed on his Schedules.

   1. On his original Schedule I, Debtor reports that he receives $350.00 per month net income from real property and from operating a business, profession, or farm. He also reports "additional room rental" of $800.00 per month. At the Meeting of Creditors held June 30, 2016, Debtor confirmed his intent to

surrender his rental real property in Carmichael, California, and that he will no longer be receiving rents on the property. Debtor has not given sufficient detail as to these rents.

2. On November 7, 2016, the Trustee met with Farmers Insurance Senior General Adjuster Won Chang. Mr. Chang explained that the Debtor has filed an insurance claim for loss of rents due to a house fire on Debtor's rental property. Debtor's schedules do not report the rental income referenced by Mr. Chang. Debtor's only rental income reported is from "room rentals" at his residential address of 3719 Martin Luther King Jr. Boulevard, Sacramento, California.

On September 27, 2016, Debtor amended Schedule I where he removed the income from rental property and from operating a business, profession, or farm and increased his monthly additional room rental to $1,200.00. On November 2, 2016, the Trustee received a call from Mr. Chang advising the Trustee that Debtor's rental property at 5629 Hesper Way, Carmichael, California, was involved in a fire and that there is a pending insurance claim filed by the Debtor for loss of property and loss of future rents.

Mr. Chang indicated that Debtor had eight to nine tenants in the rental property for a total monthly rental income of $4,655.00 and that he had been receiving those rents up until the date of the fire on October 21, 2016. Mr Chang advised the Trustee that Debtor has filed a claim for loss of future rents of approximately $27,930.00.

DISCUSSION

The Trustee's objections are well-taken.

The Trustee opposes confirmation of the Plan on the basis that the Debtor's plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. §1325(a)(4). Trustee states that the Trustee has filed an Objection to Exemptions that is set for hearing on December 6, 2016; Debtor may have non-exempt assets; and Debtor may have non-disclosed assets.

The Debtor has supplied insufficient information relating to the real property to assist the Trustee in determining the value of the property. Debtor fails to report the three pending claims on the property after it was destroyed in a fire on October 21, 2016. These claims total approximately $125,930.00. The Debtor has not provided the Trustee with any information relating to property damage or pending claims

While Debtor has reported non-exempt equity/assets in the amount of $2,350.00 and the Debtor is proposing a 4% dividend to unsecured creditors, additional assets exists. If the Trustee's Objection to Exemptions is sustained, Debtor will have at least an additional $1,650.00 in non-exempt bank balances and interest in a personal injury claim with an estimated value of $20,000.00.

The Trustee next argues that the Plan may not have been confirmed in good faith. The Motion to Confirm Amended Plan and supporting pleadings were not served on Kaiser Health Plan Inc. and UC Davis Health Systems as required by Federal Rule of Bankruptcy Procedure 2002(b). Further, Debtor's Schedule F includes claims that are not listed on Debtor's mailing matrix. Due to this, the Order Vacating Dismissal was not properly served on all parties. The Debtor has failed to file an Amended Master Mailing List to date. This is cause to deny confirmation. 11 U.S.C. § 1325(a)(3).

Debtor also appears to have income not disclosed on his schedules. Debtor had eight to nine tenants in his rental property at 5629 Hesper Way, Carmichael, California, for a total monthly rental income of $4,655.00. Debtor was receiving this rental income until the property was in a fire on October 21, 2016. Debtor has filed a claim with Farmers Insurance for a loss of future rents of approximately $27,930.00. Without an accurate picture of the Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

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

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

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

41. **16-25760-E-13** **JULIET DACPANO**
Pro Se

OBJECTION TO CONFIRMATION OF PLAN BY JPMORGAN CHASE BANK, N.A.
10-18-16 [21]

Final Ruling: No appearance at the November 22, 2016 hearing is required.

The court has determined that this case will be dismissed, but has delayed entering the order until December 21, 2016, to afford Debtor the opportunity to seek counsel. The court having determined that the case will be dismissed and Debtor having seriously failed to disclose assets and liabilities (Civil Minutes from November 16, 2016 hearing on Motion to Dismiss, Dckt. 34), the court sustains the Objection and denies confirmation.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Confirmation of Plan 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 sustained, and confirmation of the Chapter 13 Plan is denied.

42. **16-26163-E-13 DPC-1** | **RICHARD/TINA HOLLOWAY** **Lucas Garcia** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **10-24-16 [15]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on October 24, 2016. By the court's calculation, 29 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). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing ----------.

The Objection to Confirmation of Plan is sustained.

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

A. The Debtor cannot make the payments under the Plan or comply with the Plan. Debtor lists priority claims for the Internal Revenue Service ("IRS") on Schedule E in the amount of $0.00. On October 6, 2016, the IRS filed Court Claim #3, indicating a secured claim of $3,052.98 and a priority claim of $12,879.97. Both the secured and priority claim are either not provided or not fully provided for in Debtor's Plan.

B. According to the Trustee's calculations, the Plan will complete in 107 months.

C. The Debtor's plan proposes to pay $4,615.00 in attorney's fees. Schedule I shows the Debtor has no business income. Only $4,000.00 is allowed to be paid in a non-business case.

D. Debtor's propose to value the secured claim of Santander Consumer USA, but have not filed a Motion to Value Collateral. Without such motion, Debtor's plan does not have sufficient monies to pay the claim in full.

The Trustee's objections are well-taken.

The Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to the Trustee, the Plan will complete in 107 months due to the Court Claim #3 filed by the IRS, which indicates a secured claim of $3,052.98 and a priority claim of $12,879.97. The Plan does not provide for or does not fully provide for these claims. This is reason to deny confirmation. 11 U.S.C. §§ 1322(a)(2) and 1325(a)(6).

