

UNITED STATES BANKRUPTCY COURT  
Eastern District of California

Honorable Christopher M. Klein  
Bankruptcy Judge  
Sacramento, California

December 11, 2018 at 2:00 p.m.

**Notice**

**The court has reorganized the cases, including placing all of the Final Rulings in the second part of these Posted Rulings, with the Final Rulings beginning with Item 19.**

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1.	<a href="#">18-22403-C-13</a> <a href="#">BLG-3</a>	NEWALOW/LINDA WEEKES Chad Johnson	MOTION TO CONFIRM PLAN 10-30-18 [64]
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**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.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 30, 2018. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1). That requirement was met.

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

**The Motion to Confirm the Second Amended Plan is denied.**

Newalow Weekes and Linda Wilson Weeks ("Debtors") seek confirmation of the Second Amended Plan and claim that the Second Amended Plan addresses the issues identified in the prior proposed plan. Dckt. 66 (Debtors' Declaration). Specifically, the Second Amended Plan addresses: (1) the payment of

the IRS' Claim No. 3-2 by way of an offset of their 2017 federal income tax refund; (2) the Debtors changes in income; and (3) the proper treatment of secured creditor Loancare, LLC's claim.

The Second Amended Plan proposes plan payments of \$1,658.00 for months 7 through 10 and \$1,050.00 for months 11 through 60. Dckt. 69 (Second Amended Plan). Additionally, the Debtors propose a 9.82% dividend to the general unsecured creditors. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

## **CHAPTER 13 TRUSTEE'S OPPOSITION**

David Cusick ("the Chapter 13 Trustee") filed an Opposition on November 16, 2018. Dckt. 79. The proposed plan pays into the plan tax refunds beginning in 2018 that exceed \$2,000.00; however, the Trustee contends that there are funds derived from the Debtors' 2017 tax refunds that should be paid into the Plan.

Debtors' third amended Schedule A/B lists a federal refund of \$9,361.70 and a state refund of \$4,084.00. Dckt. 70. The Trustee notes that based on a letter from the IRS, the Debtors' received a \$7,583.29 refund from the IRS after the application of the \$6,492.71 offset for prior tax year liabilities. Dckt. 68, Exhibit B. Accordingly, the Trustee claims that the Debtors received a combined amount of \$11,6667.29 from their 2017 federal and state tax refunds and claims that the non-exempt funds should be paid directly into the plan.

**At the hearing ----.**

The Amended Plan does not comply with 11 U.S.C. §§ 1322, 1323, and 1325(a) because Debtors have not provided for sufficient non-exempt funds to be paid into the Plan and is not confirmed.

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

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

The Motion to Confirm the Amended Chapter 13 Plan filed by Newalow Weekes and Linda Wilson Weeks ("Debtors") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

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See Also Final Rulings: # 21 & 22

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**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.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, Creditor, creditors, parties requesting special notice, and Office of the United States Trustee on November 21, 2018. **By the court's calculation, 20 days' notice was provided. 28 days' notice is required. The court notes that while the Amended Motion to Value was filed and served on November 21, 2018, the original Motion to Value to was filed more than 28 days notice on November 8, 2018. Dckt. 13. Upon review of the original Motion the only apparent difference is the caption of the original Motion appears to inadvertently reference a claim of the IRS rather than the Franchise Tax Board.**

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

**The Motion to Value Collateral and Secured Claim of the Franchise Tax Board is granted, and Creditor's secured claim is determined to have a value of \$0.00.**

The Motion filed by Charlotte Mathias ("Debtor") to value the secured claim of the California Franchise Tax Board ("FTB" or "Creditor") is accompanied by Debtor's declaration. Debtor is the owner of personal property described as: 2008 Honda Civic, household goods, electronics, books and pictures, sports and hobby equipment, fire arms, wearing apparel, jewelry, 10 cats, cash on hand, two Bank of America accounts, EppiCard, Charlotte A. Mathias CSR, Inc., Northwestern Mutual Life Insurance, and court reporter supplies (collectively hereinafter "Property"). Debtor seeks to value the Property at a replacement value of \$9,377.28 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

Creditor FTB has not yet filed a proof of claim. Debtor states that the FTB has a secured claim by virtue of recorded State Tax Lien reflecting unpaid income tax obligations for the tax years 2010 through 2011. Dckt. 16, Exhibit C. The unpaid liability reflected on the State Tax Lien is \$7,392.07.

