UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

November 24, 2015 at 3:00 p.m.

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1. 15-26412-E-13 NICHOLAS/SAMANTHA BAKER — MOTION TO VACATE DISMISSAL OF CASE
PLC-3 Peter Cianchetta — 11-6-15 [55]

DEBTOR DISMISSED:
11/05/2015
JOINT DEBTOR DISMISSED:
11/05/2015

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on November 6, 2015. By the court's calculation, 18 days' notice was provided. 14 days' notice is required.

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

The Motion to Vacate Dismissal is denied.

Nicholas D. Baker and Samantha M. Finley Baker ("Debtor")filed the instant Motion to Vacate Dismissal on November 6, 2015. Dckt. 55. FN.1.

FN.1. The court notes that the moving party filed the motion and supporting legal authorities in this matter as one document. This is not the practice in the Bankruptcy Court in this District. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." *Revised Guidelines for the Preparation of Documents*, ¶(3)(a). Counsel is reminded of the court's expectation that documents filed with this court comply with the *Revised Guidelines for the Preparation of Documents* in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9014-1(d)(1). This failure is cause to deny the motion, Local Bankr. R. 1001-1(g), 9014-1(l), though the court declines to do so in this case.

The Debtors filed a Chapter 13 bankruptcy on August 12, 2015. On October 7, 2015, the Chapter 13 Trustee filed a Motion to Dismiss due to the default in plan payments. Dckt. 36.

Debtor failed to file a response to the Motion to Dismiss.

Debtor assert that they prepared a new plan and a Motion to Confirm, and executed the necessary documents to address the payments to the Trustee. Debtors note that although they served the Motion and amended plan on all creditors and the Trustee, Debtor failed to file the new plan and Motion to Confirm the amended plan with the court, thus resulting in the dismissal of their case.

On November 6,2015, the court filed the order dismissing the case for failure to make plan payments. Dckt. 54.

The Debtor argue that the order dismissing the case is the result of the mistake, inadvertence and neglect on the part of the Debtor, and therefore should be deemed as "excusable neglect." The Debtor assert that dismissing the Chapter 13 case would result in prejudice to the Debtor, given that the Debtor is pursuing a plan of reorganization in an effort to ensure that their creditors are paid. Debtors contend that the impact on judicial proceedings by vacating the dismissal will be minimal. Additionally, the Debtors assert that they have acted in good faith.

OPPOSITION

David P. Cusick, the Chapter 13 Trustee, filed an objection to the instant Motion on November 13, 2015. Dckt. 60. The Trustee objects on the following grounds:

1. Trustee asserts that the Trustee's Motion to Dismiss, was set on 28 days of notice and specifically stated that a written response or opposition was needed by October 21, 2015. Dckt. 37. Trustee states that Debtor failed to file a timely response. Trustee notes that an Amended Plan dated October 16, 2015 was filed on November 4, 2015.

2. Trustee asserts that the Debtor's Amended Plan, filed on November 4, 2015, called for the following payments: $10.00 for

1 month; $300.00 for 1 month; and $474.00 for 58 months. Trustee notes that the Debtors made one plan payment to the Trustee since their filing of the case on August 12, 2015, in the amount of $10.00 on September 28, 2015. Trustee asserts that the Debtor failed to make the $300.00 payment called for in October by the Amended Plan, thus resulting in their delinquency of plan payments.

3. Trustee notes that the Debtor admitted at the First Meeting of Creditors, held on September 17, 2015, that he had lost his job. Dckt. 32. However, Trustee notes that Debtors Declaration in support of Motion to Confirm reflects a change to the Debtors' financial situation, stating that Petitioner is now employed. Trustee asserts that Debtor failed to indicate the source of employment and the income Debtor is now earning, and has further failed to reflect such changes by amending Schedules I and J.

FN.2. The court notes that Trustee refers to Debtor, Nicholas Baker, as having lost his job. However, the Trustee then asserts that Debtor, Samantha, is now currently employed. The court is not clear as to whether the Trustee is seeking additional information regarding the changed financial circumstances as to both the Debtor or merely Debtor Samantha Barker, given her new employment.

FN.3. The court notes that Trustee misstates the date for the Motion to Confirm, if the case is reinstated, as January 12, 2015. The correct date is January 12, 2016.

APPLICABLE LAW

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

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

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

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

(4) the judgment is void;

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

(6) any other reason that justifies relief.

Red. R. Civ. P. 60(b). A Rule 60(b) motion may not be used as a substitute for

a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199 (5th Cir. La. 1993). The court uses equitable principals when applying Rule 60(b). *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §2857 (3rd ed. 1998). The so-called catch-all provision, Fed. R. Civ. P. 60(b)(6), is "a grand reservoir of equitable power to do justice in a particular case." *Compton v. Alton S.S. Co.*, 608 F.2d 96, 106 (4th Cir. 1979) (citations omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847, 863 (1988), relief under Rule 60(b)(6) may be granted in extraordinary circumstances, *id.* at 863 n.11.

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

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

DISCUSSION

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

Debtor's counsel improperly states that the filing of a new plan and Motion to Confirm would have "overcome the dismissal." However, this is not correct. It is not the court's responsibility to review every other filing by Debtor and Debtor's counsel to determine if a separately filed motion is a de facto response to a Motion to Dismiss. The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The written opposition is to address and be in response to the Motion the respondent opposes - not a separate Motion that the court would have to sua sponte determine if it properly addresses the set motion.

Even more significantly, Debtor's counsel, who regularly appears in this court, knows (or should know) that responses to motions and complaints are required. Merely filing some other pleading and leaving it to happenstance as to whether the court or Trustee will assert an opposition is untenable legal argument.

This court has consistently and repeatedly emphasized the importance of responding parties to file responses or oppositions if required. Otherwise,

as permitted by the rules, the court can and will issue final rulings. The court did such in the instant case.

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

> 3. The debtor was required to merely file a response, bring the trustee payments current or file a new plan to overcome the dismissal.
>
> 4. The undersigned prepared a new plan and prepared a Motion to Confirm and the debtors executed the necessary documents which would have addressed the payments to the trustee.
>
> 5. The undersigned served the Motion and amended plan on all of the creditors and the trustee.
>
> 6. The undersigned, due to mistake and inadvertence, failed to file the new plan and motion to confirm the amended plan with the court which resulted in the dismissal of the case.

Motion, p. 2; Dckt. 55. The Motion is devoid of the efforts of counsel for Debtor in responding to the Motion - other then apparently failing to file a Motion to Confirm and modified plan.

Devoid from both the Motion and Declaration are statements concerning any action taken undertaken or representation provided by Debtor's counsel as to responding directly to the Motion to Dismiss as required. While Debtor's counsel states that a new plan was meant to filed, the plan and Motion to Confirm was not properly filed and Debtor's did not file a response to the Motion to Dismiss stating that the intention of the Debtor was to file an amended plan and Motion to Confirm. But none of these action were taken by counsel.

Additionally, absent from the instant Motion and Declaration is any evidence that the delinquency has been cured. Instead, like the strategy Debtor's counsel attempted in responding to the Motion to Dismiss, the Debtor and Debtor's counsel appears to point to pleadings outside the instant Motion to explain this failure - i.e. that the delinquency is to be cured in the amended plan. Like discussed supra, it is not for the court to purse through the docket to compile and create the Debtor's grounds for relief.

It is clear that counsel for Debtor understands the consequences of the failure to represent the Debtor or respond to the motion to dismiss. Debtor's counsel states under penalty of perjury:

> Due to my mistake and inadvertency, I failed to file the new plan and motion to confirm the amended plan with the Court which resulted in the dismissal of this case

Declaration, p. 2; Dckt. 57. He does not state that due to some mistake or excusable the Debtor failed to oppose the motion to dismiss.

This is not a case where an attorneys' failure to oppose a motion to dismiss causes the Debtor any prejudice which supports the court overriding the law regarding Rule 60(b), vacate the dismissal, and remedy the lack of response by making Debtor's counsel pay monetary sanctions.

The Motion admits there is no prejudice. It merely says that Debtor wants to confirm a plan to pay creditor, whatever they might get in a bankruptcy case. The Debtor's concern appears to relate to the 0.00% dividend that is proposed in the Chapter 13 Plan. Dckt. 47. Other than paying the claim secured by Debtor's car, so that Debtor can keep the car, the plan provides for paying nothing to anybody else (except $3,785.00 to Debtor's attorney). This can be done in a new case filed by Debtor. Arguing this "prejudice" appears to demonstrate bad faith conduct by Debtor. FN.4.

FN.4. One might observe that the "prejudice" will be to counsel who will have to provide the legal services for the filing of the new case, filing a plan, and getting an order on the stipulation for the creditor's secured claim – and not be able to be paid a second time for replicating the work which was done in this case. Rule 60(b) does not exist as a safety net to remedy such "prejudice" for the attorney.

This bankruptcy case was filed on August 12, 2015. It was dismissed three months later. Debtor has not made any significant payments into this bankruptcy case. Debtor can easily file a new bankruptcy case. Debtor has already stipulated with the creditor holding a claim secured by the vehicle (the one creditor who Debtor seeks to pay) the value of the vehicle and amount of secured claim. That can be replicated in a second bankruptcy case.

Movant has failed to provide the court with grounds for relief pursuant to Federal Rule of Civil Procedure 60(b) and Federal Rule of Bankruptcy Procedure 9024.

Therefore, the Motion is denied.

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

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

2. 15-22747-E-13 GARY/VICTORIA TEDFORD
PLC-5 Peter Cianchetta

MOTION TO VACATE DISMISSAL OF CASE
11-4-15 [48]

DEBTOR DISMISSED:
10/19/2015
JOINT DEBTOR DISMISSED:
10/19/2015

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on November 4, 2015. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

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

The Motion to Vacate Dismissal is denied.

Gary F. Tedford and Victoria D. Tedford ("Debtor & Petitioner, respectively")filed the instant Motion to Vacate Dismissal on November 4, 2015. Dkct. 48. FN. 1.

FN.1. The court notes that the moving party filed the motion and supporting legal authorities in this matter as one document. This is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies,

declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." *Revised Guidelines for the Preparation of Documents*, ¶(3)(a). Counsel is reminded of the court's expectation that documents filed with this court comply with the *Revised Guidelines for the Preparation of Documents* in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9014-1(d)(1). This failure is cause to deny the motion, Local Bankr. R. 1001-1(g), 9014-1(l), though the court declines to do so in this case.

The Debtors filed a Chapter 13 bankruptcy on April 3, 2015. On September 16, 2015, the Chapter 13 Trustee filed a Motion to Dismiss based on a delay of confirmation as the Debtor failed to file an amended plan and set it confirmation. Dckt. 39. Debtors assert that they were required to file a response or a new plan to overcome the dismissal.

Debtors assert that they prepared a new plan and a Motion to Confirm, and executed the necessary documents. Debtors note that although they served the Motion and amended plan on all of the creditors and the trustee, Debtors failed to file the new plan and Motion to Confirm the amended plan with the court, thus resulting in the dismissal of their case.

On October 20, 2015, the court filed the order dismissing the case. Dckt. 46.

Debtors assert that the order dismissing the case is a result of their failure to file the amended plan and Motion to Confirm the plan, despite having served it. The Debtors argue that as such, the order dismissing the case is the result of the mistake, inadvertence and neglect on the part of the Debtors, and therefore should be deemed as "excusable neglect." The Debtors assert that dismissing the Chapter 13 case would result in prejudice to the Debtor, given that the Debtor is pursuing a plan of reorganization in an effort to cure a delinquency on their home. Debtors contend that dismissal of the plan puts their home at risk. Debtors assert that their payments were current and that the instant Motion is brought within 30 days of dismissal. Debtors contend that the impact on judicial proceedings by vacating the dismissal will be minimal. Additionally, the Debtors assert that they have acted in good faith.

TRUSTEE'S RESPONSE

David P. Cusick, the Chapter 13 Trustee, filed a response to the instant Motion on November 5, 2015. Dckt. 58. The Trustee contends the following:

1. Debtors made all payments that have come due under the proposed amended plan.

2. Trustee notes that the Debtor's Attorney does not explain why the Debtor's failed to file a response given that the Notice of the Trustee's Motion requests that Debtors' file a response or opposition stating why the believe the issues have been resolved, so as to not assume the Trustee knows the reason.

3. Trustee asserts that while the Motion to Vacate states that the

Debtors served the motion and amended plan on all parties, the motion does not indicate the date on which this was done.

4. Despite these oversights, the Trustee asserts that he has reviewed the plan and it appears feasible. As such, the Trustee requests that the instant Motion be considered.

APPLICABLE LAW

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

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

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

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

(4) the judgment is void;

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

(6) any other reason that justifies relief.

Red. R. Civ. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199 (5th Cir. La. 1993). The court uses equitable principals when applying Rule 60(b). *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §2857 (3rd ed. 1998). The so-called catch-all provision, Fed. R. Civ. P. 60(b)(6), is "a grand reservoir of equitable power to do justice in a particular case." *Compton v. Alton S.S. Co.*, 608 F.2d 96, 106 (4th Cir. 1979) (citations omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847, 863 (1988), relief under Rule 60(b)(6) may be granted in extraordinary circumstances, *id.* at 863 n.11.

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

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

DISCUSSION

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

Debtor's counsel improperly states that the filing of a new plan and Motion to Confirm would have "overcome the dismissal." However, this is not correct. It is not the court's responsibility to review every other filing by Debtor and Debtor's counsel to determine if a separately filed motion is a de facto response to a Motion to Dismiss. The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The written opposition is to address and be in response to the Motion the respondent opposes - not a separate Motion that the court would have to sua sponte determine if it properly addresses the set motion.

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

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

> 3. The debtor was required to merely file a response, bring the trustee payments current or file a new plan to overcome the dismissal.
>
> 4. The undersigned prepared a new plan and prepared a Motion to Confirm and the debtors executed the necessary documents which would have addressed the payments to the trustee.
>
> 5. The undersigned served the Motion and amended plan on all of the creditors and the trustee.
>
> 6. The undersigned, due to mistake and inadvertence, failed to file the new plan and motion to confirm the amended plan with the court which resulted in the dismissal of the case.

Motion, p. 2; Dckt. 48 The Motion is devoid of the efforts of counsel for Debtor in responding to the Motion - other then apparently failing to file a Motion to Confirm and modified plan.

This is not Counsel's first case, on this calendar alone, where he now argues that a party need not respond to a motion, but merely file some other

unrelated pleading. That isn ot, has not, and will not be the law in federal courts.