Debtor's Rights and Responsibilities indicates that $4,000.00 in attorney's fees have been charged in this case and that Debtor paid $615.00 prior to filing. This is also reflected in Debtor's Plan in Section 2.06. It appears that the Debtor or Debtor's counsel inadvertently listed an inaccurate number in the Plan concerning the remaining attorney's fees. While this appears to be a scrivener's error and could typically be corrected in the order confirming, due to the Trustee's other objections, the Plan cannot be confirmed.

A review of the Debtor's plan shows that it relies on the court valuing the secured claim of Santander Consumer USA. A review of the Docket reveals that Debtor has filed a Motion to Value Collateral of Santander Consumer USA set for hearing on December 6, 2016. Dckt. 19. Without the court valuing the claim, the Plan is not feasible. 11 U.S.C. § 1325(a)(6).

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

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

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

43. 16-26664-E-13 SHELLY SCHNEIDER
CAH-1 Gabriel Liberman

MOTION TO VALUE COLLATERAL OF ALLY FINANCIAL, INC.
10-17-16 [9]

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee and Creditor on October 17, 2016. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Motion to Value has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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 Secured Claim of Ally Financial, Inc. is granted, and the secured claim is determined to have a value of $16,831.00.

The Motion filed by Shelly Schneider ("Debtor") to value the secured claim of Ally Financial, Inc. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2015 Jeep Compass with approximately 17,000 miles ("Vehicle"). The Debtor seeks to value the Vehicle at a replacement value of $16,831.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on November 8, 2016. Dckt. 22. The Trustee states that he could not find a Proof of Service filed for the Motion, and he notes that Proof of Claim No. 5 agrees to the proposed valuation in this Motion.

DEBTOR'S RESPONSE

Debtor filed a Response on November 15, 2016. Dckt. 28. Debtor states that an incorrect document was filed accidentally in place of the Proof of Service. Debtor states that the correct Proof of

Service has been filed and that it indicates service on October 17, 2016. The Trustee's ground to oppose is resolved.

DISCUSSION

The lien on the Vehicle's title secures a purchase-money loan incurred in February 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 $21,341.00. Therefore, the Creditor's claim secured by a lien on the asset's title is under-collateralized. The creditor's secured claim is determined to be in the amount of $16,831.00. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value filed by Shelly Schneider ("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 a 2015 Jeep Compass with approximately 17,000 miles ("Vehicle") is determined to be a secured claim in the amount of $16,831.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan.

44. **16-26664-E-13** **SHELLY SCHNEIDER** **MOTION TO VALUE COLLATERAL OF**
CAH-2 **Gabriel Liberman** **MECHANICS BANK**
10-17-16 [13]

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee and Creditor on October 17, 2016. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Motion to Value has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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 Secured Claim of Mechanics Bank is granted, and the secured claim is determined to have a value of $11,270.00.

The Motion filed by Shelly Schneider ("Debtor") to value the secured claim of Mechanics Bank ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2012 Ford Fusion with approximately 70,000 miles. ("Vehicle"). The Debtor seeks to value the Vehicle at a replacement value of $11,270.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on November 8, 2016. Dckt. 25. The Trustee objects on the basis that the asset to be valued is not properly described. The Debtor's Motion refers to a 2012 Ford Fusion Jeep Compass. The Claim is for a 2012 Ford Fusion. The Debtor's Declaration describes the Vehicle as a 2012 Ford Fusion.

DEBTOR'S RESPONSE

Debtor filed a Response on November 15, 2016. Dckt. 30. Debtor concurs with the Trustee that the Motion describes the Vehicle incorrectly and that the Vehicle in question is a 2012 Ford Fusion as stated on Schedules B and D.

DISCUSSION

It appears that Debtor's counsel inadvertently copied some errant language from the Motion to Value Secured Claim of Ally Financial, Inc. that was also filed by Debtor. While "errant," the language does not render the description of the vehicle sufficiently defective to deny the Motion. Debtor's Response clarifies the matter. This appears to be a scrivener's error and is not reason to deny confirmation. Fortunately, the Chapter 13 Trustee identified this error, allowing the court to address it at this time, saving the court, and more importantly the Debtor and Debtor's counsel, from having it potentially raised at the completion of the plan by the Creditor, or transferee (asserted holder in due course) of the debt asserting that there is such an ambiguity in the motion that the order was not effective against such holder in due course.

The lien on the Vehicle's title secures a purchase-money loan incurred in August 2012, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $15,294.00. Therefore, the Creditor's claim secured by a lien on the asset's title is under-collateralized. The creditor's secured claim is determined to be in the amount of $11,270.00. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value filed by Shelly Schneider ("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 Mechanics Bank ("Creditor") secured by an asset described as a 2012 Ford Fusion with approximately 70,000 miles ("Vehicle") is determined to be a secured claim in the amount of $11,270.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan.

45. 16-26768-E-13 SJD-1 | **GREG/LISA DICKERSON** **Susan Dodds** | **MOTION TO VALUE COLLATERAL OF CAPITAL ONE AUTO FINANCE** **10-20-16 [14]**

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditor, and Office of the United States Trustee on October 20, 2016. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

The Motion filed by Greg Dickerson and Lisa Dickerson ("Debtor") to value the secured claim of Capital One Auto Finance ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2013 Ford Focus with 50,000 miles ("Vehicle"). The Debtor seeks to value the Vehicle at a replacement value of $6,554.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on November 8, 2016. Dckt. 24. The Trustee objections on the basis that the Creditor filed a claim after the Motion was filed that asserts a secured claim of $8,246.00 and notes the style of the vehicle is a Sedan 4D SE 14. Court Claim 1-1. The Debtor does not provide the style of the vehicle, and the Trustee is not certain that the value asserted by the Debtor is correct.