The court notes that the Debtor filed a Motion to Value Collateral and Secured Claim of IRS listing the same personal property and identifying secured tax liens that both have priority over the State Tax Lien and exhaust the value of the personal property. Dckt. 8.

Upon review of the evidence, the court determines the value of the secured claim of the FTB to be \$0.00, with the balance to be treated as unsecured claims (whether priority or general unsecured claims).

The Motion is granted.

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

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

The Motion to Value Collateral and Secured Claim filed by Charlotte Mathias (“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 California Franchise Tax Board (“FTB” or “Creditor”) secured by an asset described as: 2008 Honda Civic, household goods, electronics, books and pictures, sports and hobby equipment, fire arms, wearing apparel, jewelry, 10 cats, cash on hand, two Bank of America accounts, EppiCard, Charlotte A. Mathias CSR, Inc., Northwestern Mutual Life Insurance, and court reporter supplies (“Property”) is determined to be a secured claim in the amount of \$0.00, and the balance of the claim is an unsecured claim (whether priority or general unsecured claim) to be paid through the confirmed bankruptcy plan.

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3. [18-22033](#)-C-13      MARIA VALENCIA DE LOPEZ      MOTION TO CONFIRM PLAN  
[FF-1](#)                      Gary Fraley                      11-13-18 [24]

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**Tentative Ruling:**  
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**No appearance at the December 11, 2018 hearing is required, other than counsel for the Chapter 13 Trustee. Debtor filed an Amended Notice of Service setting this hearing for January 15, 2018 at 2:00 p.m. Dckt. 35. The Trustee's opposition to the Motion is that inadequate notice was given for the December 11, 2018 hearing. No other opposition has been filed.**

**The court treats the Opposition and Notice of Continued hearing as the parties' joint request for the continuance of the noticed hearing, which Trustee's counsel will make by oral motion at the scheduled December 11, 2018 hearing that is on the court's calendar.**

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**Tentative Ruling:** The Motion to Confirm the Debtors' First Amended Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). 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.**

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 19, 2018. Thirty-five days' notice is required. That requirement was met.

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

The Chapter 13 Trustee objects to the confirmation of the Debtor's Plan based on the following:

A. Debtor's Plan does not appear to comply with 11 U.S.C. § 1325(a)(1) because the Plan does not authorize payments already made by the Trustee under Debtor's original Plan to creditor One Main Financial. The original Plan listed the creditor in Class 2 but in the Amended Plan the creditor is listed in Class 3.

B. Debtor's Plan appears to propose set payments but does so in the incorrect section of the Plan. The Trustee claims that Debtor either needs to propose the step payments in Section 2.01 or Section 7, but may not do so through Section 2.02.

C. Debtor's Motion seeks to confirm the amended plan filed on October 19, 2018. However, Debtor appears to have filed two Amended Plan on October 19, 2018. Dckts. 24 and 28. While the Plans appear identical, the Trustee is not certain which Plan Debtor seeks to confirm.

At the hearing -----.

The Plan does not comply with 11 U.S.C. §§ 1322 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.

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**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).**

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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 November 14, 2018. Fourteen days' notice is required. That requirement was met.

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 sustain the Objection.**

The Trustee opposes confirmation of the Plan based on the following:

A. Debtor did not appear at First Meeting of Creditors held on November 8, 2018. The meeting was continued to December 13, 2018 at 11:00 a.m.

B. The Trustee also notes that prior to the hearing a payment of \$1,700.00 will become due.

**At the hearing -----.**

The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a) because the Debtor did not attend the First Meeting of Creditors. The objection is sustained and the Plan is not confirmed.

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

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

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

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

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 26, 2018. 14 days' notice is required. That requirement was met.

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

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**The Motion to Extend the Automatic Stay is granted.**

Vyacheslav Nesterchuk and Iryna Nesterchuk ("Debtors") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(a) extended beyond thirty days in this case. This is Debtor's second bankruptcy petition pending in the past year. Debtor's prior bankruptcy case (No. 17-25640) was dismissed on September 7, 2018, after Debtor did not make a required payments required under the confirmed plan. *See* Order, Bankr. E.D. Cal. No. 17-25640, Dckt. 47, September 7, 2018. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to Debtor thirty days after filing of the petition.

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed because Debtor Iryna Nesterchuk changed employers during the course of the prior case causing a reduction of income preventing them from making the required plan payments. Dckt. 12. In the current case, the Debtors state they anticipate selling the home instead of trying to cure the mortgage arrears through the plan. Additionally, Debtors claim that the mortgage holder, AmeriHome Mortgage, acted in bad faith during the intervening time between the prior and current bankruptcy. Specifically, Debtors allege that the mortgage holder initiated foreclosure proceeding while the Debtors were in the process of trying to obtain a loan modification.