It is clear that counsel for Debtor understands the consequences of the failure to represent the Debtor or respond to the motion to dismiss. Debtor's counsel states under penalty of perjury:

> Due to my mistake and inadvertency, I failed to file the new plan and motion to confirm the amended plan with the Court which resulted in the dismissal of this case

Declaration, p. 2; Dckt. 50.

Devoid from both the Motion and Declaration are statements concerning any action taken undertaken or representation provided by Debtor's counsel as to responding directly to the Motion to Dismiss as required. While Debtor's counsel states that a new plan was meant to filed, the plan and Motion to Confirm was not properly filed and Debtor's did not file a response to the Motion to Dismiss stating that the intention of the Debtor was to file an amended plan and Motion to Confirm. But none of these action were taken by counsel.

Additionally, absent from the instant Motion and Declaration is any evidence that the delinquency has been cured. Instead, like the strategy Debtor's counsel attempted in failing to respond to the Motion to Dismiss, the Debtor and Debtor's counsel appears to point to pleadings outside the instant Motion to explain this failure - i.e. that the delinquency is to be cured in the amended plan. Like discussed supra, it is not for the court to purse through the docket to compile and create the Debtor's grounds for relief. The only "saving grace" for the Debtor is that the Trustee states that the Debtor is current under the proposed amended plan.

To date, the Debtor has failed to have a plan confirmed.

There is no demonstrated prejudice to Debtor with the dismissal of this case. The case was filed on April 3, 2015, and dismissed seven months later. No plan was confirmed in this case. Confirmation of the plan was denied due to Debtor's substantial failure in prosecuting this case.

> "The Trustee's objections are well-taken. First, a review of the Debtors' plan shows that it relies on the court valuing the secured claim of Schools Financial Credit Union. However, the **Debtors have failed to file a Motion to Value the Collateral** of Schools Financial Credit Union. Without the court valuing the claim, the plan is not feasible. 11 U.S.C. 1325(a)(6). Therefore, the Trustee's first objection is sustained.

The Trustee's second objection is also sustained. The plan provides for what appears to be an accelerated pay off of the arrears for "residential Credit Slt" but does not provide for any justification or explanation of

> why such treatment is proper. As noted by the Trustee, the accelerated pay off of the arrears, rather than the standard pay off through the life of the plan, will cause a delay in the unsecured creditors receiving their dividend. **Without**

> **legal justification that would allow such preferential treatment for the creditor (and the Debtor in enhancing the value of the property Debtor seeks to retain), the unfair delay to the unsecured claimants makes the plan not feasible or viable.**
>
> The Trustee's remaining objections all **concern the Debtors failing to accurately, completely, and honestly providing necessary information.** The Debtor **failed to report a pending lawsuit** against their mortgage lenders and **failed to complete all income and payment information** on Statement of Financial Affairs. Taken collectively, the court finds that the **Debtors are not accurately and truthfully providing information as to their financial reality** nor are the Debtors fulfilling their duties as fiduciaries. Without the Debtors properly filling out the schedules and reporting all assets and expenses, the court and the Trustee are unable to determine if the plan is feasible, viable, or complies with 11 U.S.C. 1325. **These failures appear to be more than mere scrivener's errors and may be, in fact, an attempt by the Debtors to not fully disclose their finances.** These then feed into the possibility that the Debtor, with the pending lawsuit, may not pass the liquidation analysis."

Civil Minutes, Dckt. 36.

This motion appears to be another step in the Debtor's failure to prosecute this case, the Debtor's failure to act in good faith, and Debtor's failure to fulfill the fiduciary obligations of a Chapter 13 Debtor to the estate.

The Motion is denied.

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

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

3. 12-39954-E-13 JOHN/MICHELLE PINEDA **MOTION TO VACATE DISMISSAL OF**
PLC-3 Peter Cianchetta **CASE**
11-4-15 [45]

DEBTOR DISMISSED:
10/19/2015
JOINT DEBTOR DISMISSED:
10/19/2015

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on November 4, 2015. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

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

The Motion to Vacate Dismissal is conditionally granted.

John Pineda and Michelle L. Pineda ("Debtor")filed the instant Motion to Vacate Dismissal on November 4, 2015. Dkct. 45. FN.1.

FN.1. The court notes that the moving party filed the motion and supporting legal authorities in this matter as one document. This is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies,

declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." *Revised Guidelines for the Preparation of Documents*, ¶(3)(a). Counsel is reminded of the court's expectation that documents filed with this court comply with the *Revised Guidelines for the Preparation of Documents* in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9014-1(d)(1). This failure is cause to deny the motion, Local Bankr. R. 1001-1(g), 9014-1(l), though the court declines to do so in this case.

The Debtors filed a Chapter 13 bankruptcy on November 13, 2012. On September 16, 2015, the Chapter 13 Trustee filed a Motion to Dismiss based on Debtors being in material default of their plan. Dckt. 36. Debtors assert that they were required to file a response or a new plan to overcome the dismissal.

Debtors assert that they prepared a new plan and a Motion to Confirm, and executed the necessary documents. Debtors note that although they served the Motion and amended plan on all of the creditors and the trustee, Debtors failed to file the new plan and Motion to Confirm the amended plan with the court, thus resulting in the dismissal of their case.

On October 20, 2015, the court filed the order dismissing the case. Dckt. 43.

Debtors assert that the order dismissing the case is a result of their failure to file the amended plan and Motion to Confirm the plan, despite having served it. The Debtors argue that as such, the order dismissing the case is the result of the mistake, inadvertence and neglect on the part of the Debtors, and therefore should be deemed as "excusable neglect." The Debtors assert that dismissing the Chapter 13 case would result in prejudice to the Debtor, given that the Debtor is pursuing a plan of reorganization in an effort to cure a delinquency on their home. Debtors contend that dismissal of the plan puts their home at risk. Debtors state that the new proposed plan would have addressed the delinquency, and would have resulted in a feasible plan to cure such delinquency. Debtors assert that the instant Motion is brought within 30 days of dismissal. Debtors contend that the impact on judicial proceedings by vacating the dismissal will be minimal. Additionally, the Debtors assert that they have acted in good faith.

TRUSTEE'S OBJECTION

David P. Cusick, the Chapter 13 Trustee, filed a response to the instant Motion on November 10, 2015. Dckt. 54. The Trustee objects on the following grounds:

1. Debtors are delinquent in the amount of $3,153.56, with an additional payment of $2,653.29 coming due. Trustee asserts that the Notice outlined multiple ways for the Debtors to address the delinquency, however, none of the options were exercised. Dckt. 37.

2. Trustee notes that the instant Motion states on page 2, paragraph 3, "the Debtor was required to **merely** file a response or bring the current plan current or file a new plan to

overcome the dismissal." (Emphasis added). Trustee asserts that the Motion to Dismiss was noticed under Local Bankr. Rule 9014-1(f)(1), requiring a written response to be filed with the court on or before September 30, 2015. Debtors failed to file a response or opposition on or before that date. Additionally, the notice informed Debtors that failure to file a timely written response or opposition may result in the court resolving the matter without oral argument, and without providing the Debtor a hearing.

3. Trustee states that Counsel for Trustee, Neil Enmark, had a telephone conversation with Debtor's Counsel, Mr. Ciancetta. Trustee alleges that Mr. Ciancetta was advised to file a late response to the Motion to Dismiss and a new plan as well, however failed to do so.

4. Trustee notes that the instant Motion states on page 2, paragraph 5, that "the undersigned served the Motion and amended plan on all of the creditors and the trustee." Trustee therefore assumes that Debtor intends that the signature date of October 12, 2015 on the plan and motion to confirm to be deemed as the date it was served. However, Trustee asserts that his records do not reflect being served the amended plan or motion during on or before October 12, 2015. Rather, as reflected on the court docket, the plan and motion to confirm were filed with the court on November 4, 2015.

5. Trustee states that the court issued a Final Ruling dismissing the case, as no opposition was filed. Trustee urges the court to affirm its ruling in dismissing the case.

Neil Enmark, Counsel of Trustee, filed a declaration in response to the instant Motion on November 10, 2015. Dckt. 55. Counsel for the Trustee states the following:

1. That he had a telephone conversation with Debtor's Counsel on October 2, 2015, and advised Mr. Ciancetta to file a late response to the Motion to Dismiss and a new plan. However, no response nor plan was filed by Debtor.

DEBTOR'S DECLARATION

Michelle L. Pineda, Debtor, filed a declaration in support of the instant Motion on November 16, 2015. Dckt. 57. The Debtor contends as follows:

1. That she was unable to sign a new plan, before October 12, 2015, because she was assisting her sister-in-law and her conjoined twins at Stanford Hospital in Palo Alto, California. Debtor states that the conjoined twins underwent a complicated and life threatening procedure, and were unable to be transported without direct assistance.

2. Debtor states that she has been the primary source of assistance to her sister-in-law, in preserving the life and safety of the conjoined twins. That this extraordinary family

demand led to the late execution and filing of the plan.

DEBTOR'S COUNSEL DECLARATION

Peter Cianchetta, the Debtor's counsel, filed a responsive declaration on November 16, 2015. Dckt. 58. Debtor's counsel states the following:

1. "After reviewing the response, I recall the conversation with Neil Enmark, counsel for the trustee as stated in his response."

2. "Further complicating the matter was a family emergency that the Debtor was facing."

3. "This complications exacerbated the filing of the amended plan and response."

4. "I inadvertently stated on my declaration that I had served the Motion and amended plan, what I meant to ay was that I had it all ready as soon a I met with my clients and secured their signatures but in error, failed to file or serve it."

5. "All of these complications and error on my part led to the failure to timely respond leading to the dismissal."

6. "Due to my mistake and inadvertence, I failed to file the new plan and motion to confirm the amended plan with the Court which resulted in the dismissal of this case."

TRUSTEE'S REPLY

The Trustee filed a reply on November 20, 2015. Dckt. 60. The Trustee states that he no longer opposes the Motion to Vacate Dismissal based on the responses of the Debtor and Debtor's counsel.

APPLICABLE LAW

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

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

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

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

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated;

or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

Red. R. Civ. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199 (5th Cir. La. 1993). The court uses equitable principals when applying Rule 60(b). *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §2857 (3rd ed. 1998). The so-called catch-all provision, Fed. R. Civ. P. 60(b)(6), is "a grand reservoir of equitable power to do justice in a particular case." *Compton v. Alton S.S. Co.*, 608 F.2d 96, 106 (4th Cir. 1979) (citations omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847, 863 (1988), relief under Rule 60(b)(6) may be granted in extraordinary circumstances, *id.* at 863 n.11.

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

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

DISCUSSION

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

Debtor's counsel improperly states that the filing of a new plan and Motion to Confirm would have "overcome the dismissal." However, this is not correct. It is not the court's responsibility to review every other filing by Debtor and Debtor's counsel to determine if a separately filed motion is a de facto response to a Motion to Dismiss. The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The written opposition is to address and be in response to the Motion the respondent opposes - not a separate Motion that the court would have to sua sponte determine if it properly addresses the set motion.

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

court did such in the instant case.

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

> 3. The debtor was required to merely file a response, bring the trustee payments current or file a new plan to overcome the dismissal.
>
> 4. The undersigned prepared a new plan and prepared a Motion to Confirm and the debtors executed the necessary documents which would have addressed the payments to the trustee.
>
> 5. The undersigned served the Motion and amended plan on all of the creditors and the trustee.
>
> 6. The undersigned, due to mistake and inadvertence, failed to file the new plan and motion to confirm the amended plan with the court which resulted in the dismissal of the case.

Motion, p. 2; Dckt. 45. The Motion is devoid of the efforts of counsel for Debtor in responding to the Motion - other then apparently failing to file a Motion to Confirm and modified plan.

Devoid from both the Motion and Declaration are statements concerning any action taken undertaken or representation provided by Debtor's counsel as to responding directly to the Motion to Dismiss as required. While Debtor's counsel states that a new plan was meant to filed, the plan and Motion to Confirm was not properly filed and Debtor's did not file a response to the Motion to Dismiss stating that the intention of the Debtor was to file an amended plan and Motion to Confirm. But none of these action were taken by counsel.

Additionally, absent from the instant Motion and Declaration is any evidence that the delinquency has been cured. Instead, like the strategy Debtor's counsel attempted in responding to the Motion to Dismiss, the Debtor and Debtor's counsel appears to point to pleadings outside the instant Motion to explain this failure - i.e. that the delinquency is to be cured in the amended plan. Like discussed supra, it is not for the court to purse through the docket to compile and create the Debtor's grounds for relief.

As admitted by Debtor's counsel in the subsequent declaration, Debtor's counsel did not, in fact, ever serve the Motion to Confirm or the modified plan. It is clear that the Debtor's counsel merely copied the same Motion to Vacate as the other two Motions to Vacate on the November 24th calendar filed by the Debtor's counsel without stating the particularities of the case. Instead, Debtor's counsel appears to give a conclusory and non-specific motion in the hopes that the fact the Debtor's counsel did such is sufficient to vacate the dismissal.

While offering facts and circumstances as to the serious life and family events facing Debtor, the Motion is devoid of any reason for not

complying with the Federal Rule of Civil Procedure, Federal Rule of Bankruptcy Procedure, and Local Bankruptcy Rules and file an opposition to the motion to dismiss. The only response by counsel, who regularly appears in this court and knows that responsive pleadings must be filed to motions, is that he didn't. There is no good faith, bona fide argument that counsel believed that if he filed unrelated documents that the court, Trustee, or creditors would "represent" his clients and state an opposition is untenable.

This is the third motion to vacate dismissal on this calendar alone filed by counsel. Something went wrong. Whether counsel delegated the responsibility to a paralegal or other non-lawyer and they made the mistake, counsel decided that is was easier to not respond, or that it is more profitable to not respond to the motion, the court does not know.

At this juncture, grounds for vacating the order for counsel's failure to respond have not been shown. However, the court notes that Debtor in this case has been a Chapter 11 debtor since November 2012. After investing three years in this case, it has been dismissed due to the failure to respond. This will cause Debtor prejudice.

To avoid creating a multiplicity of bankruptcy filings and law suits, and to ameliorate the prejudice to Debtor casued by the failure to respond to the motion to dismiss the court conditionally grants the Motion to Vacate. The condition precedent to vacating the dismissal order is counsel paying $975.00 to the Chapter 13 Trustee for the otherwise unnecessary legal expenses following the order dismissing the case, addressing the present motion, the hearing on this motion, and then unwinding the dismissal.

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

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

The $975.00 is ordered to be paid as an expense reimbursement, and shall be paid on or before December 7, 2015. Upon the payment of the $975.00 by counsel for Debtor, the court shall issue the order vacating the order dismissing the case and an order denying without prejudice the motion to dismiss.