DEBTOR'S REPLY

Debtor filed a Reply on November 10, 2016. Dckt. 29. Debtor states that there is some confusion relating to the filings surrounding this Motion and explains the situation as follows:

A. An unsecured claim was filed by Santander Consumer USA, Inc. regarding a 2013 Volkswagen Jetta. That vehicle was repossessed, and the debt it secured is listed on Schedule F and is being paid as an unsecured claim.

B. A secured claim was filed by Capital One Auto Finance regarding a 2014 Volkswagen Jetta, and that claim is being paid under Class 2.

C. This Motion concerns a secured claim filed by Capital One Auto Finance regarding a 2013 Ford Focus, and the claim is being paid under Class 2.

DISCUSSION

Going back to the Motion, Debtor seeks to:

A. Value the secured claim of Capital One Auto Finance;

B. The collateral is a 2013 Ford Focus;

C. The amount of Capital One Auto Finance's claim is $11,776.00;

D. The loan secured by the 2013 Ford Focus was made more than 910 days before the case was filed; and

E. The value of the 2013 Ford Focus is $6,554.00; therefore,

F. The secured claim of Capital One Auto Finance should be determined to have a value of $5,554.00 and the balance is a general unsecured claim in the case.

Motion, Dckt. 14.

An entity named "Capital One Auto Finance" was served at a post office box in Plano, Texas. Certificate of Service, Dckt. 17. As this court has previously addressed, service upon a post office box is deficient. *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 92–93 (B.A.P. 9th Cir. 2004) (holding that service upon a post office box does not comply with the requirement to serve a pleading to the attention of an officer or other agent authorized as provided in Federal Rule of Bankruptcy Procedure 7004(b)(3)); *see also Addison v. Gibson Equipment Co., Inc., (In re Pittman Mechanical Contractors, Inc.)*, 180 B.R. 453, 457 (Bankr. E.D. Va. 1995) ("Strict compliance with this notice provision in turn serves to protect due process rights as well as assure that bankruptcy matters proceed expeditiously.").

Next, a separate service has been made to "Attn: Capital Auto Finance, a division of Capital One, N.A. Department Ascension Capital Group." Certificate of Service, Dckt. 17. Again, service on the post office box is not sufficient. Second, a check of the FDIC Directory shows that Capital One, N.A. is a federally insured financial institution. https://www5.fdic.gov/idasp/main.asp. As such, it must be served by certified mail. Fed. R. Bankr. P. 7004(h), 9014.

Third, a check of the California Secretary of State's on-line data base discloses that a "Capital One Auto Finance, Inc. has surrendered its corporate status. http://kepler.sos.ca.gov/.

Fourth, Capital One, N.A., through its division Capital One Auto Finance (which is not a separate legal entity if it is a division of a federally insured financial institution) has filed two proofs of claim in this case. Proof of Claim No. 1 names a 2013 Ford Focus as the collateral.

Unfortunately, the Motion does not seek relief against the claim of Capital One, N.A. To the extent it seeks relief against a federally insured financial institution, there has been deficient service.

The Motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value filed by Greg Dickerson and Lisa Dickerson ("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 denied without prejudice.

46. **14-22769-E-13** **MICHELLE HARGARAY**
PGM-2 **Peter Macaluso**

MOTION FOR COMPENSATION FOR PETER G. MACALUSO, DEBTOR'S ATTORNEY
10-24-16 [55]

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 24, 2016. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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 granted.

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

The period for which the fees are requested is for the period August 11, 2015, through October 26, 2015. Applicant requests fees in the amount of $1,200.00.

TRUSTEE'S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a statement of non-opposition on October 25, 2016.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature,

the extent, and the value of such services, taking into account all relevant factors, including–

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

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

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

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including drafting a successful Modified Plan to prevent the Trustee's dismissal of the case and subsequent correspondence and meetings with Debtor to maintain the case. The court finds the services were beneficial to the Client and bankruptcy estate and were reasonable.

"No-Look" Fees

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

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

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

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

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

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

The Order Confirming the Chapter 13 Plan expressly provides that Applicant is allowed $4,000.00 in attorneys fees, the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Dckt. 22. Applicant prepared the Order Confirming the Plan.

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

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

FEES REQUESTED

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

Motion to Modify Plan: Applicant spent 4.75 hours in this category. Applicant assisted Client with reviewing Trustee's Motion to Dismiss, meeting with the Debtor, and drafting the Motion to Modify Plan and Order Modifying.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Peter Macaluso	4	$300.00	$1,200.00
Total Fees for Period of Application			$1,200.00

FEES ALLOWED

The unique facts surrounding the case, including litigating successful Motions to Modify, to Approve Loan Modification, and to Compel, all raise substantial and unanticipated work for the benefit of the estate, Debtor, and parties in interest. The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. The request for Additional Fees in the amount of $1,200.00 is approved pursuant to 11 U.S.C. § 330, and the fees are authorized to be paid by the Trustee from the available Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

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

Fees $1,200.00

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Peter Macaluso ("Applicant"), Attorney having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Peter Macaluso is allowed the following fees and expenses as a professional of the Estate:
>
> Peter Macaluso, Professional Employed by Chapter 13 Debtor
>
> Fees $1,200.00

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

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

47.	**16-25070-E-13** **HLG-1**	**JOHN COYLE AND ERIKA MADSEN-COYLE** **Kristy Hernandez**	**MOTION TO CONFIRM PLAN** **9-26-16 [25]**

Final Ruling: No appearance at the November 22, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 27, 2016. By the court's calculation, 56 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). 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. The Debtor has provided evidence in support of confirmation. The Chapter 13 Trustee filed a statement of non-opposition on October 26, 2016. The Amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

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

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

IT IS ORDERED that the Motion is granted, and Debtor's Chapter 13 Plan filed on September 26, 2016, is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

48. 16-22972-E-13 RJ-4 | **ELIZABETH BARRIOS** **Richard Jare** | **MOTION TO CONFIRM PLAN** **9-29-16 [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.