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

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

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

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

Debtor has sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay.

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

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

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

The Motion to Extend the Automatic Stay filed by Vyacheslav Nesterchuk and Iryna Nesterchuk (“Debtors”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion 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.

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**Tentative Ruling:** The Motion to Confirm 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).**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on October 10, 2018. Fourteen days' notice is required. That requirement was met.

The Motion to Confirm 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 deny Confirmation.**

The Trustee opposes confirmation of the Plan based on the following:

A. Debtor is delinquent in plan payment in the amount of \$60.00. Another payment of \$575.00 will become due prior to the hearing. Debtor has paid \$2,815.00 into the plan.

B. Debtor did not provide explanations for the changes in expenses in the amended Schedules I and J filed on October 10, 2018. Dckt. 36. Debtor reduced the court ordered support obligation to Debtor's ex-wife from \$1,447.00 to \$953.00 and increased various other expenses.

**DEBTOR'S RESPONSE:**

On December 10, 2018, Debtor's counsel filed a response to the Trustee's Opposition to Confirmation. Debtor's counsel states without an accompanying declaration from the Debtor that:

A. The Plan payments will be current by the hearing date.

B. The domestic support obligation is currently \$1,447.00 per month in Spousal Support and \$953.00 per month for a requirement of life insurance for Debtor's former spouse. Debtor states that there has been a reduction due to a temporary agreement between Debtor and the former spouse, pending further order from the family court.

**At the hearing -----.**

The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a) because the Debtor has not made all required Plan payments and has not provided sufficient explanation for the changes in expenses. 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 Opposition to Motion to Confirm the Chapter 13 Plan filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Motion to Confirmation the Plan is denied.

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**Tentative Ruling:** The Motion to Confirm the Debtors' Second Modified 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.**

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 31, 2018. Thirty-five days' notice is required. That requirement was met.

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

The Chapter 13 Trustee responds to Debtors' motion by noting that Section 3.06 proposes a \$0.00 monthly dividend for administrative expenses when the Trustee's records reflect \$200.00 remains to be paid in attorneys fees. The Trustee states that he would have no opposition if this were corrected in the order confirming the Plan. The Trustee further notes for the court that Debtor is current under the propose Plan and the Plan is feasible.

At the hearing -----.

The Plan, as modified by the Trustee's correction to Section 3.06, complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

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

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

**IT IS ORDERED** that Motion to Confirm the Plan is granted, and Debtors' Modified Chapter 13 Plan filed on October 31, 2018, is confirmed. Debtors' Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the

proposed order to David Cusick (“the Chapter 13 Trustee”) for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

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**Thru #10**

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

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

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

Sufficient Notice Provided. The Amended Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, Creditor, creditors, parties requesting special notice, and Office of the United States Trustee on November 15, 2018. 14 days' notice is required. That requirement was met.

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

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**The Motion to Value Collateral and Secured Claim of Exeter Finance, LLC ("Creditor") is granted, and Creditor's secured claim is determined to have a value of \$7,500.00.**

The Motion filed by James Walker ("Debtor") to value the secured claim of Exeter Finance, LLC ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2014 Nisan Versa ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of \$7,500.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The lien on the Vehicle's title secures a purchase-money loan incurred in October 2015, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately \$12,774.00. Therefore, Creditor's claim secured by a lien on the asset's title is under-collateralized. Creditor's secured claim is determined to be in the amount of \$7,500.00, the value of the collateral. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is \$7,500.00.

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

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

The Motion to Value Collateral and Secured Claim filed by James Walker (“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 Exeter Finance, LLC (“Creditor”) secured by an asset described as 2014 Nissan Versa (“Vehicle”) is determined to be a secured claim in the amount of \$7,500.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is \$7,500.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

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**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).**

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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 Debtors' Attorney on October 1, 2018. Fourteen days' notice is required. That requirement was met.

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 sustain the Objection.**

The Trustee opposes confirmation of the Plan based on the following:

A. Debtor is delinquent \$606.00, with another payment of \$606.00 due prior to the hearing. Debtor has paid a \$0.00 into the plan.

B. Debtor's Plan is not feasible because it relies on a Motion to Value Collateral of Exeter Finance. The court notes that the Motion to Value is set for hearing on November 6, 2018. (Dckt. 22). That hearing has been continued to December 11, 2018.