Therefore, given these facts, the Motion is conditionally granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Vacate filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is conditionally granted on the completion of the following condition precedent.

Peter Cianchetta (“Counsel for Debtor”) shall, on or before December 7, 2015, pay $975.00 to the Chapter 13 Trustee as the reimbursement for otherwise unnecessary legal expenses relating to the post-dismissal legal work required due to counsel’s failure to file an opposition to the Motion to Dismiss. Upon timely payment of the $975.00 by counsel for Debtor, the counsel for the Chapter 13 Trustee shall prepare and lodge with the court an order granting the present Motion and vacating the dismissal and a separate order denying without prejudice the motion to dismiss.

IT IS FURTHER ORDERED that if Counsel fails to timely satisfy the condition precedent and pay the $975.00 in reimbursement of legal expenses, on or before December 7, 2015, the Motion to Vacate is denied. The Chapter 13 Trustee shall file a declaration attesting to the failure to make said timely payment and counsel for the Chapter 13 Trustee shall lodge an order with the court denying the Motion to Vacate.

4. 15-20810-E-13 VASILIY/YELENA KUMANSKIY MOTION TO CONFIRM PLAN
MLA-4 Mitchell Abdallah 10-8-15 [91]

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 8, 2015. By the court's calculation, 47 days' notice was provided. 42 days' notice is required.

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

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

Vasiliy and Yelena Kumanskiy ("Debtor") filed the instant Motion to Confirm the Amended Plan on October 8, 2015. Dckt. 91.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on November 10, 2015. Dckt. 108. After a discussion of the procedural history, the Trustee objects on the following grounds:

1. The court must decide the effect of the provision of Wells Fargo Card Services as Class 6 for $2,547.72, where Proof of Claim No. 2 has been filed for $2,718.04. The Trustee notes a pending Adversary Proceeding No. 15-02056 with a complaint for $2,547.72. The Trustee asserts that the court must determine pursuant to 11 U.S.C. § 1325(b)(1) whether any discrimination

in favor of Wells Fargo Card Services if unfair and whether the classification applies to only $2,547.72 of the Proof of Claim or the additional $170.32 amount claimed.

2. The Trustee raises the objection again that the proposed plan may not be the Debtor's best effort. The Debtor filed a joint declaration in order to address the court's prior concerns over the objection. The Debtor provides Schedules I and J and other exhibits. Dckt. 100. The Trustee states, however, that the Debtor do not describe or reason why the exhibits are "proof" of documented evidence. The Trustee is concerned with the failure to provide information as to any income of the father listed as a dependent - as referred to in the ruling. The Trustee provides the following analysis of the items. The Trustee provides the following explanation for the exhibits.

   a. The payments for college expenses. Dckt. 100, pgs. 3-5. The account statement reflects an account statement for an account that was not listed on Schedule B. Transactions from Wells Fargo Account No. 7362 dated from July 1, 2015 to September 24, 2015 attached. $4,023.22 withdrawal/debit to UC SANTA BARBARA UCSB BARC was made on September 11, 2015. Amended Schedule J (Dckt. 95) lists childcare/education cost in the amount of $300.00 per month. The Debtor has not provided a full explanation as to whatever school expenses they are proposing to pay out of the $5,600.00 ($300.00 per month and first $2,000.00 of tax refund) each year. This amount would appear excessive if the only expense to be paid is $4,023.22 once per year.

   b. Charitable Contributions. Dckt. 100, pgs 6-14. Where the Debtor claims $500.00 per month charitable expense, these exhibits support that claim for the month of July, August, and September. The Trustee has reviewed the Debtor's 2013 and 2012 tax returns, and they reflect charity of $5,642.00 of the $22,790.00 of exemption in 2013 and the 2012 copy the Trustee does not include Schedule A but has $21,110.00 of exemptions claimed.

   c. Payments for rental property maintenance expenses. Dckt. 100, pgs. 15-17. The Trustee states on page 16 contains two bills for $2,147.05. Even if these are the only maintenance expense for the year, that would be $178.00 per month and is not a scheduled expense.

DISCUSSION

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

The court first notes that a review of the Debtor's Declaration does not authenticate or provide explanation to any of the accompanying exhibits. The only "authenticating" statement made be the Debtor is:

> Filed herewith as Exhibit "A" is proof of documented expenses on Schedule I & J, as required by the Court, in support of our Joint Declaration. Per Schedule J, our monthly disposable income is $133.25.

Dckt. 99.

The court next notes that the third proposed amended plan is identical to the Debtor's second amended plan, with the exception of further detail as to the Debtor's responsibility as to remitting any tax returns and any tax refunds the Debtor may receive. The court denied confirmation of the Debtor's second amended plan. Dckt. 86.

Financial Information Lacking

Reviewing the Debtor's unauthenticated exhibits and the information provided, the court is once again left concerned over the viability and truthfulness of the proposed plan.

11 U.S.C. § 1325(b)(1), provides:

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

Debtor's proposed plan only provides 2.97% dividend for Class 7 general unsecured creditors. Dckt. 73. This is for a plan which requires only a $133.25 monthly plan payment by Debtor. *Id.* Debtor reports on Schedule I having gross monthly wage income of $7,999.07. Dckt. 66 at 7. Debtor's deductions include a mandatory ($318) and voluntary ($200) retirement contributions. Additional monthly withholding of $12.07for CERS Pension Low, $156.64 for CERS Pension High, $219.14 for 457 Plan FT, and $160.49 for a medical HSA is made by Debtor. In addition to the $160 withholding for the HSA, Debtor also lists $160 of expenses on Schedule J. *Id.* at 11.

Debtor filed a supplemental Schedule J on October 13, 2015. Dckt. 95. On Schedule J Debtor lists two dependant minor children and a father. No income information is provided for the father, though listed as a dependant. On Schedule J Debtor's expenses include: $1,100.00 for food and housekeeping supplies, $200.00 for clothing and laundry, $400 for transportation, $400 for charitable contributions, and $1,111.48 for mortgage on other property. Net income from rental or business of $1,350.00 is listed on Schedule I. No other expenses for business or rental (such as maintenance or repairs) are disclosed on Schedule I (which requires that a separate statement of gross income and all expenses be provided as part of Schedule I).

The Debtor's expenses do not appear credible or reasonable. Some key information is not provided (such as the gross income and expenses for the

rental property or business net income stated on Schedule I). Debtor lists a substantial monthly expense for charitable contributions. In support of the charitable contributions the Debtor provides copies of checks and donations slip for the year. The court notes that the Debtor reduced the contribution from $600 on the originally filed Schedule J to $400.00. While this is more evidence previously disclosed, the Debtor still does not indicate the frequency or future contributions in the declaration.

Furthermore, as the Trustee points out, the Debtor only provides two invoices as to the upkeep of the rental property. The Debtor does not provide the separate income and expense schedule as required and does not list any expenses on the schedules. The expense evidenced in the attached invoices average to $178.00 per month in maintenance. The Debtor lists a $200.00 expense for "Maintenance, repair, and upkeep expenses" on Schedule J. The court construes this as a reasonable maintenance expense for the Debtor's residence and not to include the Debtor's maintenance for the rental property (which, as mentioned supra, should be attached as a separate expense list). The failure of the Debtor to include the reasonable expense of upkeep on the rental property once again raises questions over whether the court has the full economic picture of the Debtor.

From the information provided, the information on Schedules I and J appear to be a carefully crafted statement to support a preconceived minimal monthly plan payment amount. This evidences bad faith in the prosecution of this bankruptcy case and this bankruptcy plan.

Unfair Discrimination Between Creditors Holding General Unsecured Claims

Debtor faces a complaint to have the court determine that the debt owed to Wells Fargo Bank, N.A. E.D Bank. Adv. 15-2056. The Complaint alleges that $2,547.72 of the claim is nondischargeable based on fraud (11 U.S.C. § 523(a)(2)(A)) and that it is debt for luxury consumer goods purchased within 90 days of the commencement of the bankruptcy case (11 U.S.C. § 523(a)(2)(C)(i)(I)). The court has continued the status conference in the Adversary Proceeding based on the Stipulation of Debtor and Wells Fargo Bank, N.A. requesting a continuance while they resolved the matter through the confirmation of a Chapter 13 Plan.

Unfortunately, it appears that Debtor and Wells Fargo Bank, N.A. have worked out a stipulation which results in an unconfirmable plan. Debtor provides in this Third Amended Plan that Wells Fargo Bank, N.A. will be given special treatment, in discrimination of the other creditors hold general unsecured claims, and be paid in full solely on the grounds that the debt to Wells Fargo Bank, N.A. is nondischargeable. In substance, Wells Fargo Bank, N.A. and Debtor have conspired to make the other creditors holding general unsecured claims pay the nondischargeable debt owed to the Bank. For Class 6 of the plan the other creditors holding general unsecured claims (as does Wells Fargo Bank, N.A., see Proof of Claim No. 2 filed by Wells Fargo Bank, N.A.) will be paid only a 2.97% dividend while Wells Fargo Bank, N.A. will be paid a 100% dividend. Third Amended Plan, Dckt. 92.

Debtor has filed no response and has left the Chapter 13 Trustee's objection based on unfair discrimination unaddressed. The Chapter 13 Trustee cited to the Bankruptcy Appellate Panel's decision, *In re Sperna*, 173 B.R. 654

(B.A.P. 9th Cir. 1994), in pointing out this fundamental defect in the agreement between Wells Fargo Bank, N.A. and Debtor, and this Third Amended Plan itself.

The ruling in *Sperna* hits directly on point and has been included in this court's rulings on other decisions relating to the attempt by a debtor to improperly prefer a creditor with a nondischargeable general unsecured claim over other creditors with general unsecured claims.

> "However, Congress did not provide a definition of "discriminate unfairly" in the Code. *In re Leser*, supra, 939 F.2d at 672. Courts developed a four-part test to evaluate a plan's discrimination. See *In re Dziedzic*, 9 Bankr. 424 (S. Tex. 1981); *In re Kovich*, 4 Bankr. 403, 407 (W. Mich. 1980). The Panel adopted this test in *In re Wolff*, supra, 22 Bankr. at 512. Under this test, the court must determine:
>
> > '(1) whether the discrimination has a reasonable basis; (2) whether the debtor can carry out a plan without the discrimination; (3) whether the discrimination is proposed in good faith; and (4) whether the degree of discrimination is directly related to the basis or rationale for the discrimination. Restating the last element, does the basis for the discrimination demand that this degree of differential treatment be imposed?'
>
> *Id.* See also *In re Leser*, supra, 939 F.2d at 672. The bankruptcy court correctly ruled it was required to apply this test. See *In re Proudfoot*, 144 Bankr. 876, 878 (9th Cir. BAP 1992)."

Id. at 658. The *Sperna* court went on to determine that the mere nondischargeability of a debt does not entity that creditor and the debtor to discriminate against other creditors holding general unsecured claims which are not nondischargeable. *Id.* at 658-659

In considering the four prongs of the question of whether the proposed plan will "discriminate unfairly" in violation of the Bankruptcy Code, the court determines:

(1) whether the discrimination has a reasonable basis.

Debtor and Wells Fargo Bank, N.A. have remained mute to the Chapter 13 Trustee's opposition. No reasonable basis for paying Wells Fargo Bank, N.A. in full on its credit card debt and the other $99,876.27 in projected general unsecured debt (as stated in Class 7 of the proposed Third Amended Plan) exists. On Schedule F the general unsecured claims include the following "credit card" debts (on Schedule F Debtor listed some creditors with a $0.00 amount of claim, so the court has used only those listed by Debtor with a dollar amount owing):

A. Credit Control LLC (BofA, N.A.).....$3,965

B. Dsnb Macys.....$2,848

C. Syncb/tjx Cos.....$ 160

D. Wells Fargo Card Services.....$2,547

Amended Schedule F, Dckt. 26. Debtor states on Amended Schedule F that there is only $9,520.99 of general unsecured claims. It appears that the increase to $99,876.27 is based on the claim of Bank of America, N.A. secured by the Thalia Way Property which is to be valued at $0.00 secured pursuant to 11 U.S.C. § 506(a). Order, Dckt. 57.

No reasonable basis exists for paying Wells Fargo Bank, N.A. $2,547.72 on its claim of $2,547.72 and

a. Paying Credit Control, LLC $117.76 on its claim of $3,965;

b. Paying Dsnb Macys $84.59 on its claim of $2,848; and

c. Paying Syncb/tjz Cos $4.75 on its claim of $160.

(2) Whether the debtor can carry out a plan without the discrimination.

The Debtor could have easily proposed, confirmed, and completed a plan with provided for nondiscriminatory treatment. At the end of the case, Debtor would have been left with a modest unsecured debt. Both debtors are employed by the State of California and have combined gross monthly income of $7,999. Both debtors are contributing to CalPers defined benefit pension plans, with one debtor making an extra $200 a month contribution.

Not providing discriminatory treatment for Wells Fargo Bank, N.A. does not impair the ability to perform the plan or Debtor's "fresh start" after completion. No action can be taken by Wells Fargo Bank, N.A. during the performance of the Plan, the Bank cannot impair Debtor's income (such as foreclosing on or selling an asset critical to generating the income to perform the plan), or default a payment plan to cause Debtor an inability to financially function after completion of the plan.

(3) Whether the discrimination is proposed in good faith.

Debtor has not argued any good faith basis for the discrimination. The court concludes that this discrimination has not been in good faith. Further, the discrimination in light of the other defects and attempts to confirm unconfirmable plans demonstrates bad faith on the part of Debtor, and each of them.

In sustaining the Objection to Confirmation of the original plan proposed by Debtor, the court's findings of fact and conclusions of law include:

> "The Trustees remaining objections are also well-taken. The Debtors Form 22C seems to miscalculate the proper tax deductions and life insurance expenses which led to an improper calculation of disposable income. A comparison of Form 22C with Schedule I shows the discrepancy. Without the

> Debtors Form 22c accurately reflecting the Debtors financial reality and properly calculating the Debtors disposable income for determining proper monthly plan payments, the court cannot determine if the Debtors can afford to make the proposed plan payments or even if those payments are proper.
>
> Additionally, the failure of the Debtors to provide for future tax refunds raises concerns if the information provided in the schedules as well as Form 22C is an accurate reflection of the Debtors financial reality. Without the plan and schedules reflecting the tax refund income, the court cannot confirm the plan."

Civil Minutes, Dckt. 38.

In denying the motion to confirm the First Amended Plan, after citing the same defects exists as the court concluded in sustaining the Trustee's objection to confirmation of the original Plan, the court noted, "The Debtor's new proposed plan does not correct any of the Trustees prior objections. It is concerning to the court that after the prior plan being denied confirmation, the Debtors have not proposed a plan which addresses the detailed concerns outlined by the Trustee and the court." Civil Minutes, Dckt. 58.