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on the parties listed in an unattached mailing matrix on September 29, 2016. By the court's calculation, 54 days' notice would be provided. 35 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). 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.

INCORRECT NOTICE PROVIDED

The Proof of Service attached to the Motion states that it was served on the parties listed in a mailing matrix, but not matrix was provided. Proof of service has not yet been shown, and the court denies the Motion without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Confirm the Plan is denied without prejudice, and the proposed Chapter 13 Plan is not confirmed.

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF DEBTOR FILES THE COMPLETE PROOF OF SERVICE LISTING THE PARTIES SERVED ON SEPTEMBER 29, 2016

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

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on November 2, 2016. Dckt. 52. The Trustee Opposes Confirmation on the basis that:

A. The Debtor's Plan and Motion to Confirm conflict. The Debtor's Plan proposes a 0% dividend to unsecured creditor, but Debtor's Motion proposes a 100% dividend to unsecured creditors.

B. The Additional Provisions of the Plan specifically call for an "Adequate Protection Payment" to the creditor in the amount of $1,030.00, which applies $434.95 to escrow for taxes and insurance and the balance of $595.05 to the post-petition interest and principal on this claim or as specified in a loan modification. According to the Plan, $1,426.23 was the monthly contract installment, and so, the Plan calls for 41% of this payment to be paid to principal and interest each month.

While no claim has yet been filed, Debtor scheduled the claim at $231,632.00. If this creditor is entitled to at least 4% interest, $772.11 would accrue in interest each month. That means the $595.05 part of the adequate protection

payment would allow the Debtor to accrue interest of $177.06 per month with no payment provided for principal for the life of the Plan.

The payment called for by the Plan for adequate protection of the mortgage may not be sufficient to adequately protect the mortgage.

DISCUSSION

The Trustee's objections are well-taken.

The Trustee points out that Debtor's Plan and Motion to Confirm provide conflicting dividends to unsecured creditors. While Debtor's Plan proposes a 0% dividend, the Motion to Confirm proposes a 100% dividend. Based on the content surrounding the proposed dividend, it appears that Debtor intends to pay a 0% dividend. While this appears to be only a scrivener's error, the Trustee's other objections keep the Plan from being confirmed.

The Trustee also alleges that the plan violates 11 U.S.C. § 1325(a)(5)(B)(iii)(II) because the amount of the periodic payments it proposes to pay the creditor is insufficient to provide it with adequate protection during the period of the Plan. The Additional Provisions of the Plan call for an Adequate Protection payment to the Bank of New York Mellon as Trustee, Serviced by Shellpoint ("Creditor") in the amount of $1,030.00, which applies $434.95 to escrow for tax and insurance with the balance of $595.05 to the post-petition interest and principal on this claim or as specified in a loan modification. A proof of Claim has been filed by the Creditor, indicating a secured claim in the amount of $237.348.61 at 2% interest. Court Claim No. 1. The Plan calls for total monthly payments of $1,426.23, which consists of $434.95 to escrow and $991.28 to post-petition interest and principal. It appears that Debtor's proposed payment of $1,030.00 is insufficient.

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

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

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

49. 16-25173-E-13 RONALD GRASSI
PLC-1 Peter Cianchetta

CONTINUED MOTION TO CONFIRM PLAN
9-19-16 [23]

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on September 19, 2016. By the court's calculation, 43 days' notice was provided. 42 days' notice is required.

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

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

Ronald Grassi ("Debtor") filed a Motion to Confirm Amended Plan on September 19, 2016. Dckt 23.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition to the Instant Motion on October 12, 2016. Dckt. 33. The Trustee Opposes Confirmation on the basis that:

A. The Debtor may not be able to make payments or comply with the Plan.

1. The plan payments listed in the Additional Provisions of the Amended Plan are $1,500.00 for five months and $2,497.78 for fifty-five months. The Debtor's budget does not support the increase in plan payments beginning in the sixth month. Debtor's Schedule I indicates monthly net income of $1,500.34. Debtor offers no explanation how he is able to increase his plan payments by $997.78 per month.

2. Debtor's Schedule J lists a rent expense in the amount of $850.00 per month. The Voluntary Petition lists the Debtor's place of residence as 17 Forcallat Court, Sacramento, California. According to Zillow, this is a four bedroom,

three bathroom, 1,920 square foot home. It is not clear if the $850.00 rent expense is an accurate monthly expense. FN.1.

FN.1. The court does not accept as credible, admissible evidence hearsay valuation or property description information from third-party services such as Zillow.com. However, the court does accept the Trustee's argument that $850.00 in rent is a relatively low rent to be paid in the Sacramento Area. On Schedule A, Debtor states under penalty of perjury that he has no interest in any real property. Dckt. 9 at 3.

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3. Debtor's Schedule J lists a monthly expense of $150.00 for Family Law Attorney Fees. The Statement of Financial Affairs lists the dissolution of marriage as pending. It is not clear if this expense will continue for the life of the Plan.

B. The Debtor's Plan may not be the Debtor's best effort. The Debtor appears to be over the median income and proposes plan payments of $1,500.00 for five months and $2,497.78 for fifty-five months with a 0% dividend to unsecured creditors.