C. Debtor has not demonstrated to the Trustee that Debtor's 2017 Tax Return was either filed or filing was not required.

The November 6, 2018 hearing was continued to allow for the resolution of Debtor's

pending Motion to Value (Dekt. 22). Additionally, the Debtor is afforded additional time demonstrate that the Debtor is current with all required Plan payments and has provided the Trustee with the necessary information regarding the 2017 federal income tax return

**At the hearing -----.**

The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a) because Debtor has not made all required Plan payments, proposed a feasible Plan, or provided the Trustee with all required information. The objection is sustained and the Plan is not confirmed.

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

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

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

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

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Thru #12

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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.

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

**Insufficient Notice Provided.** The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 13 Trustee, Creditor, creditors, parties requesting special notice, and Office of the United States Trustee on November 26, 2018. **The Proof of Service reflects that Flagship Credit Acceptance, LLC was served at a P.O. Box address; however, as reflected on the California Secretary of State website, Flagship Credit Acceptance, LLC has a registered agent for service that does not appear to be served.** 14 days' notice is required.

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

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**The Motion to Value Collateral and Secured Claim of Flagship Credit Acceptance, LLC ("Creditor") is ~~xxxxx~~, and Creditor's secured claim is determined to have a value of \$6,724.00.**

The Motion filed by Octavio Gonzalez Saenz and Diana Carolina Saenz ("Debtors") to value the secured claim of Flagship Credit Acceptance, LLC ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2010 Toyota Venza ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of \$6,724.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

Debtor's Motion has be "served" by delivery to a post office box. Service upon a post office box is deficient. *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 92-93 (B.A.P. 9<sup>th</sup> Cir. 2004) (holding that service upon a post office box does not comply with the requirement to serve a pleading to the attention of an officer or other agent authorized as provided in Federal Rule of Bankruptcy Procedure 7004(b)(3)); *see also Addison v. Gibson Equipment Co., Inc., (In re Pittman Mechanical Contractors, Inc.)*, 180 B.R. 453, 457 (Bankr. E.D. Va. 1995) ("Strict compliance with this notice provision in turn serves to protect due process rights as well as assure that bankruptcy matters proceed expeditiously.").

Debtors state in their declaration that the lien on the Vehicle's title secures a purchase-money loan incurred more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately \$14,682.00. Therefore, Creditor's claim secured by a lien on the asset's title is under-collateralized. ~~Creditor's secured claim is determined to be in the amount of \$6,724.00, the value of the collateral. See 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.~~

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

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

~~The Motion to Value Collateral and Secured Claim filed by Octavio Gonzalez Saenz and Diana Carolina Saenz ("Debtors") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of Ally Financial ("Creditor") secured by an asset described as 2010 Toyota Venza ("Vehicle") is determined to be a secured claim in the amount of \$6,724.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is \$6,724.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.~~

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**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.

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

**Insufficient Notice Provided.** The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 13 Trustee, Creditor, creditors, parties requesting special notice, and Office of the United States Trustee on November 26, 2018. **The Proof of Service reflects that Ally Financial was served at a P.O. Box address; however, as reflected on the California Secretary of State website, Ally Financial has a registered agent for service that does not appear to be served. Additionally, the court is not clear whether the proper creditor for this motion is Ally Financial or Ally Bank given the creditor identified in Proof of Claim No. 3-1.**

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

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**The Motion to Value Collateral and Secured Claim of Ally Financial (“Creditor”) is ~~xxxxx~~, and Creditor’s secured claim is determined to have a value of \$11,925.00.**

The Motion filed by Octavio Gonzalez Saenz and Diana Carolina Saenz (“Debtors”) to value the secured claim of Ally Financial (“Creditor”) is accompanied by Debtor’s declaration. The court notes that the body of the motion appears to reference the incorrect creditor claiming that the creditor is Flagship Credit Acceptance, the same creditor identified in another motion to value filed on the same date. Dckt. 11. Debtor is the owner of a 2015 Chevy Camaro (“Vehicle”). Debtor seeks to value the Vehicle at a replacement value of \$11,925.00 as of the petition filing date. As the owner, Debtor’s opinion of value is evidence of the asset’s value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The “service” of the Motion is purported to have been made through a post office box. Service upon a post office box is deficient. *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 92-93 (B.A.P. 9<sup>th</sup> Cir. 2004) (holding that service upon a post office box does not comply with the requirement to serve a pleading to the attention of an officer or other agent authorized as provided in Federal Rule of Bankruptcy Procedure 7004(b)(3)); *see also Addison v. Gibson Equipment Co., Inc., (In re Pittman Mechanical*

*Contractors, Inc.*), 180 B.R. 453, 457 (Bankr. E.D. Va. 1995) (“Strict compliance with this notice provision in turn serves to protect due process rights as well as assure that bankruptcy matters proceed expeditiously.”).