In denying the motion to confirm the Second Amended Plan, the court's findings and conclusions include the following:

> "Debtor's proposed plan only provides 2.97% dividend for Class 7 general unsecured creditors. Dckt. 73. This is for a plan which requires only a $133.25 monthly plan payment by Debtor. Id. Debtor reports on Schedule I having gross monthly wage income of $7,999.07.Dckt. 66 at 7. Debtor's deductions include a mandatory ($318) and voluntary ($200) retirement contributions. Additional monthly withholding of $12.07for CERS Pension Low, $156.64 for CERS Pension High, $219.14 for 457 Plan FT, and $160.49 for a medical HSA is made by Debtor. In addition to the $160 withholding for the HSA, Debtor also lists $160 of expenses on Schedule J. Id. at 11.
>
> On Schedule J Debtor lists two dependant minor children and a father. No income information is provided for the father, though listed as a dependant. On Schedule J Debtor's expenses include: $1,100.00 for food and housekeeping supplies, $200.00 for clothing and laundry, $400 for transportation, $600 for charitable contributions, and $1,111.48 for mortgage on other property. Net income from rental or business of $1,350.00 is listed on Schedule I. No other expenses for business or rental (such as maintenance or repairs) are disclosed on Schedule I (which requires that a separate statement of gross income and all expenses be provided as part of Schedule I).
>
> The Debtor's expenses do not appear credible or reasonable. Some key information is not provided (such as the gross income and expenses for the rental property or business net income stated on Schedule I). Debtor lists a substantial

> monthly expense for charitable contributions, but does not provide any evidence of a history of such contributions or that such contributions are currently being made by Debtor.
>
> From the information provided, the information on Schedules I and J appear to be a carefully crafted statement to support a preconceived minimal monthly plan payment amount. This evidences bad faith in the prosecution of this bankruptcy case and this bankruptcy plan.
>
> Debtor seeks to withhold $2,000.00 from post-petition income tax refunds with no explanation for how the $2,000.00 will be used for expenses under the plan. Further, this court has previously noted that, without further explanation, the court cannot confirm a plan when there is not either a justification for withholding tax return. Dckt. 38, 58. Thus, this court may not approve the plan because Debtor's post-petition tax refund is projected disposable income that is not going toward payments to general unsecured creditors. 11 U.S.C. 1325(b)(1)(B).
>
> Based on the fact that the Debtor appears to want to withhold partial tax returns without any explanation or argument as to why the Debtor, as a fiduciary of the Chapter 13 estate, is entitled to a maximum of $2,000.00 in any tax returns. The Debtor's response misses the mark over the Trustee's objection. It is not the time for remitting the tax return funds but instead why the Debtor is entitled to any of the tax refund."

Civil Minutes, Dckt. 83.

The present proposed discrimination appears to be the latest in a series of intentional, preconceived schemes to violate the Bankruptcy Code and bamboozle the court, Chapter 13 Trustee, and creditors into violating the Bankruptcy Code and confirm an improper plan. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 1381 n.14, 176 (2010), for a discussion of the duty of the court to make correct rulings on the law, not merely grant whatever a party requests.

(4) Whether the degree of discrimination is directly related to the basis or rationale for the discrimination. (Does the basis for the discrimination demand that this degree of differential treatment be imposed.)

The discrimination is unrelated to any basis or rationale for discrimination – other than Debtor, having been caught by one creditor for conduct which results in the nondischargeability of debt, seeks to make the other creditors pay the nondischargeable debt.

As stated above, this willful, intentional discrimination which is not permitted under the Bankruptcy Code demonstrates actual, intended bad faith in the prosecution of this case and presenting the proposed Third Amended Plan to the court.

The proposed Third Amended Plan improperly discriminates for Wells Fargo Bank, N.A. (as supported by Wells Fargo Bank, N.A. in its apparent stipulation for such discrimination against the other creditors) and cannot be confirmed.

DEBTOR'S BAD FAITH

After the court clearly identified Debtor's conduct as manifesting bad faith in denying confirmation of the proposed Second Amended Plan ("From the information provided, the information on Schedules I and J appear to be a carefully crafted statement to support a preconceived minimal monthly plan payment amount. This evidences bad faith in the prosecution of this bankruptcy case and this bankruptcy plan." Dckt. 83.), the court would have expected Debtor and counsel to present a "squeaky clean plan." Instead, Debtor continues not to merely push the boundaries, but present another unconfirmable plan.

After three prior tries and Debtor being clearly aware that the misstatements of income, trying to hide from the Trustee and creditors future tax refunds due to Debtor continuing to have monies over-withheld, and being told that their conduct was in bad faith, Debtor has continued in such conduct. Debtor has now suffered a fourth strike, which manifests a broader bad faith in this case.

Considering the totality of the circumstances, Debtor's repeated incomplete disclosures and presenting unconfirmable plans demonstrates an intentional scheme to abuse the Bankruptcy Code, defraud creditors, and defraud the court. Even after having been expressly denied confirmation due to the failure to provide for all of future tax refunds to be paid into the plan, this Third Amended Plan does provide for turning over tax refunds, but only those amounts in excess of $2,000.00. Debtor offers no explanation as to why Debtor retains $2,000.00 of the additional disposable income from the over-withholding.

Debtor's conduct demonstrates that this case was not filed in good faith and that this (and prior plans) were not proposed in good faith. Further, the conduct demonstrates the active bad faith of Debtor, not merely a misguided belief that it is "unfair," because it impinges on Debtor's lifestyle, that the actual projected disposable income must be provided to fund the plan.

The court will not approve a plan that is based on cut corners, lack of disclosure, misrepresentations, and improper discrimination against other creditors.

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.

5. 15-20810-E-13 DPC-2 VASILIY/YELENA KUMANSKIY Mitchell Abdallah

CONTINUED MOTION TO DISMISS CASE
10-7-15 [87]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, and Office of the United States Trustee on October 7, 2015. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

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

David Cusick, the Chapter 13 Trustee, filed the instant Motion to Dismiss on October 7, 2015. Dckt. 87. The Trustee's Motion argues that the Debtor did not file a Plan or a Motion to Confirm a Plan following the court's denial of confirmation to Debtor's prior plan on September 25, 2015. Dckt. 86.

DEBTOR'S OPPOSITION

Debtor filed an opposition on October 20, 2015. Dckt. 102. Debtor declares that a Third Amended Plan was filed and served on October 8, 2015 to address "unexpected changes in my month-to-month finances, secured debt delinquency, and unsecured debts." *Id.* at ¶ 3. The delay in filing was due to the "need to verify our current disposable income. We were required by the court to provide verification of charitable donations, expenditures for child's college expenses, and rental property expenses." *Id.* at ¶ 7. Finally Debtor filed an Amended Schedule J and Amended Summary of Schedules. Dckt. 95, 96.

NOVEMBER 4, 2015 HEARING

At the hearing and due to the Trustee's Motion being based on the Debtor's failure to confirm a plan after the prior plan was denied, the court continued the instant Motion to 3:00 p.m. on November 24, 2015. Dckt. 107.

DISCUSSION

On November 24, 2015, the court denied the Debtor's third amended plan because the Debtor once again failed to provide sufficient explanation to justify the Debtor's expenses.

The Trustee's Motion argues that the Debtor did not file a Plan or a Motion to Confirm a Plan following the court's denial of confirmation to Debtor's prior plan. As stated supra, the Debtor's most recent plan was once again denied confirmation for substantively the same reason that the prior plan was denied - failure to provide sufficient evidence as to the Debtor's expenses. This is unreasonable delay which is prejudicial to creditors. 11 U.S.C. §1307(c)(1).

Further, in denying the motion to confirm the Third Amended Plan, the court concluded that not only had the case not been filed in good faith and that the proposed Third Amended Plan had not be proposed in good faith, but that Debtor has demonstrated bad faith in the filing and prosecution of this case. See Civil Minutes for November 24, 2015 hearing on Motion to Confirm Third Amended Plan, DCN: MLA-4. Debtor has not had four attempts to confirm a plan, failing each time for multiple reasons. Debtor has demonstrated that Debtor, and each of them, are incapable of proposing, prosecuting, and confirming in good faith a Chapter 13 Plan which complies with the Bankruptcy Code.

The Motion to Dismiss 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 Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is granted and the case is dismissed.

6. 15-27136-E-13 SALLY CRIZALDO
DPC-1 Peter Macaluso

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
10-29-15 [20]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney on October 29, 2015. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

1. The Debtor's plan relies on a Motion to Value Collateral of Internal Revenue Service.

2. The plan would complete in 112 months as opposed to the 60 months proposed. The Trustee asserts that this is due, in part, to the Internal Revenue Service's priority claim. The claim is for a priority portion in the amount of $51,876.38 while the plan only provides for only $18,726.00.

3. The Trustee is unable to determine if the Debtor can make plan payments. The Debtor admitted at the Meeting of Creditors that she has moved in with her daughter in the city of Antioch, California. The Debtor also admitted she is changing jobs. Schedule J lists a pre-petition $500.00 per month room rental expense that is no longer an expense. The Debtor pays no rent at this time.

4. The Debtor is delinquent in plan payments in the amount of $625.00. The Debtor has paid $0.00.

The Trustee's objections are well-taken.

Debtor is in material default under the plan because the plan will complete in more than the permitted 60 months. According to the Trustee, the plan will complete in 112 months due to the Debtor not providing the full amount of the Internal Revenue Service priority claim in the amount of $51,876.38. This exceeds the maximum 60 months allowed under 11 U.S.C. § 1322(d). Therefore, the objection is sustained.

The Debtor may not be able to make plan payments or comply with the plan under 11 U.S.C. § 1325(a)(6). Based on the representations made by the Debtor at the Meeting of Creditors, it appears that the Debtor's Schedules no long accurately reflect the Debtor's finances. The Debtor is now living with her daughter, which may indicate that the Debtor's has additional income that can now fund the plan. Without an accurate picture of the Debtor's financial reality, the court cannot determine whether the plan is confirmable. Therefore, the objection is sustained.

The basis for the Trustee's objection is that the Debtor is $625.00 delinquent in plan payments and has failed to pay anything into the plan to date. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

While the court granted the Motion to Value the Collateral of Internal Revenue Service, the Trustee's remaining objections are grounds 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.

7. 15-27136-E-13 SALLY CRIZALDO
PGM-1 Peter Macaluso

MOTION TO VALUE COLLATERAL OF INTERNAL REVENUE SERVICE
10-26-15 [15]

Final Ruling: No appearance at the November 24, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, Creditors, parties requesting special notice, and Office of the United States Trustee on October 26, 2015. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The Motion to Value secured claim of the Internal Revenue Service ("Creditor") is granted and the secured claim is determined to have a value of $7,482.00.

The Motion filed by Sally Crizaldo ("Debtor") to value the secured claim of the Internal Revenue Service ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of personal property, listed in Debtor's Declaration as:

Property	Fair Market Value	Balance Owed	Net Value
Bank Accounts	$105.00	$0.00	$1,260.00
Rental Deposit	$1.00	$0.00	$1.00
Computer Equip	$500.00	$0.00	$500.00
Electronic Equip	$300.00	$0.00	$300.00
Furniture	$500.00	$0.00	$500.00
Kitchen items	$30.00	$0.00	$30.00

Knick Knacks	$50.00	$0.00	$50.00
Clothing	$500.00	$0.00	$500.00
Jewelry - valuable	$600.00	$0.00	$600.00
Term life insurance	$1.00	$0.00	$1.00
Vanguard Retirement	$4,000.00	Not property of the estate	Not property of the estate
1997 Ford Expedition	$1,200.00	$0.00	$1,200.00
2001 BMW 525I	$2,500.00	$0.00	$2,500.00
		TOTAL	$7,482.00

("Personal Property"). The Debtor seeks to value the Assets at a replacement value of $7,482.00 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).

The debt secured by the lien of the Internal Revenue Service exceeds the value of the collective personal property assets listed in Debtor's Declaration. Therefore, the Creditor's claim secured by a lien on the Assets is under-collateralized. The creditor's secured claim is determined to be in the amount of $7,482.00. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Sally Crizaldo ("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 the Internal Revenue Service ("Creditor") secured by assets described as:

Property	**Fair Market Value**	**Balance Owed**	**Net Value**
Bank Accounts	$105.00	$0.00	$1,260.00
Rental Deposit	$1.00	$0.00	$1.00

Computer Equip	$500.00	$0.00	$500.00
Electronic Equip	$300.00	$0.00	$300.00
Furniture	$500.00	$0.00	$500.00
Kitchen items	$30.00	$0.00	$30.00
Knick Knacks	$50.00	$0.00	$50.00
Clothing	$500.00	$0.00	$500.00
Jewelry - valuable	$600.00	$0.00	$600.00
Term life insurance	$1.00	$0.00	$1.00
Vanguard Retirement	$4,000.00	Not property of the estate	Not property of the estate
1997 Ford Expedition	$1,200.00	$0.00	$1,200.00
2001 BMW 525I	$2,500.00	$0.00	$2,500.00
		TOTAL	$7,482.00

(“Assets”) is determined to be a secured claim in the amount of $7,482.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Assets is $7,482.00 and is encumbered by liens securing claims which exceed the value of the asset.

No other or additional relief is granted.

8. 15-27236-E-13 JAMES/KARI BIRDSEYE
ASW-1 Robert McConnell

OBJECTION TO CONFIRMATION OF PLAN BY SUNTRUST MORTGAGE, INC.
10-29-15 [29]

Final Ruling: No appearance at the November 24, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, Chapter 13 Trustee and Office of the United States Trustee on October 29, 2015. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

Non-Opposition Filed to Related Motion.

Debtor filed a non-opposition to a related motion to dismiss filed by the Trustee. The confirmation being denied pursuant to that Motion, the court has determined that oral argument will not be of assistance in ruling on the Motion.

The court's decision is to sustain the Objection.

SunTrust Mortgage Inc. ("Creditor") opposes confirmation of the Plan on the basis that the plan does not provide for the full value of arrearage of the Creditor's claim. The Debtor's plan proposes to cure arrearage in the amount of $7,505.10 when the actual arrearages total $8,645.69.

The Creditor's objections are well-taken.

The objecting creditor holds a deed of trust secured by the Debtor's residence. The creditor has filed a timely proof of claim in which it asserts $8,654.69 in pre-petition arrearages. See also, Declaration; Dckt. 33. The Plan does not propose to cure these arrearages. Because the Plan does not provide for the surrender of the collateral for this claim, the Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments. *See* 11 U.S.C. §§ 1322(b)(2), (b)(5) & 1325(a)(5)(B). Because it fails to provide for the full payment of arrearages, the plan cannot be confirmed.