1. Debtor's Schedule I lists a Domestic Support Obligation in the amount of $915.42 per month. It is not clear if the obligation is child support, spousal support, or a combination of both types of support. Schedule J lists two dependents, a seventeen-year-old daughter and a twenty-year-old son. It appears the support obligation, if for child support only, could end within one year.

2. Schedule J lists an expense in the amount of $725.00 per month for "Son's Tuition and living Expense." Debtor has not provided any explanation as to the tuition or living expenses that total $43,500.00 over sixty months.

3. The Debtor has not properly completed Form 122C-1. Form 122C-1 lists Debtor's gross wages as $7,106.00, but Schedule I shows $13,340.17. Debtor lists his monthly disposable income as $401.48. It does not appear that this amount has been calculated correctly.

4. It does not appear that the Debtor has reported all of his income. According to the Golden 1 Credit Union Bank Statements received and reviewed by the Trustee, the Debtor appears to have numerous checking deposits from Ryan Baily. The Debtor receives monthly renewal commissions from Blue Shield of California, with an average commission of approximately $180.22 per month. Neither was disclosed on Schedule I or on the Statement of Financial Affairs. It is not clear if the Debtor continues to operate a business because no information was provided on the Statement of Financial Affairs.

DEBTOR'S REPLY

Debtor filed a Reply on October 24, 2016. Dckt. 39. Debtor states that he has almost reached an agreement for a Stipulation in his family law case that would cause the codebtor ex-spouse to pay half of the Chapter 13 plan payments. Debtor asserts that he owes only income taxes, and they would be paid fully by the additional money available with the Stipulation. Debtor requests that the hearing on the Motion be continued to November 22, 2016.

NOVEMBER 1, 2016 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on November 22, 2016, to allow the parties time to resolve issues from a marital dissolution. Dckt. 43.

DISCUSSION

No additional pleadings have been filed. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

The Trustee's objections are well-taken. It is clear that Debtor has some very serious problems with this case and his credibility. While apparently attempting to minimize the situation by saying he "only" owes some taxes, the Internal Revenue Service has filed Proof of Claim No. 1 for $132,439.12, of which $49,007.62 is asserted to be secured, $69,072.83 as nondischargeable priority, and the balance as unsecured.

The court also notes that in reviewing Schedule I, though Debtor has gross income of $13,340 per month, his take-home income is only $6,150 per month. This more than $7,000 a month reduction appears to occur for several reasons. Debtor purports to have reasonable and necessary insurance expenses of $2,000.00 per month. Dckt. 9. On Schedule J, in addition to the college expenses, Debtor purports to have reasonable and necessary transportation expenses of $650.00 per month, $350.00 per month for clothing, $50 for charitable contributions, and $300 for entertainment. It appears that Debtor, wanting to receive all of the benefits of the extraordinary relief available under the Bankruptcy Code, does not want to accept the burden—choosing to maintain his pre-bankruptcy lifestyle that has caused him to incur over $130,000.00 of tax liabilities.

While the court respects the need for supporting the educational goals of one's children, it appears that Debtor is happy to do so—spending his creditor's money to do that. It is not the "parental obligation" of a creditor to fund the Debtor's child's education. Again, Debtor and Debtor's counsel present the court with a situation where the filing of bankruptcy is not going to impinge on Debtor's chosen lifestyle and "hang the law because we don't like it."

Additionally, while health is important, Debtor and Debtor's counsel will have to provide solid, credible evidence why spending $100 per month on gym membership is reasonable and necessary.

The information provided by the Trustee that Debtor has not disclosed all of his income is equally troubling. If true, such bad faith may doom not only this bankruptcy case, but Debtor's ability to seek any bankruptcy relief for the debts he now owes. The Motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Confirm the Plan is denied without prejudice.

50. **13-22083-E-13 PGM-3** | **CYNTHIA BAKER** **Peter Macaluso** | **MOTION FOR COMPENSATION FOR PETER G. MACALUSO, DEBTOR'S ATTORNEY** **10-20-16 [53]**

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 20 2016. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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 granted.

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

The period for which the fees are requested is for the period March 12, 2014, through May 27, 2014. Applicant requests fees in the amount of $1,050.00.

TRUSTEE'S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a statement of non-opposition on October 24, 2016.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including drafting a successful Modified Plan to prevent the Trustee's dismissal of the case. The court finds the services were beneficial to the Client and bankruptcy estate and were reasonable.

"No-Look" Fees

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

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

> (c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.
>
> (1) The maximum fee that may be charged is $4,000.00 in nonbusiness cases, and $6,000.00 in business cases.
>
> (2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.
>
> (3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor's attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6)."

The Order Confirming the Chapter 13 Plan expressly provides that Applicant is allowed $4,000.00 in attorneys fees, the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Dckt. 22. Applicant prepared the order confirming the Plan.

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

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of a professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). It is appropriate for the court to have this discretion "in view of the [court's] superior

understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437.

FEES REQUESTED

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

Motion to Modify Plan: Applicant spent 3.5 hours in this category. Applicant assisted Client with reviewing Trustee's Motion to Dismiss and drafting the Motion to Modify Plan.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Peter Macaluso	3.5	$300.00	$1,050.00
Total Fees for Period of Application			$1,050.00

FEES ALLOWED

The unique facts surrounding the case, including litigating successful Motions to Modify, to Approve Loan Modification, and to Compel, all raise substantial and unanticipated work for the benefit of the estate, Debtor, and parties in interest. The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. The request for Additional Fees in the amount of $1,050.00 is approved pursuant to 11 U.S.C. § 330, and the fees are authorized to be paid by the Trustee from the available Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

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

Fees $1,050.00

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

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

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

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

IT IS ORDERED that Peter Macaluso is allowed the following fees as a professional of the Estate:

Peter Macaluso, Professional Employed by Chapter 13 Debtor

Fees $1,050.00

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

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

51. 15-20683-E-13 DEREK WOLF
PGM-2 Peter Macaluso

OBJECTION TO CLAIM OF GATEWAY ONE LENDING & FINANCE, LLC, CLAIM NUMBER 1-1
10-7-16 [46]

CASE DISMISSED: 10/16/2016

Final Ruling: No appearance at the November 22, 2016 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 Claim 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.

52. **16-27083-E-13** **DANNY CLARKE** **MOTION TO VALUE COLLATERAL OF**
PLC-1 **Peter Cianchetta** **BANK OF AMERICA**
10-28-16 [10]

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, and Office of the United States Trustee on October 28, 2016. By the court's calculation, 25 days' notice was provided. 14 days' notice is required.

The Motion to Value was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. 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 Secured Claim of Bank of America ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $0.00.

The Motion to Value filed by Danny Clarke ("Debtor") to value the secured claim of Bank of America N.A. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 6443 Oakcreek Way, Citrus Heights, California ("Property"). Debtor seeks to value the Property at a fair market value of $250,000.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

TRUSTEE'S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a statement of non-opposition on November 8, 2016. Dckt. 27.

APPLICABLE LAW

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

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

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

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

DISCUSSION

The court has reviewed the Claims Registry for this bankruptcy case. No Proof of Claim has been filed by a creditor that appears to be for the claim to be valued. Additionally, Creditor has not filed any opposition to the Motion.

The senior in priority first deed of trust secures a claim with a balance of approximately $273,000.00. Creditor's second deed of trust secures a claim with a balance of approximately $61,418.00. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

The Motion for Valuation of Collateral filed by Danny Clarke ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of Bank of America N.A. ("Creditor") secured by a second in priority deed of trust recorded against the real property commonly known as 6443 Oakcreek Way, Citrus Heights, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $250,000.00 and is encumbered by a senior lien securing a claim in the amount of $273,000.00, which exceeds the value of the Property that is subject to Creditor's lien.

53. 16-27083-E-13 PLC-2 | **DANNY CLARKE** **Peter Cianchetta** | **MOTION TO IMPOSE AUTOMATIC STAY** **10-28-16 [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.

Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 28, 2016. By the court's calculation, 25 days' notice was provided. 14 days' notice is required.

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

The Motion to Impose Automatic Stay is xxxxx.

Danny Clarke ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(a) imposed in this case. This is Debtor's third bankruptcy petition pending in the past year with the two prior cases having been dismissed. Debtor's prior bankruptcy cases (Nos. 16-24338 and 15-22083) were dismissed on May 10, 2016, and October 13, 2016, respectively. Therefore, pursuant to 11 U.S.C. § 362(c)(4)(A)(I), the provisions of the automatic stay did not go into effect in this case.

Here, Debtor's prior cases were dismissed when:

A. Debtor failed to cure a default, file a written objection and request a hearing, file a motion to modify the plan, perform the terms of the proposed modified plan pending its approval, or obtain approval of the modified plan (Case No. 15-22083, Dckt. 94); and

B. Debtor was delinquent, did not commence making plan payments, and failed to provide business questionnaires (Case No. 16-24338, Dckt. 44).

Debtor argues that good cause exists for imposing the automatic stay as to all creditors because he has rebutted the presumption of bad faith. Debtor states that he had difficulties in the prior cases because of illness, but he now is receiving care from the Veterans Administration, and his spouse—who was also in poor health—now receives income from SSDI. Therefore, the Debtor's medical expenses for "insullin and supplies are greatly reduced." Dckt. 17.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on November 8, 2016. Dckt. 24. The Trustee notes that the Motion is entitled "Notice of Hearing on Motion to Invoke Stay," while the body of the Notice and the Declaration refer to a Motion to Value the Secured Portion of the Claim of Bank of America. Both are incorrect. The Motion is a Motion to *Impose* Automatic Stay.

QUESTIONABLE TESTIMONY UNDER PENALTY OF PERJURY

For some reason, attorneys in this District have recently begun submitting declarations, schedules, statements of financial affairs, and other documents under penalty of perjury for which the declarant has not "Really Read It," but "Merely Skimmed It." Here, taken at face value, Debtor Danny Clarke assumed the declaration was about valuing Bank of America, N.A.'s claim, did not bother to read it, and he just signed it because his attorney told him, "Say This Under Penalty of Perjury and YOU WIN!!!"

Worse, Danny Clarke never read this and signed a series of declaration signature pages for blank declarations that the attorney would fill in later for whatever the attorney thought would be the winning (if it were true) testimony. It appears that the declaration is of this type, give the two blank lines between the last line of text and Danny Clarke's signature and statement that his testimony is made under penalty of perjury.

DISCUSSION

Upon motion of a party in interest and after notice and hearing, the court may order the provisions imposed if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(4)(B). The subsequently filed case is presumed to be filed in bad faith if the Debtor failed to file documents without offering a "substantial excuse." *Id.* at § 362(c)(4)(D)(i)(II). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* at § 362(c)(4)(D). Mere inadvertence or negligence is not a "substantial excuse," unless caused by the negligence of the debtor's attorney. *Id.* at § 362(c)(4)(D)(i)(II).