Debtor filed a non-opposition to the Trustee's Motion to Dismiss, stating that an amended plan will be filed in this case.

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

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

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

9. 15-27236-E-13 JAMES/KARI BIRDSEYE
DPC-1 Robert McConnell

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
10-29-15 [25]

Final Ruling: No appearance at the November 24, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney on October 29, 2015. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

Non-Opposition Filed by Debtor

On November 19, 2015, Debtor filed a non-opposition to this Objection to Confirmation. Dckt. 35. Debtor's counsel's proactive response to the Objection allows the court to dispose of this by a final ruling, saving the parties the need to appear at this hearing.

The court's decision is to sustain the Objection.

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

1. Debtor Kari Lynn Birdseye failed to appear at the First Meeting of Creditors on October 22, 2015.

2. The Debtor's plan relies on the Motion to Value Collateral of Dell Financial Services.

3. The plan indicates that there are no additional provisions but there is attached a page 6 that contains such. These additional provisions fail to list additional section numbers as required by the District's forms. Additionally, the Trustee states that the additional provisions places and administrative burden on the Trustee in the following provisions:

   a. "Trustee may, if the funds are available, pay the lump sum total of the value of the collateral on the laptop computer to Dell Financial Services."

   b. "If Trustee desires to obtain from the levying creditor CACH, INC. the amount garnished from co-debtor's wages within 90 days of the filing of this case, the amount obtained by Trustee can be applied to payment to Class 7

creditors."

4. The Debtor's plan is not the Debtor's best efforts. The Debtor appears to be over the median income and propose plan payments of $2,950.00 per month for 60 months, with a 0% dividend to the unsecured creditors.

   a. The Debtor's Current Monthly Income reflects a negative $593.40. The Trustee notes Mr. Birdseye failed to list his wage income from Media Produc.

   b. Debtor's Schedule I lists Mrs. Birdseye's net income as $2,843.62. Schedule I lists a deduction of $1,203.78 for Garnishment. This is not an expense and should not have been included on Schedule I. Mrs. Birdseye's actual net should have been listed as $4,047.40.

The Trustee's objections are well-taken.

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

As to the Trustee's third objection, the court is also concerned with the additional provisions. First off, the Debtor indicates that no additional provisions are attached but there is an additional page attached containing such. This is improper under the District's form. Secondly, a review of the additional provisions shifts the responsibility of determining the payments to creditors, namely Dell and CACH, to the Trustee. This is improper and is improperly "passing the buck" for the Trustee to determine what funds should be paid to who. These are not permissible provisions.

As to the Trustee's fourth objection, the court agrees that the Debtor's plan does not appear to be the Debtor's best efforts. The Debtor failed to list the Debtor's wage income from Media Produc on Schedule I and the Debtor Kari Birdseye improperly deducts a garnishment from her income. The finances reported by the Debtor appears to not accurately reflect the Debtor's reality and does not provide a complete disclosure of the Debtor's financial reality.

While the Motion to Value is not set until December 8, 2015, a review of the Debtor's plan shows that it relies on the court valuing the secured claim of Dell Financial Services. However, in light of the Trustee's other objections, the plan is not feasible. 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.

10. 15-21839-E-13 PGM-1 | **ROBERT REED AND MARIA BARTLOW-REED** **Peter Macaluso** | **MOTION TO CONFIRM PLAN 10-8-15 [47]**

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 8, 2015. By the court's calculation, 47 days' notice was provided. 42 days' notice is required.

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

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

Robert Reed and Maria Bartlow-Reed ("Debtor") filed the instant Motion to Confirm the Amended Plan on October 8, 2015. Dckt. 47.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on November 4, 2015. Dckt. 75. The Trustee objects on the following grounds:

1. Debtor's plan may not be the Debtor's best efforts. The Debtor is above median income debtor according to the Debtor's Statement of current Monthly Income:

   a. Debtor's original plan listed additional provision in section 6 which provided for a step payment increases due to the 401k loans being paid off over the life of the plan. Debtor's Schedule I lists retirement loan payments of $905.90 per month. The original plan provided for a payment increase of $210.00 in month 13, an increase of $275.00 in month 19, and an increase of $475.00 in month 30. The proposed total paid in the original plan was $116,648.00 over the term of the plan. The proposed total paid in under the instant proposed plan is $85,800.00 - a difference of $40,848.00.

   b. A review of Debtor's 2014 federal and state income tax returns indicates that Debtor received refunds totaling $8,516.00. Future tax refunds are not being paid into the plan for the benefit of unsecured creditors.

   c. Section 2.11 of Debtor's amended plan lists a Class 4 payment to US Bank/Chase Mortgage for $2,021.59 per month. The notice of Mortgage Payment Change filed by creditor US Bank National Association/JP Morgan Chase Bank on September 26, 2015 indicates the new mortgage payment effective November 1, 2015 is $1,509.37, a reduction of $512.22 per month. Debtor has additional net income which is not being paid into the plan.

2. Debtor's plan relies on the Motion to Value Collateral of Aqua Finance, Inc. and the Motion to Avoid Lien of Springleaf Financial Services.

DEBTOR'S REPLY

The Debtor filed a reply on November 17, 2015. Dckt. 78. The Debtor replies as follows:

1. According to the Current Monthly Income, the Debtor is over the median income, however, the net result is a -<182.33>. Given the correction required by the Trustee, as outlined below;

a. Retirement Loans: ($9,970.00 + $11,275.00 + $9,975.00) = $31,220.00

b. The Debtor's plan is projected to pay a total of $117,020.00.

2. The 401k loans being paid over the life of the plan is $905.90, in which payoffs are; $210.00 in month 13, $275.00 in month 19, and $475.00 in month 30. The Debtor acknowledge and request that this be inserted in the Order Confirming as the deadline to file claims expired September 7, 2015.

3. The Debtor acknowledge that any refunds in excess of an allowable amount (under $2,000.00) should be turned over to the Trustee for the benefit of the creditors. However, the refund that was due the Debtor was actually taken by the Internal Revenue Service for taxes that were due and not set aside. The Debtor acknowledge and request that this be inserted in the Order Confirming as the deadline to file claims expired September 7, 2015.

4. As to the mortgage payment, the Debtor states that at the time of filing, the monthly payment to U.S. Bank, N.A. as Trustee was $2,021.59. U.S. Bank, N.A. filed Proof of Claim No. 5-1 on May 21, 2015 in which the Debtors' monthly payment was reflected as $1,510.05 with arrears of $1,137.05. U.S. Bank, N.A. amended the Proof of Claim No. 5-1 on September 17, 2015 which states: "The previous POC filed in this case listed pre-petition arrears in the amount of $1,1370.05. Payments received from the chapter 13 Trustee in the amount of $0.00 were credited towards that arrearage and the remaining arrears have been incorporated into the final loan modification." Debtor's counsel has not received the applicable loan modification that reduces the Debtor's interest rate to a flat 2% as stated in the proof of claim, from the Adjustable Rate Balloon Rider, which states that the interest rate "will never be greater than 9.950%." Debtor requests the court order U.S. Bank, N.A. to present the loan modification in full for full review and approval Nun Pro Tunc. Debtor is willing to increase the monthly payment to the plan by the savings of $512.22, from $1,430.00 to $1,940.00.

5. Debtor has received no opposition to the pending Motions to Value and Motion to Avoid Lien.

DISCUSSION

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

A review of the Debtor's plan shows that it relies on the court valuing the secured claims of Aqua Finance, Inc. and Springleaf Financial Services. While the court granted the Debtor's Motion to Value Collateral of Aqua Finance, Inc., the Debtor improperly moved the court to avoid the lien of

Springleaf Financial Services. The court denied the request on November 17, 2015. However, to date, the Debtor has failed to file a Motion to Value the Collateral of Springleaf Financial Services. Without the court valuing the claim, the plan is not feasible. 11 U.S.C. § 1325(a)(6). Therefore, the Trustee's objection is sustained.

The remaining objections appear to address whether the plan is viable and feasible when it does not appear that it is the Debtor's best effort. The Trustee notes numerous concerns ranging from the unexplained reduction in total payment into the plan and the proposed modification to U.S. Bank, N.A. The court shares the concerns of the Trustee that there appears to be additional funds the Debtor should commit to the plan. The Debtor's response notes different amendments that the Debtor believes will correct the objections raised by the Trustee. However, the Trustee's objections and the Debtor's proposed amendments are more substantive than scrivener's error that could properly be addressed in the order confirming. There are legitimate concerns over whether there is proper step up payments and whether there is additional funds that should be committed to the plan. The plan, at this juncture, does not appear to be the Debtor's best efforts.

Further, the evidence indicates that Debtor is not prosecuting this case in good faith. Debtor has attempted to confirm this plan to do away with his obligation to increase the plan payment when stops repaying Debtor on the 401K loan. There is no evidence presented as to any good faith reasons for this change. Further, Debtor knows the tax refunds received that the state tax payments are overpayments. It appears that Debtor intentionally presented knowing false financial information to the court, Chapter 13 Trustee, and creditors. This is not a demonstration of good faith.

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.

11.	**14-21142-E-13 LBG-11**	**THOMAS LISLE AND BARBARA TREAT Lucas Garcia**	**MOTION FOR COMPENSATION FOR LUCAS GARCIA, DEBTORS' ATTORNEY(S) 9-14-15 [147]**

Final Ruling: No appearance at the November 24, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, Creditors, parties requesting special notice, and Office of the United States Trustee on September 14, 2015. By the court's calculation, 71 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is continued to January 12, 2016 at 3:00 p.m.

Lucas Garcia, the Attorney ("Applicant") for Thomas Lisle and Barbara Treat, the Chapter 13 Debtor, ("Client"), makes a Second Request for the Allowance of Interim Fees and Expenses in this case. FN.1.

FN.1. The court notes that, while Applicant filed for § 330 Final Fees, the plan has only progressed 2 of the total 5 years provided in the Confirmed Plan. More fees and costs will certainly be requested by Applicant. For the reasons discussed below, the court will *sua sponte* treat this as an application for interim fees under 11 U.S.C. § 331.

The period for which the fees are requested is for the period November 7, 2013, through September 13, 2015. Applicant requests fees and costs in the amount of $5,107.06.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

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

the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

Id. at 959.

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

DISCUSSION

First, the court notes the legislative history of 11 U.S.C. § 331:

> Section 331 permits trustees and professional persons to apply to the court not more than once every 120 days for interim compensation and reimbursement payments. The court may permit more frequent applications if the circumstances warrant, such as in very large cases where the legal work is extensive and merits more frequent payments. The court is authorized to allow and order disbursements to the applicant of compensation and reimbursement that is otherwise allowable under section 330. The only affect of this section is to remove any doubt that officers of the estate may apply for, and the court may approve, compensation and reimbursement during the case, instead of being required to wait until the end of the case, which in some instances, may be years. The practice of interim compensation is followed in some courts today, but has been subject to some question. This section explicitly authorizes it.

House Report No. 95-595, 95th Cong., 1st Sess. 330 (1977); *Senate Report No. 95-989, 95th Cong., 2d Sess.* 41-2 (1978). In sum, § 331 is the appropriate avenue to request reimbursement for fees and costs while the case is pending, which is then subject to final approval under § 330.

While the court approved final fees in this case previously under § 330, this was an apparent oversight of the court. The Motion, as discussed supra, should be requested pursuant to § 331. The court sua sponte corrects this error and construes both the previous request (Dckt.) and the instant Motion as a request for interim fees pursuant to 11 U.S.C. § 331.

Second, the court finds helpful, and in most cases essential, for

professionals to provide a basic task billing analysis for the services provided and fees charged. This has long been required by the Office of the U.S. Trustee, and is nothing new for professionals in this District. The task billing analysis requires only that the professional organize his or her task billing. The more simple the services provided, the easier is for Applicant to quickly state the tasks. The more complicated and difficult to discern the tasks from the raw billing records, the more evident it is for Applicant to create the task billing analysis to provide the court, creditors, U.S. Trustee with fair and proper disclosure of the services provided and fees being requested by this Professional.

Included in the motion is Applicant's raw time and billing records, which has not been organized into categories. Rather than organizing the activities which are best known to Applicant, it is left for the court, U.S. trustee, and other parties in interest to mine the records to construct a task billing. The court declines the opportunity to provide this service to Applicant, instead leaving it to Applicant who intimately knows the work done and its billing system to correctly assemble the information. FN.1.

FN.1. The requirement for a task billing analysis is not new to this district and was required well before the modern computer billings systems. More than 20 years ago a bright young associate (not the present judge) developed a system in which he used different color highlighters to code the billing statements for the time period for the fee application. General administrative matters were highlighted in yellow, sales of property in green, adversary proceedings in red, and so on. Subsequently, the billing procedure advanced so that each adversary proceeding was provided a separate billing number so that it would generate a separate billing. Within the bankruptcy case billing number the time entries were given a code on which the billing system could sort the entries and automatically produce a billing report which separates the activities into the different tasks.

The court continues the hearing, rather than denying the Application without prejudice, to afford Applicant the opportunity to provide the court, U.S. Trustee, and other parties in interest requesting the information with the necessary task billing analysis.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Lucas Garcia ("Applicant"), Attorney for the Chapter 13 Debtor, having been presented to the court, no task billing analysis having been provided in support of the Application, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Application for Fees and Expenses is continued to January 12th at 3:00 p.m. Applicant shall file a supplemental declaration and supporting

documents as necessary, to provide the court, U.S. Trustee, and other parties in interest requesting copies of such supplemental pleadings, with an explanation of the fees requested and a task billing analysis which specifically groups the time and charges by the various task areas for such services.

12. 15-26247-E-13 RICHARD LAWSON
DPC-1 Marc Voisenat

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
9-23-15 [21]

Final Ruling: No appearance at the November 24, 2015 hearing is required.

The Chapter 13 Trustee having filed a Withdrawal of the Objection to Confirmation of Plan, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(I) and Federal Rules of Bankruptcy Procedure 9014 and 7041, the court having signed an order confirming the Chapter 13 plan on November 6, 2015 (Dckt. 37), **the Objection to Confirmation of Plan was dismissed without prejudice, and the matter is removed from the calendar.**

13. 15-27047-E-13 PRISCILLA/ANDREW CARRASCO
PGM-1 Peter Macaluso
MOTION TO CONFIRM PLAN
10-5-15 [25]

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.

The Motion to Confirm Plan was filed on October 5, 2015. The hearing on the Motion was set for November 17, 2015. (Forty-three days notice.) On October 13, 2015, Debtor filed an Amended Notice of Hearing, effectively continuing the matter to November 24, 2015. (Fifty days from filing of Motion.) On November 4, 2015, Debtor filed a second Amended Notice of Hearing, further continuing the matter to January 12, 2016. (Now, ninety-nine days after the filing of the Motion.)

Nothing in the court's file indicates why Debtor is repeatedly filing amended notices of hearing – effectively usurping the court's control of its calendar. A party does not have the ability to unilaterally continue hearings.

14. 15-27054-E-13 YUVANA NUNEZ
DPC-1 John Burt
OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
10-29-15 [20]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney on October 29, 2015. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

1. The Debtor cannot make the plan payments:

   a. The Debtor lists Nationstar Mortgage LLC in Class 1, yet listed the monthly contract installments as $0.00. Schedule J lists rental or home ownership expense in the amount of $1,250.00.

   b. The Debtor lists Capital One Auto Finance on Schedule D but does not provide for the debt in the plan. The Debtor's Schedule J lists the car payment in the amount of $384.00. The Trustee cannot determine if the car payment amount or the net monthly income on Schedule J are accurate.

2. The Debtor fails to indicate on Section 2.06 whether the attorney is seeking fees pursuant to Local Bankr. R. 2016-1(a) or through 11 U.S.C. § 330 and 331. Additionally, Section 2.07 lists the administrative expenses as $0.00

The Trustee's objections are well-taken.

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

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

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

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

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

Here, the plan provides for treatment to Nationstar Mortgage, LLC but does not provide for any monthly dividend. This is nor permissible under 11 U.S.C. § 1325(a)(5). The Debtor, if providing for the creditor, must provide for the payment in full or an agreed upon treatment. Neither has been done.

As to the Trustee's objection to the Debtor failing to provide for Capital One Auto Finance in plan also raises concerns. The Debtor lists the creditor as a secured claim on Schedule D and provides for payment in Schedule J. However, the plan does not disclose the creditor nor lists the creditor in Class 4. Such failures raise serious concerns over whether the Debtor can afford the plan, whether the financial information provided for by the Debtor is accurate, and whether the proposed plan is the Debtor's best efforts.

Lastly, the Debtor's failure to indicate how the attorney's fees are to be paid just further highlights that the plan does not appear to be the Debtor's best efforts. The plan appears to be a mere placeholder while the Debtor prepares a more accurate and feasible amended plan.

Therefore, 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.

15. 15-27154-E-13 EVANGELINA GARIBAY
DPC-1 Charnel James

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
10-29-15 [14]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney on October 29, 2015. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

1. The Debtor is delinquent in plan payments in the amount of $3,082.96. The Debtor has paid $0.00 into the plan to date. The plan requires a payment of $982.96 per month for sixty months, and an additional lump sum payment of $2,100.00 in Month 1 of the Plan.

2. The Debtor lists Chrysler Capital in Class 1 which appears improper. The Debtor admitted at the Meeting of Creditors that

the 2011 Ford Escape should be listed in Class 4.

3. The Debtor stated at the Meeting of Creditors that she works 4 months a year for Pacific Coast, receives unemployment income benefits while not working and 2 months each year she receives no income. Debtor additionally admitted that her 23-year-old daughter contributes $350.00 per month to the household.

4. The Debtor has failed to list any income on Form 22C-1. The Debtor lists the household size as 3 yet only has one dependant listed on Schedule J. Additionally, the Debtor failed to report any income for 2015 on Statement of Financial Affairs.

5. The Debtor fails the liquidation analysis. The Debtor has non-exempt equity totaling $127.00 and the Debtor is proposing a 0% dividend to unsecured. The Debtor is married and her spouse is not included in the bankruptcy and failed to file a Spousal Waiver for use of the California State Exemptions.

The Trustee's objections are well-taken.

The basis for the Trustee's objection is that the Debtor is $3,082.96 delinquent in plan payments. The Debtor has paid $0.00 into the plan to date. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

The Trustee's second objection deals with the improper classification of Chrysler Capital. The Debtor improperly listed the creditor as a Class 1 claimant when the Debtor stated at the Meeting of Creditors that the creditor is meant to be in Class 4. The inaccuracies of the plan make it impossible for the court or parties in interest to determine the viability and feasibility of the plan.

As to the Trustee's third and fourth objection, the concern is whether the information provided by the Debtor, namely the Debtor's income, is an accurate picture of the Debtor's finances. The Debtor admitted at the Meeting of Creditors that she is paid 4 months a year for Pacific Coast and then receives unemployment. However, the Debtor only lists the unemployment income on Schedule J. Additionally, the Debtor failed to disclose the contributions from the Debtor's daughter. The concern over whether the court has an accurate picture of the Debtor's finances is further exasperated by the Debtor failing to completely fill out the Statement of Financial Affairs. The court cannot confirm the plan when the court is unsure if the plan is feasible and viable.

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 Debtor has reported non-exempt equity in the amount of $127.00 and the Debtor is proposing a 0% dividend to unsecured creditors. The Debtor has not explained how, under the proposed plan and the schedules filed under the penalty of perjury, that the unsecured claimants are entitled to a 0% dividend especially when the Debtor's non-filing spouse has failed to file a Spousal Waiver.

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.

16. 13-27864-E-13 KIM/KERI WONG — MOTION TO MODIFY PLAN
SJS-2 Scott Johnson — 10-12-15 [57]

Final Ruling: No appearance at the November 24, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 12, 2015. By the court's calculation, 43 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is granted.

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

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

holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on October 12, 2015 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

17. 12-22167-E-13 MICHAEL/TANYA CHILSON MOTION TO MODIFY PLAN
BLG-2 Paul Bains 10-20-15 [38]

Final Ruling: No appearance at the November 24, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 20, 2015. 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). Upon review of the Motion and supporting pleadings, no opposition having been filed, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

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

Michael and Tanya Chilson ("Debtor") filed the instant Motion to Confirm the Modified Plan on October 20, 2015. Dckt. 28.

TRUSTEE'S LIMITED OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a limited opposition to the instant Motion on November 6, 2015. Dckt. 45. The Trustee states that the proposed plan no longer provides for the secured creditor Central Mortgage Company. Under the confirmed plan (Dckt. 5), the creditor was listed as a Class 4 claimant in the amount of $1,535.13.

The Trustee does not oppose if the order confirming corrects this oversight.

DEBTOR'S RESPONSE

The Debtor filed a response on November 10, 2015. Dckt. 48. The Debtor admit that the exclusion of Central Mortgage Company in Class 4 was an oversight and that the Debtor is continuing to make ongoing mortgage payments directly in the amount of $1,536.13. The Debtor requests that the order confirming corrects this oversight.

DISCUSSION

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

The only objection to the proposed plan is whether the Debtor accidently excluded Central Mortgage Company from Class 4 under the proposed

plan. The Debtor admits in their response that this was an oversight and asks that the order confirming corrects this mistake.

A review of the confirmed plan and the supplemental Schedule J shows that the Debtor has and intends to continue to make ongoing monthly mortgage payments to Central Mortgage Company in the amount of $1,536.13. As this appears to be a mere scrivener's error and the correcting this in the order confirming having no effect on the other terms of the plan, the court finds that the error can be corrected in the order confirming.

Therefore, following the additional language that "Debtors will continue to make their ongoing mortgage payment of $1,536.13 to Central Mortgage company as a Class 4 claim" in the order confirming, the modified Plan complies with 11 U.S.C. §§ 1322, 1325(a) and 1329 and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on October 20, 2015 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, adding the additional language "Debtors will continue to make their ongoing mortgage payment of $1,536.13 to Central Mortgage company as a Class 4 claim", 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. 14-25069-E-13 KENNETH/RENETTE JOHNSON CONTINUED MOTION TO MODIFY PLAN
RJ-2 Richard Jare 9-1-15 [79]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 1, 2015. 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). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

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

Kenneth and Renette Johnson ("Debtor") filed the instant Motion to Confirm the Modified Plan on September 1, 2015. Dckt. 79.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an objection to the instant Motion on September 21, 2015. Dckt. 86. The Trustee objects on the following grounds:

1. The Debtor is delinquent in the amount of $200.00 under the terms of the proposed plan. According to the proposed plan, payments of $26,250.00 have become due. The Debtor has paid a total of $26,050.00 with the last payment posted on September 2, 2015 in the amount of $2,050.00

2. Section 6.12 of the plan provides:

> Section 6.12 - Additional Provisions for Section 4.02(b). The disbursement Dividends are based upon a trustee compensation of 6.5%. In the event the trustee compensation rate increases, the trustee is entitled to inform the debtors of an automatic corresponding plan payment increase.
>
> The Trustee opposes this provision in that the Debtor appears to require the Trustee to contact the Debtor for an increase to occur in Trustee compensation which appears contrary to the statute.

3. Section 6.10 and 6.11 of Debtor's modified plan are not clear to the Trustee. Arguably they appear to provide that the Debtor will pay $367.00 per month to student loan debts while general unsecured claims receive 0%. The Trustee objects to the plan as unfairly discriminating in favor of student loan debtors and against general unsecured claims. In the event that the plan calls for arrears to be paid by the Trustee, it is not clear how the plan can defer payments to the student loans when arrears have accrued – the long term debt is not being maintained under 11 U.S.C. § 1325(a)(5).

OCTOBER 6, 2015 HEARING

At the hearing, the court continued the Motion to Confirm the Modified Plan to 3:00 p.m. on October 20, 2015 to allow the Debtor to supplement the record to address the additional provisions regarding the student loan.

TRUSTEE'S RESPONSE

The Trustee filed a response on October 13, 2015. Dckt. 91. The Trustee restates his first objection.

As to the second objection, the Trustee opposes the proposed language of Section 6.12 because it requires the Trustee to change the way the Trustee's system disburses administrative expenses for this case alone. The case is feasible with a monthly dividend of $135.00 so the proposed additional language of "$57 plus up to an additional amount available in the event the trustee compensation [sic] is below 10% and that additional sum could increase the dividend to an amount estimated [sic] to be $135," is unnecessary.

For the Department of Education, the Trustee states that the plan states that post petition arrears are not provided for since it is the policy of the Department of Education to defer post arrears upon filing of a Chapter 13 bankruptcy case. Debtor does not indicate whether they have accrued post petition arrears and if so in what amount.

The Trustee concludes by stating that the Trustee does not oppose the additional provisions dealing with the real property but notes that they are unusual. Namely:

1. Debtor has increased various time lines from 14 days to 28 days.

2. Debtor has added additional language under 6.05 stating that a loan modification is likely and deleted the provision which require arrearage cure payments made during the term of the plan.

3. Debtor has omitted the fourth point under Section 6.07 which should state "Post-Petition non-monetary default under the Deed of Trust, including, without limitation, the failure to timely pay post-petition property taxes or property insurance."

4. The Debtor omitted the language regarding the termination of the automatic stay.

5. Section 6.04 states that they want to start the process of a loan modification, not that they have.

OCTOBER 20, 2015 HEARING

On October 20, 2015, the court continued the hearing to 3:00 p.m. on November 24, 2015. Dckt. 98. The court ordered that the Debtor shall file and serve the proposed modifications for the Bank of America, N.A. claim on or before October 30, 2015; and the opposition if any, filed and served on or before November 13, 2015. Id.

TRUSTEE'S SUPPLEMENTAL OPPOSITION

The Trustee filed a supplemental opposition on November 10, 2015. Dckt. 99. The Trustee states, first, that the Debtor has failed to file and serve the proposed modifications by the October 20, 2015 deadline. The Trustee does note that the Debtor sent the Trustee, through email, a copy of the proposed Ensminger provision language but the Debtor never properly served or uploaded.

The Trustee continues by stating that the Debtor continues to be delinquent under the proposed plan. The Debtor is $2,400.00 delinquent under the proposed plan. The Trustee has adjusted the payments in the case to disburse in amounts consistent with the proposed plan pursuant to the October 20, 2015 Interim Order.

DEBTOR'S SUPPLEMENTAL EXHIBIT

The Debtor filed a supplemental exhibit on November 18, 2015. Dckt. 102. The cover page provides the following explanation for why the Debtor failed to file and serve the supplement by the October 30, 2015 deadline:

> Submission on or prior to October 30th was inadvertently overlooked.

No declaration is filed in conjunction with the proposed order.

The proposed order contains the following additions:

> It is further ORDERED that the plan is modified to provide:

> "All 28 day provisions in Section 6 (an all its subsections) of the plan, the additional provisions, shall be shortened to 14 days".

It is further ORDERED that the plan is modified to provide:

> In addition to the provisions currently stated in § 6.07 Events of Default, the following shall also apply as a condition of default: "4. Post-petition non-monetary default under the Deed of Trust, including without limitation, the failure to timely pay post petition property taxes or property insurance.

It is further ORDERED that the plan is modified to provide:

> § 6.13 Termination of the automatic Stay. Bank of New York Mellon may file and serve an ex parte application for relief from the automatic stay so as to allow it to conduct a non-judicial foreclosure sale of it's collateral in the event of an event of Default under § 6.07 of the plan.

Dckt. 102.

DISCUSSION

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

The Trustee's objections are well-taken.

The basis for the Trustee's objection is that the Debtor is now $2,400.00 delinquent in plan payments, which is an increase of $2,200.00 in delinquency since the last hearing on the instant Motion. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

While the proposed Ensminger provision appear to correct the Trustee's prior objection, the Debtor's continued delinquency under the proposed plan makes confirmation impossible. The Debtor has had over two months to operate under the proposed plan and has failed to timely provide for the plan payments. This raises serious doubts of the feasibility of the plan when the Debtor cannot stay current under a proposed plan, not yet confirmed.

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

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

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

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

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

19. 14-28480-E-13 JAVIER MACIEL
PGM-1 Peter Macaluso
MOTION TO MODIFY PLAN
10-19-15 [32]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 19, 2015. By the court's calculation, 36 days' notice was provided. 35 days' notice is required.