Unfortunately, the court cannot find that Debtor has provided clear and convincing evidence to rebut the presumption of bad faith. While the "Declaration" recites words that Debtor has received medical treatment for himself and his spouse, appears to be in a more stable situation to make plan payments, and wants to prosecute the case in good faith, it does not appear to be a declaration given by Danny Clarke. Rather, it appears to be a paper written by Debtor's counsel, with Mr. Clarke having signed a series of blank, "write whatever testimony you want from me Mr. Attorney" signature pages.

The Motion is xxxxx, and the automatic stay is xxxxx in this case. *See* 11 U.S.C. § 362(d)(4)(c).

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

> Finding of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Impose the Automatic Stay 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 to Impose Automatic Stay provided by 11 U.S.C. § 362(a) is xxxxx.

54. 16-21089-E-13 STEPHEN MAR — MOTION TO CONFIRM PLAN
PLC-2 Peter Cianchetta — 9-28-16 [57]

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

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on parties listed on a mailing matrix on September 7, 2016. No mailing matrix was attached to the Proof of Service. By the court's calculation, 76 days' notice would have been provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(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 without prejudice.

INCORRECT NOTICE PROVIDED

The Proof of Service did not include a mailing matrix, and the court cannot determine if service requirements have been met by Stephen Mar ("Debtor"). Accordingly, the Motion is denied without prejudice.

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

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

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF DEBTOR ATTACHES THE COMPLETE PROOF OF SERVICE LISTING THE PARTIES SERVED ON SEPTEMBER 7, 2016

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

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on November 8, 2016. Dckt. 67. The Trustee Opposes Confirmation on the basis that:

A. Debtor's Plan is not the Debtor's best effort. Debtor is over the median income according to the Statement of Currently Monthly Income, Form 122C-1. Debtor's Schedule J shows net monthly income of $2,243.00, while the Amended Plan proposes a payment of $182.83 per month for twenty-six months and a lump sum payment of $6,200.00. The Trustee calculates that the Plan could pay all creditors in full within nineteen months if the plan payments were increased to $1,000.00 per month beginning December 25, 2016.

B. The Plan Terms are unclear. The additional provisions of Debtor's Amended Plan call for payments of $182.83 for twenty-six months and a lump sum payment upon approval of the settlement in the adversary proceeding 16-02051. The Plan does not indicate when this settlement will be paid into the Plan. Debtor's Declaration in Support of the Motion states, "I intend to fund the plan with the settlement proceeds from the adversary proceeding upon approval of the settlement in the amount of $6,800.00." The Trustee calculates that the Plan will complete timely as proposed with the $6,200.00 lump sum.

Debtor's Declaration also states that the Plan was amended to reduce the length to twelve months. The Trustee calculates the Plan will take at least twenty-six months with the proposed plan payment and lump sum of $6,200.00. The Trustee requests the Debtor clarify the amount of the lump sum, the month in which that sum will be paid in, and the total length of the Plan.

DISCUSSION

The Trustee's objections are well-taken.

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

[i]f the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan–-(A) the value of the property to be distributed under the plan on account of

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

The Plan proposes to pay a 100% dividend to unsecured claims, which total $6,198.11, though the Debtor's projected disposable income under 11 U.S.C. § 1325(b)(2) totals $3,163.00. The Debtor's Plan could pay all creditors in full within nineteen months if the plan payments were increased to $1,000.00 per month beginning December 25, 2016, according to the Trustee's calculations. Thus, the court may not approve the plan.

The Trustee also opposes confirmation on the basis that the Additional Provisions of Debtor's Amended Plan are unclear. The Additional provisions call for a lump sum payment of $6,200.00 upon the approval of the settlement in adversary proceeding 16-02051, but the Plan does not indicate when this lump sum payment will be paid into the Plan. Without more specific information regarding the amount of the lump sum, the month in which that sum will be paid in, and the total length of the Plan, the Plan cannot be confirmed.

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

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

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

55. 16-25089-E-13 DPC-2 | **MARK/JENNIFER GALISATUS** **Daniel Davis** | **OBJECTION TO DEBTORS' CLAIM OF EXEMPTIONS** **10-13-16 [32]**

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on October 13, 2016. By the court's calculation, 40 days' notice was provided. 28 days' notice is required.

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

The Objection to Claim of Exemptions is overruled without prejudice.

David Cusick, the Chapter 13 Trustee, objects to Mark Galisatus and Jennifer Galisatus's ("Debtor") claimed exemptions on the following grounds:

A. Debtor's real and personal property exemptions are vague. Debtor's Schedule C claims some exemptions of 100% of the value of real and personal property listed on Schedule A/B, while some other exemptions are claimed as 100% of fair market value, up to any statutory limit. The Debtor has failed to claim definite amounts where C.C.P. §703.140 allows exemptions only up to a definite amount, the "debtor's aggregate interest."

1. Debtor exempts real property at 8175 Bonnie Oak Way, Citrus Heights, California, valued at $275,000.00 under C.C.P. § 703.140(b)(1). Debtor's Schedule D indicates that there is $14,000.00 of equity in the property. Schedule C claims an exemption of 100% rather than the actual value of the available equity, or the allowable amount under the statute, which is $26,800.00.

2. Debtor exempts a Golden 1 Credit Union checking account valued at $1,500.00 and twenty-five shares of Pepsi stock valued at $2,200.00 under

C.C.P. § 703.140(b)(5). Debtor claims an exemption of 100% rather than the actual values of the property.

3. Debtor exempts three vehicles: a 2003 Dodge Dakota valued at $3,000.00; a 2000 Mazda B-2500 valued at $1,000.00; and a 2006 Toyota Rav 4 valued at $2,000.00. Debtor claims these exemptions as 100% of fair market value, up to any applicable statutory limit, rather than the actual value of the vehicles.