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

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

Javier Maciel ("Debtor") filed the instant Motion to Confirm the Modified Plan on October 19, 2015. Dckt 33.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on November 10, 2015. Dckt. 38. The Trustee objects on the ground that the Debtor's declaration is insufficient at explaining the adjustments to the Debtor's budget. The Trustee provides the following chart comparing the August 21, 2014 Schedules I and J and the October 19, 2015 Schedules I and J:

INCOME

	August 21, 2014	October 19, 2015
Debtor - Net Income	$2,341.41	$2,841.86
Non-filing Spouse Income	$1,630.20	$1,656.20
Combine Net Income	$3,971.61	$4,498.06

EXPENSES

	August 21, 2014	October 19, 2015	Difference
Rent/Mortgage	$1,275.00	$1,325.00	$50.00
Renter's insurance	$0.00	$20.00	$20.00
Home maintenance	$0.00	$100.00	$100.00
Electricity/Heat	$175.00	$100.00	<$75.00>
Telephone/Cell	**$60.00**	**$260.00**	**$200.00**
Food	$500.00	$600.00	$100.00
Childcare/Education Costs	$800.00	$761.00	-<$39.00>
Clothing/Laundry	$25.00	$50.00	$25.00
Medical/Dental	$30.00	$42.00	$12.00
Transportation	**$235.00**	**$350.00**	**$115.00**
Entertainment	$11.00	$22.00	$11.00
Charity	$300.00	$50.00	-<$250.00>
Life Insurance	**$0.00**	**$78.00**	**$78.00**
Health Insurance	**$0.00**	**$50.00**	**$50.00**
Vehicle Insurance	$140.61	$150.00	$9.39
Elderly parents	**$0.00**	**$100.00**	**$100.00**

The Trustee highlights the following changes:

1. The $200.00 increase in Debtor's telephone/cell phone.

2. The slight reduction in childcare expenses when the Debtor's dependent children have increased from 1 to 2.

3. The $50.00 increase in health insurance when Schedule I reflects insurance expense being withheld from earning.

4. The $100.00 monthly contribution to elderly parents.

DEBTOR'S SUPPLEMENTAL DECLARATION

The Debtor filed a supplemental declaration on November 17, 2015. Dckt. 41. The Debtor provides the following responses to the adjustments highlighted by the Trustee:

1. The rent was increased by $50.00.

2. "Renter's insurance is a necessity."

3. "Home maintenance I have made minor repairs around the house and my dryer broke."

4. "Electricity/Heat - I do not use my air conditioning."

5. "Telephone/Cell - my rates increased."

6. "Food increase because I now have two children in the home, the third son was born 9-15-15."

7. "Childcare/Education Cost decreased because pre-school rete [sic] decreased."

8. "Clothing/Laundry increase is due to the newborn."

9. "Medical/Dental increase because the rates increased."

10. "Transportation increased monthly because I drive more."

11. "I no longer donate to charity."

12. "Life insurance is a necessity."

13. "Health Insurance increase rates."

14. "Vehicle Insurance rates increased."

15. "Elderly Parents contribution of $100 is because my mother in law has not [sic] income."

DISCUSSION

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

The Trustee's objection is well-taken. The Debtor and Debtor's attorney apparently believe that substantial change to the Debtor's budget does not require explanation, especially when the proposed plan relies on such budget. The Debtor and Debtor's counsel, rather than providing such testimony at the time of filing the instant Motion and proposed plan, only provides an explanation after the Trustee raises concerns. However, looking at the response, the Debtor's supplemental declaration leaves much to be desired.

The Debtor's supplemental response does not provide what the court considers "explanation." Instead, for the majority of the expenses, the Debtor merely states the expense is either a "necessity" or that the rates increased. This does not explain why, for instance, the Debtor's telephone expenses raised to $200.00 from $60.00. A $140.00 increase in an expense is not merely an increase in rates. This type of categorical and conclusory justification in rate changes without providing more is not persuasive.

While some of the explanations sufficiently provide details as to why the change (for instance, the change in child care rates), the majority of the expenses are not sufficiently justified. For example, the explanation that the "Electricity/Heat" reduced because Debtor "did not use [his] air conditioning" suggests that the Debtor is taking a limited snap shot of the Debtor's finance to give the appearance of feasibility of the plan.

Therefore, because the Debtor has failed to give sufficient evidence and explanation as to the Debtor's changes in expenses, the court is unable to determine if the proposed plan is feasible or viable. 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.

20. 10-52482-E-13 SEAN/JENNIFER BAUERS
TBH-2 Thomas Hjerpe

MOTION FOR COMPENSATION FOR THOMAS B. HJERPE, DEBTORS' ATTORNEY
10-13-15 [207]

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

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

Below is the court's tentative ruling.

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

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

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

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

Thomas Hjerpe, the Attorney ("Applicant") for Sean and Jennifer Bauers, the Chapter 13 Debtor ("Client"), makes a Second and Final Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period February 18, 2014, through November 24, 2015. The order of the court approving employment of Applicant was entered on January 27, 2012. Dckt. 174. Applicant requests fees in the amount of $1815.00 and $0.00 in costs.

Due to the substantial defects in the pleadings, the Application is denied without prejudice. The court having previously addressed this pleading issues with counsel in February 2014 (Dckt. 203) and those defects not being

corrected, the court will not continue the hearing on this Motion.

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.

DISCUSSION

First, the court notes that, in the February 11, 2014 Civil Minute Order approving Applicant’s Motion for Interim Fees, the Order made note that:

> The court recently addressed with Counsel the requirements of Federal Rule of Bankruptcy Procedure 9013, 7007; Federal Rule of Civil Procedure 7; and Local Bankruptcy Rules and Guidelines for Pleadings which are enforced in this court. Counsel has motions in the pipeline for which the court will not deny or continue for supplemental pleadings when appropriate, such as in the present case. The court is confident that motions and other pleadings filed going forward with comply with the Rules and Guidelines.

Dckt. 203, FN. 1. However, now more than a year later, Applicant’s instant motion again does not comply with the requirements provided under Federal Rules of Bankruptcy Procedure 9013 and 7007, Federal Rule of Civil Procedure 7, and Local Bankruptcy Rules and Guidelines for Pleadings.

Second, the court finds helpful, and in most cases essential, for professionals to provide a basic task billing analysis for the services provided and fees charged. This has long been required by the Office of the U.S. Trustee, and is nothing new for professionals in this District. The task billing analysis requires only that the professional organize his or her task billing. The more simple the services provided, the easier is for Applicant to quickly state the tasks. The more complicated and difficult to discern the tasks from the raw billing records, the more evident it is for Applicant to create the task billing analysis to provide the court, creditors, U.S. Trustee with fair and proper disclosure of the services provided and fees being requested by this Professional.

Included in the motion is Applicant’s raw time and billing records, which has not been organized into categories. Rather than organizing the

activities which are best known to Applicant, it is left for the court, U.S. trustee, and other parties in interest to mine the records to construct a task billing. The court declines the opportunity to provide this service to Applicant, instead leaving it to Applicant who intimately knows the work done and its billing system to correctly assemble the information. FN.1.

FN.1. The requirement for a task billing analysis is not new to this district and was required well before the modern computer billings systems. More than 20 years ago a bright young associate (not the present judge) developed a system in which he used different color highlighters to code the billing statements for the time period for the fee application. General administrative matters were highlighted in yellow, sales of property in green, adversary proceedings in red, and so on. Subsequently, the billing procedure advanced so that each adversary proceeding was provided a separate billing number so that it would generate a separate billing. Within the bankruptcy case billing number the time entries were given a code on which the billing system could sort the entries and automatically produce a billing report which separates the activities into the different tasks.

The court denies without prejudice the Application

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Thomas Hjerpe (“Applicant”), Attorney for the Chapter 13 Debtor, having been presented to the court, no task billing analysis having been provided in support of the Application, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Application is denied without prejudice.

21. 13-29882-E-13 VASILIY ORMANZHI **MOTION FOR OMNIBUS RELIEF**
PGM-1 Peter Macaluso **10-26-15 [47]**

Final Ruling: No appearance at the November 24, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 26, 2015. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

Son of Debtor, Vadim Ormanzhi, seeks an order approving the motion to substitute the Mr. Ormanzhi for the deceased Debtor, Vasiliy Ormanzhi. This motion is being filed pursuant to Federal Rule Of Bankruptcy Procedure 1004.1.

The Debtor filed for relief under Chapter 13 on July 26, 2013. On October 7, 2013, the Debtor's Chapter 13 Plan was confirmed. Dckt. 32. On September 19, 2015, Debtor Vasiliy Ormanzhi passed away. The Debtor's son asserts that he is the lawful successor and representative of the Debtor.

Pursuant to Federal Rule of Bankruptcy Procedure 1004.1, the Joint Debtor requests authorization to be substituting in for the deceased debtor and to perform the obligations and duties of the deceased party in addition to performing her own obligations and duties. The Suggestion of Death was filed on October 26, 2015. Dckt. 47. Debtor's son is the son of the deceased party and is the successor's heir and lawful representative. Debtor's son states that he will continue to prosecute this case in a timely and reasonable manner.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response to the instant Motion on November 11, 2015. Dckt. 52. The Trustee states that he does not

oppose the Motion. He notes that the Debtor's attorney does not cite by section the legal authority for continued administration of the case as to Fed. R. Bankr. P. 1016 and Local Bankr. R. 1016-1. However, Debtor's attorney does recognize that he must prove that further administration is possible and in the best interest of the parties.

The Trustee notes where the plan will result in the stripping a second deed of trust, continued plan payments and some payment to unsecured claims, the Trustee believes that continued administration is in the best interest of the parties.

DEBTOR'S SON'S REPLY

On November 17, 2015, the Debtor's son filed a reply. Dckt. 55. After citing to Fed. R. Bankr. P. 1016, the Debtor's son asserts that he will be able to complete the case. The Debtor's son states that it is in the best interest of the estate and the creditors to continue the administration of the state. The Debtor's son recognizes that he may need to supplement the schedules if there is a resulting increase in income as a result of the death of the Debtor.

DISCUSSION

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

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

The application of Rule 25 and Rule 7025 is discussed in COLLIER ON BANKRUPTCY, 16TH EDITION, §7025.02, which states [emphasis added],

> Subdivision (a) of Rule 25 of the Federal Rules of Civil Procedure deals with the situation of death of one of the parties. If a party dies and the claim is not extinguished, then the court may order substitution. **A motion for substitution may be made by a party to the action or by the successors or representatives of the deceased party.** There is no time limitation for making the motion for substitution originally. Such time limitation is keyed into the period following the time when the fact of death is suggested on the record. In other words, procedurally, **a statement of the fact of death is to be served on the parties in accordance with Bankruptcy Rule 7004 and upon nonparties as provided in**

> **Bankruptcy Rule 7005** and suggested on the record. The suggestion of death may be filed only by a party or the representative of such a party. The suggestion of death should substantially conform to Form 30, contained in the Appendix of Forms to the Federal Rules of Civil Procedure.
>
> The motion for substitution must be made not later than 90 days following the service of the suggestion of death. Until the suggestion is served and filed, the 90 day period does not begin to run. In the absence of making the motion for substitution within that 90 day period, paragraph (1) of subdivision (a) requires the action to be dismissed as to the deceased party. However, the 90 day period is subject to enlargement by the court pursuant to the provisions of Bankruptcy Rule 9006(b). Bankruptcy Rule 9006(b) does not incorporate by reference Civil Rule 6(b) but rather speaks in terms of the bankruptcy rules and the bankruptcy case context. Since Rule 7025 is not one of the rules which is excepted from the provisions of Rule 9006(b), the court has discretion to enlarge the time which is set forth in Rule 25(a)(1) and which is incorporated in adversary proceedings by Bankruptcy Rule 7025. Under the terms of Rule 9006(b), a motion made after the 90 day period must be denied unless the movant can show that the failure to move within that time was the result of excusable neglect. 5 The suggestion of the fact of death, while it begins the 90 day period running, is not a prerequisite to the filing of a motion for substitution. The motion for substitution can be made by a party or by a successor at any time before the statement of fact of death is suggested on the record. **However, the court may not act upon the motion until a suggestion of death is actually served and filed.**
>
> The **motion for substitution together with notice of the hearing is to be served on the parties in accordance with Bankruptcy Rule 7005 and upon persons not parties in accordance with Bankruptcy Rule 7004...**

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

Here, Vadim Ormanzhi has provided sufficient evidence to show that administration of the Chapter 13 case is possible and in the best interest of creditors after the passing of the debtor. The Motion was filed within the 90 day period specified in Federal Rule of Bankruptcy Procedure 1016, following the filing of the Suggestion of Death. Dckt. 47. Based on the evidence provided, the court determines that further administration of this Chapter 13 case is in the best interests of all parties, and that Debtor's son, Vadim Ormanzhi, as the son of the deceased party and is the successor's heir and

lawful representative may continue to administer the case on behalf of the deceased debtor, Vasiliy Ormanzhi. The court grants the Motion to Substitute Party.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Substitute After Death filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and Vadim Ormanzhi is substituted as the successor-in-interest to Vasiliy Ormanzhi and is allowed to continue the administration of this Chapter 13 case pursuant to Federal Rule of Bankruptcy Procedure 1016.

22. 15-27283-E-13 APN-1 | **GABRIELA RENTERIA AND JESUS MARTINEZ**
Steven Alpert | **OBJECTION TO CONFIRMATION OF PLAN BY CAPITAL ONE AUTO FINANCE**
10-1-15 [14]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, Chapter 13 Trustee and Office of the United States Trustee on October 1, 2015. By the court's calculation, 54 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

Capitol One Auto Finance ("Creditor") opposes confirmation of the Plan on the basis that the Debtor's plan improperly tries to value Creditor's claim and does not provide for the full claim of the Creditor. The plan attempts to value the Creditor's secured claim as $7,000.00. The Creditor asserts that it holds a $12,173.84 secured claim. Proof of Claim No. 9.

The Creditor's objections are well-taken.

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

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

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

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

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

Here, the claim is provided for in Class 2 but is not provided for in full. Instead, it appears that the Debtor is attempting to value the Creditor's secured claim at $7,000.00. This is improper for two reasons. First, there is no Motion to Value Collateral of Creditor pursuant to 11 U.S.C. § 506(a). Second, even if there was a pending Motion, the value of the Creditor could not be claimed pursuant to the hanging paragraph of 11 U.S.C. § 1325 because the debt was incurred less than 910-days prior to filing.

Therefore, 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 Creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to confirmation the Plan is sustained and the proposed Chapter 13 Plan is not confirmed.

23.	**15-27283-E-13 DPC-1**	**GABRIELA RENTERIA AND JESUS MARTINEZ Steven Alpert**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 10-29-15 [22]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney on October 29, 2015. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

1. Debtor is delinquent in plan payments in the amount of $413.73. The Debtor has paid $0.00 into the plan to date.

2. The plan will exceed 60 months. The reason for such is the Debtor's plan indicates that they will try to value the secured claim of Capital One Auto Finance. However, the Trustee states that the debt was incurred less than 910-days prior to the filing.

3. Section 2.06 of the plan, the Rights and Responsibilities, and Statement of Financial Affairs all state that the Debtor's attorney was paid $290.00 prior to the filing. However, the Trustee asserts that a review of the Debtor's Bank of America bank statements dated July 30, 2015 to August 27, 2015 a withdrawal dated August 24, 2015 was payable to "PRICE LAW GROUP APC" in the amount of $1,085.00. This is a difference of $792.00 compared to what was reported by the Debtor.

4. The expenses listed are improper. The Debtor lists an expense in the amount of $275.00 on Schedule J for Vehicle 1. Debtor's automobile is listed in Class 2.

The Trustee's objections are well-taken.

The basis for the Trustee's objection is that the Debtor is $413.73 delinquent in plan payments. According to the Trustee, the Debtor has failed to make any plan payments into the plan. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

Debtor is in material default under the plan because the plan will complete in more than the permitted 60 months. According to the Trustee, the plan will complete in excess of 60 months due to the Debtor relying on a Motion to Value the Collateral of Capitol One Auto Finance. However, as noted by the Trustee, the Debtor will be unable to value the secured claim of the creditor because the debt is for the purchase of a vehicle less than 910-days prior to filing. This exceeds the maximum 60 months allowed under 11 U.S.C. § 1322(d). Therefore, the objection is sustained.

The Trustee's remaining objections concern the accuracy, truthfulness of the Debtor's representations. To first address the attorney fees, it appears that the Debtor has inaccurately reported what has been paid to the Debtor's counsel to date. In all places required in the petition and schedules, the Debtor indicates that $290.00 was paid to Debtor's counsel prior to filing. However, as indicated by the Trustee, it appears that the Debtor has actually paid $1,085.00 to Debtor's counsel.

The proposed plan also represents that only $290.00 was paid to the Debtor's counsel prior to the plan and that $3,710.00 shall be paid through the plan. While the Debtor does not properly indicate whether the see will be pursuant to Local Bankr. R. 2016-1(c) or through 11 U.S.C. §§ 330 and 331, there is a serious concern over whether the Debtor and Debtor's counsel has properly and truthfully reported the fees paid in the instant case. The court cannot determine if the plan is feasible or viable when the Debtor has not provided accurate financial information to the court.

Furthermore, the "double-counting" of the vehicle payment on Schedule J while also listing the payment in Class 2 of the proposed plan raises additional concerns for the court over the accuracy of the Debtor's finances.

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.

24. 12-24595-E-13 CHRISTOPHER DARLING — MOTION TO MODIFY PLAN
PGM-1 Peter Macaluso — 10-19-15 [70]

Final Ruling: No appearance at the November 24, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 19, 2015. By the court's calculation, 36 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is granted.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on October 19, 2015 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

25. 15-27296-E-13 HOWARD THOMAS
DPC-1 W. Steven Shumway

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
10-29-15 [14]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney on October 29, 2015. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

David P. Cusick, the Chapter 13 Trustee opposes confirmation of the Plan on the basis that the Debtor's plan is not the Debtor's best efforts. The Debtor is proposing $1,945.00 per month with a 100% dividend to unsecured creditors. The Debtor's Schedules I and J, provided to the Trustee at the Meeting of Creditors, indicate the Debtor has a net income of $3,826.32.

The Trustee states that the Schedules filed by the Debtor indicates that the Debtor's non-filing spouse is unemployed and that the Debtor's 24-year-old son lives with the Debtor. Additionally, the Trustee notes that at the Meeting of Creditors, the Debtor admitted that the mortgage expense of $1,158.00 is not correctly listed as an expense in the court-filed Schedule J.

The Debtor told the Trustee at the Meeting of Creditors that his non-filing spouse is now employed and that his son has since moved out of the residence. The Schedule J provided by the Debtor to the Trustee removed the son as a dependant and corrected the mortgage expense to $1,158.00.

The Trustee's objections are well-taken. The Trustee's objection reveals that the financial information filed by the Debtor is not accurate nor properly reflects the Debtor's current financial reality. Instead, the Schedules are based on inaccurate household income and expenses. The fact that the Debtor has not filed supplemental schedules to update the court on these changes makes it impossible for the court to review the plan and determine whether it is feasible and viable. The proposed plan, based on the representations of the Debtor at the Meeting of Creditor and to the admitted inaccuracies in the Schedules, the proposed plan is not the Debtor's best efforts. 11 U.S.C. § 1325(b).

Therefore, 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.

26. 15-25697-E-13 DONNA PALMER
APN-1 Eamonn Foster

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY CREDITOR WELLS FARGO BANK, N.A. 8-11-15 [15]

Final Ruling: No appearance at the November 24, 2015 hearing is required.

Local Rule 9014-1(f)(2) Motion - Continued Hearing. No 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, and Office of the U.S. Trustee on August 11, 2015. By the court's calculation, 35 days' notice was provided. 70 days' notice is required.

The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Upon review of the Motion and supporting pleadings, no opposition having been filed, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

The court's decision is to overrule the Objection.

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

1. The value of the collateral is improperly low.

2. The proposed $148.24 monthly adequate protection payments is too low.

3. The proposed interest rate of 4.25% is less than necessary under *Till*.

OCTOBER 20, 2015 HEARING

On October 6, 2015, the Motion to Value Collateral of Wells Fargo Bank was heard. At the request of the parties, the Motion was set for an evidentiary hearing on November 23, 2015 at 9:00 a.m. Since the Trustee's objections relates to the Motion to Value Collateral, the instant Objection was continued to 3:00 p.m. on November 24, 2015.

OCTOBER 28, 2015 ORDER

On October 22, 2015, the Debtor and Creditor filed a stipulation which resolved the Motion to Value Collateral. The parties stipulated to value the secured claim of Wells Fargo Bank to be $8,750.00. The court signed an order on October 28, 2015, valuing the secured claim of Creditor at $8,750.00.

The Stipulation also contained additional terms that the court stated in the order would be addressed at the hearing on the instant Objection. The

Stipulation provides the following terms:

1. The secured claim shall be $8,750.00 with interest thereon accruing at the rate of 4.50% per annum.

2. The Creditor shall be entitled to receive pre- and post-Confirmation monthly adequate protection payments of no less than $163.13 per month under and pursuant to Debtor's Chapter 13 Plan.

3. Debtor agrees to amend the plan and/or accompanying schedules, as and if necessary, to ensure that the same conform with the terms of the Stipulation.

DISCUSSION

The proposed plan provides the following treatment for Creditor:

Amount Claimed	Value of Creditor's Interest in its Collateral	Interest Rate	Monthly Dividend
$10,679.00	$8,000.00	4.25%	$148.24

Under the Stipulation, the parties agreed to the following treatment:

Amount Claimed	Value of Creditor's Interest in its Collateral	Interest Rate	Monthly Dividend
$10,679.00	$8,750.00	4.50%	$163.13

The difference between the proposed plan terms and the Stipulation treatment is:

1. $750.00 difference in the value of the secured claim.

2. 0.25% difference in interest rate.

3. $14.89 difference in monthly dividend.

The proposed plan provides for a monthly plan payment of $324.00. Under to terms of the plan, the only claims to be paid are two Class 2 claimants (one being the Creditor). Under the proposed treatment of Creditor and the proposed monthly divided for the other Class 2 claimant, the total due to Class 2 claims would be $320.03. There are no administrative expenses to be paid through the plan and the proposed plan calls for an estimated dividend of 0% to Class 7 general unsecured claims.

Even with the proposed stipulated terms, the monthly plan payment will sufficiently fund the plans. The Trustee has withdrawn his objection in light

of the court's order valuing the Creditor's secured claim.

The court's own review of the plan and the stipulated terms of the Creditor's treatment are in the best interest of the creditors and estate. The Plan does comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is overruled and the Plan is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is overruled, Debtor's Chapter 13 Plan filed on July 16, 2015 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, incorporating the stipulated terms as to the treatment of Creditor's secured claim, 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. 15-25697-E-13 DONNA PALMER
DPC-1 Eamonn Foster

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
9-15-15 [24]

Final Ruling: No appearance at the October 20, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on September 15, 2015. By the court's calculation, 35 days' notice was provided. 14 days' notice is required.

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

The court's decision is to overrule the Objection.

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that the proposed plan relies on a pending Motion to Value Collateral of Wells Fargo Bank.

OCTOBER 20, 2015 HEARING

On October 6, 2015, the Motion to Value Collateral of Wells Fargo Bank was heard. At the request of the parties, the Motion was set for an evidentiary hearing on November 23, 2015 at 9:00 a.m. Since the Trustee's objections relates to the Motion to Value Collateral, the instant Objection was continued to 3:00 p.m. on November 24, 2015.

OCTOBER 28, 2015 ORDER

On October 22, 2015, the Debtor and Wells Fargo Bank filed a stipulation which resolved the Motion to Value Collateral. The parties stipulated to value the secured claim of Wells Fargo Bank to be $8,750.00. The court signed an order on October 28, 2015, valuing the secured claim of Wells Fargo Bank at $8,750.00.

TRUSTEE'S WITHDRAWAL

On November 9, 2015, the Trustee filed a withdrawal of his instant objection. Dckt. 44.

Therefore, in light of the Trustee's withdrawal of his Objection following the court's valuation of Wells Fargo Bank's secured claim, the objection is overruled.

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

holding that:

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

28. 15-22798-E-13 PARKER/DONNA PUGH
PGM-2 Peter Macaluso

MOTION TO APPROVE LOAN MODIFICATION
10-22-15 [108]

Final Ruling: No appearance at the November 24, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 22, 2015. 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). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Approve Loan Modification is denied without prejudice.

The Motion to Approve Loan Modification filed by Parker and Donna Pugh ("Debtor") seeks court approval for Debtor to incur post-petition credit. Wells Fargo Home Mortgage ("Creditor"), whose claim the plan provides for in Class 4, has agreed to a loan modification. The new principal balance will be $326,208.11. The interest rate will be 2.00% and the maturity date of the loan will be April 1, 2039. The payment amount for the first 60 months will be $1,487.74 at 2.00%.

The Motion requests that the court authorize Debtor to enter into a loan modification with "Wells Fargo Home Mortgage." In reviewing the Loan Modification documents (Exhibit A, Dckt. 111), a person known as "Wells Fargo Home Mortgage" does not appear to be a party to the modification. On the Modification Agreement (Deed of Trust), the "lender" is identified as "Wells Fargo Bank, N.A." Exhibit A, Dckt. 111 at 3. All of the terms of the Agreement are with "Wells Fargo Bank, N.A." The Agreement is executed for Wells Fargo Bank, N.A. by one of the Bank's Vice Presidents. *Id.* at 13. The Loan Modification document was prepared by Wells Fargo Bank, N.A. *Id.*

In reviewing the on-line data base provided by the California Secretary of State, the court notes that there formally was an entity known as "Wells Fargo Home Mortgage, Inc." http://kepler.sos.ca.gov/. This entity is

identified as having been “merged out.” The California Secretary of State also identifies two other “Wells Fargo Home Mortgage” entities: (1) Wells Fargo Home Mortgage of Hawaii, LLC (its status listed as cancelled) and Wells Fargo Home Mortgage, LLC (status listed as active, but “agent resigned 05/20/2014). *Id.*

The Motion is supported by the Declaration of Debtor. The Declaration affirms Debtor's desire to obtain the post-petition financing and provides evidence of Debtor's ability to pay this claim on the modified terms. Debtor testifies under penalty of perjury, “That we have been offered a loan modification by our lender, **Wells Fargo Home Mortgage**, under HAMP.” Dckt. 110, ¶ 3 [emphasis added].

David Cusick, the Chapter 13 Trustee, filed a non-opposition on November 10, 2015.

Wells Fargo Bank, N.A. filed proof of claim No. 3 in this case on June 11, 2015. The creditor is identified as **Wells Fargo Bank, N.A.** The Promissory Note attached to Proof of Claim No. 3 identifies the lender and payee under the notes as **Wells Fargo Bank, N.A.** Proof of Claim No. 3 Attachment, pg. 6. The Deed of Trust securing the Note attached to Proof of Claim No. 3 identifies Wells Fargo Bank, N.A. as the Lender and the beneficiary under the Deed of Trust. *Id.* at 11-13.

On September 2, 2015, a Notice of Mortgage Payment Change was filed, naming **Wells Fargo Bank, N.A.** as the creditor. The Notice is signed by a vice president of a “company” identified as “Wells Fargo Home Mortgage.”

On November 9, 2015, a second Notice of Mortgage Payment Change was filed, naming **Wells Fargo Bank, N.A.** as the creditor. The Notice is signed by a vice president of a “company” identified as “Wells Fargo Home Mortgage.”

Debtor has not provided the court with documentation of any debt owing to, or any loan (upon which a claim is based) for which some entity named “Wells Fargo Home Mortgage” is the creditor. The only evidence presented is that Wells Fargo Bank, N.A. is the creditor.

In light of more than five years stressing to the parties and attorneys who appear in this court the need to correctly identify the real parties in interest so that the court’s order have legal force and effect, the court is at a loss to find any bona fide, good faith reason for listing “Wells Fargo Home Mortgage” as the person with whom the court should authorize Debtor to modify a loan. The court presumes that Debtor and Debtor’s counsel carefully chose the name of the party with whom the loan modification was to be conducted. There is no evidence to support an order of the court authorizing a modification with Wells Fargo Home Mortgage. FN.1.

FN.1. It could well be that Debtor is attempting to mislead the court into entering an order which Debtor could later, in bad faith, disavow. Such conduct does not bode well for a debtor who must not only file, but propose and confirm a plan, and prosecute the bankruptcy case in good faith.

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 Approve the Loan Modification with Wells Fargo Home Mortgage filed by Parker and Donna Pugh 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.

29. 15-28690-E-13 LISA SLEDGE — MOTION TO EXTEND AUTOMATIC STAY
BLG-1 Paul Bains — 11-10-15 [8]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 10, 2015. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion to Extend the Automatic Stay is granted.

Lisa Sledge ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond 30 days in this case. This is the Debtor's second bankruptcy petition pending in the past year. The Debtor's prior bankruptcy case (No. 14-28563) was dismissed on October 25, 2015, after Debtor was in material default under the confirmed plan. *See* Order, Bankr. E.D. Cal. No. 14-28563, Dckt. 50, October 25, 2015. 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.

David Cusick, the Chapter 13 Trustee, filed a non-opposition to the instant Motion on November 12, 2015.

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 the Debtor failed to perform under the terms of a confirmed plan. *Id.* at § 362(c)(3)(C)(i)(II)(cc). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* at § 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, 209-210 (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:

1. Why was the previous plan filed?

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

Elliot-Cook, 357 B.R. at 814-815.

Here, Debtor states that the instant case was filed in good faith and provides an explanation for why the previous case was dismissed, as the Debtor previously lost her income and there was a delay in payment of unemployment benefits. Now, however, the Debtor has a new job which will allow her to make the monthly payments.

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.