4. Debtor exempts furniture, appliances, books, sports equipment, jewelry, a Chase checking account, 401k plan, business equipment, and other unspecified personal property in various amounts. Debtor claims an exemption of 100% of fair market value, up to any statutory limit, rather than the actual values of the property.

DEBTOR'S REPLY

Debtor filed a Reply on November 17, 2016. Dckt. 45. Debtor asserts that an Amended Schedule C has been filed that clarifies all of the Trustee's objections.

DISCUSSION

The court has reviewed Amended Schedule C. Dckt. 44. While the court has overruled with prejudice the objection, the Trustee and all other parties in interest may file objections to the Amended Schedule C filed in response to the Objection.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Exemptions filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection is overruled without prejudice. The Chapter 13 Trustee and all parties in interest may file objections to the Amended Schedule C and all exemptions stated therein by the later of December 31, 2016, or the time otherwise provided for filing an objection to the Amended Schedule C.

56. **16-26989-E-13** **EDWARD/SUSAN CARDOZA** **MOTION TO EXTEND AUTOMATIC STAY**
DBL-1 **Bruce Dwiggins** **11-3-16 [11]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on November 3, 2016. By the court's calculation, 19 days' notice was provided. 14 days' notice is required.

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

The Motion to Extend the Automatic Stay is granted.

Edward Cardoza and Susan Cardoza ("Debtor") seek to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond thirty days in this case. This is the Debtor's second bankruptcy petition pending in the past year. The Debtor's prior bankruptcy case (No. 15-27111) was dismissed on September 9, 2016, after Debtor failed to make plan payments. *See* Order, Bankr. E.D. Cal. No. 15-27111, Dckt. 77, September 9, 2016. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor thirty days after filing of the petition.

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed because Debtor experienced unusual and unexpected household expenses, repairs, a family emergency, and the death of Co-Debtor's mother.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on November 8, 2016. Dckt. The Trustee asserts no opposition to 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). 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). 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 impressed upon the court that the last case was dismissed because Debtor experienced several financial complications within close time periods. The Debtor has sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay.

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

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

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

57. **16-24396-E-13** **ROBERT MACBRIDE** **MOTION TO CONFIRM PLAN**
RSM-4 **Pro Se** **9-27-16 [47]**

Final Ruling: No appearance at the November 22, 2016 hearing is required.

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

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

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

The Motion to Confirm Plan 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 dismissed as moot, the case having been dismissed.

58. **13-23599-E-13 PGM-10** | **IVAN MONTELONGO** **Peter Macaluso** | **MOTION FOR COMPENSATION FOR PETER G. MACALUSO, DEBTOR'S ATTORNEY 10-13-16 [184]**

Final Ruling: No appearance at the November 22, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 13, 2016. By the court's calculation, 40 days' notice was provided. 28 days' notice is required.

The Motion for 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Allowance of Professional Fees is granted.

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

The period for which the fees are requested is for the period July 15, 2014, through June 16, 2015. Applicant requests fees in the amount of $3,500.00.

TRUSTEE'S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a statement of non-opposition on October 17, 2016.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

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

According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including drafting a successful Modified Plan and Motion to Approve Loan Modification. The court finds the services were beneficial to the Client and bankruptcy estate and were reasonable.

"No-Look" Fees

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

> "(a) Compensation. Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c). The failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall signify that the attorney has opted out of Subpart (c). When there is an objection or when an attorney opts out, compensation shall be determined in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017, and any other applicable authority."
> ...
> (c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.
>
> (1) The maximum fee that may be charged is $4,000.00 in nonbusiness cases, and $6,000.00 in business cases.
>
> (2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.

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

The Order Confirming the Chapter 13 Plan expressly provides that Applicant is allowed $4,000.00 in attorneys fees, the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Dckt. 86. Applicant prepared the order confirming the Plan.

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

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

FEES REQUESTED

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

Motions to Modify Plan: Applicant spent 8.5 hours in this category. Applicant assisted Client with reviewing Trustee's Motion to Dismiss, drafting the Motion to Modify Plan, and appearing for hearings.

Motion to Approve Loan Modification and Motion to Compel: Applicant spent 6.0 hours in this category. Applicant assisted Client with preparing and filing the Motion to Approve Loan Modification; Response to the Opposition to the Motion; Request for Production of Documents; Supplemental Response to Motion to Approve Loan Modification; Motion to Compel; Status Report; and appearing for hearings.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Peter Macaluso	11.66667	$300.00	$3,500.00
Total Fees for Period of Application			$3,500.00

FEES ALLOWED

The unique facts surrounding the case, including filing successful Motions to Modify, to Approve Loan Modification, and to Compel, all raise substantial and unanticipated work for the benefit of the estate, Debtor, and parties in interest. The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. The request for Additional Fees in the amount of $3,500.00 is approved pursuant to 11 U.S.C. § 330, and the fees are authorized to be paid by the Trustee from the available Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

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

Fees $3,500.00

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Peter Macaluso ("Applicant"), Attorney having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Peter Macaluso is allowed the following fees and expenses as a professional of the Estate:

Peter Macaluso, Professional Employed by Chapter 13 Debtor

Fees $3,500.00

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

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

59. 16-22157-E-13 ROBIN/THOMAS HARLAND MOTION TO CONFIRM PLAN
RLC-1 Stephen Reynolds 9-6-16 [34]

Final Ruling: No appearance at the November 22, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 6, 2016. By the court's calculation, 77 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). 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. The Debtor has provided evidence in support of confirmation. The Chapter 13 Trustee filed a statement of non-opposition on September 13, 2016. The Amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Debtor's Chapter 13 Plan filed on September 6, 2016, is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.