Debtors state in their declaration that the lien on the Vehicle’s title secures a purchase-money loan incurred more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately \$18,339.00. Therefore, Creditor’s claim secured by a lien on the asset’s title is under-collateralized. ~~Creditor’s secured claim is determined to be in the amount of \$11,925.00, the value of the collateral. See 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.~~

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

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

~~The Motion to Value Collateral and Secured Claim filed by Octavio Gonzalez Saenz and Diana Carolina Saenz (“Debtors”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of Ally Financial (“Creditor”) secured by an asset described as 2015 Chevy Camaro (“Vehicle”) is determined to be a secured claim in the amount of \$11,925.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is \$11,925.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.~~

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**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.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 13, 2018. The court calculates that 28 days notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed \$1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition). Here the fees requested do not exceed \$1,000.00.

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

**The Motion for Compensation is ~~XXXX~~.**

Thomas L. Amberg, Jr., the Attorney ("Applicant") for Penny Pelkey, Debtor ("Client"), makes an Application for Additional Compensation in this case.

Fees are requested for the period July 10, 2018, through September 17, 2018. Applicant requests fees in the amount of \$1,000.00 representing four hours of billable hours at \$250.00 per hour.

#### **NON-OPPOSITION OF CHAPTER 13 TRUSTEE:**

On November 15, 2018, the Chapter 13 Trustee filed a Non-Opposition to the fee request. Dckt. 50.

#### **STATUTORY BASIS FOR PROFESSIONAL FEES**

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature,

the extent, and the value of such services, taking into account all relevant factors, including—

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

(i) unnecessary duplication of services; or

(ii) services that were not—

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

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

## **APPLICABLE LAW**

### **Reasonable Fees**

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

A. Were the services authorized?

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

- C. Are the services documented adequately?
- D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?
- E. Did the attorney exercise reasonable billing judgment?

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

### **Reasonable Billing Judgment**

Even if the court finds that the services billed by an attorney are “actual,” meaning that the fee application reflects time entries properly charged for services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors’ Comm. 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 because the court’s authorization to employ an attorney to work in a bankruptcy case does not give that attorney “free reign to run up a [fees and expenses] tab without considering the maximum probable recovery,” as opposed to a possible recovery. *Id.*; see also *Brosio v. Deutsche Bank Nat’l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) (“Billing judgment is mandatory.”). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney is obligated to consider:

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

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

A review of the application shows that Applicant’s for the Estate include Summary of Services. The summary and the Applicant’s declaration state that the services forming the basis of this fee request involve work completed to sell Debtor’s real property, including two unanticipated Motions to Sell Property and communications with Debtor’s real estate agent. The court finds the services were beneficial to Client and the Estate and were reasonable.

### **“No-Look” Fees**

In this District, the Local Rules provide consumer counsel in Chapter 13 cases with an election for the allowance of fees in connection with the services required in obtaining confirmation of a plan and the services related thereto through the debtor obtaining a discharge. Local Bankruptcy Rule 2016-1 provides, in pertinent part,

- (a) Compensation. Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c). The

failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall signify that the attorney has opted out of Subpart (c). When there is an objection or when an attorney opts out, compensation shall be determined in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017, and any other applicable authority.”

...

(c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.

(1) The maximum fee that may be charged is \$4,000.00 in nonbusiness cases, and \$6,000.00 in business cases.

(2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.

(3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor’s attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6).

The Order Confirming the Chapter 13 Plan expressly provides that Applicant is allowed \$4,000.00 in attorneys’ fees, the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Dckt. 15. Applicant prepared the order confirming the Plan.

### **Lodestar Analysis**

If Applicant believes that there has been substantial and unanticipated legal services that have been provided, then such additional fees may be requested as provided in Local Bankruptcy Rule 2016-1(c)(3). The attorney may file a fee application, and the court will consider the fees to be awarded pursuant to 11 U.S.C. §§ 329, 330, and 331. For bankruptcy cases in the Ninth Circuit, “the primary method” to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves “multiplying the number of hours reasonably expended by a reasonable hourly rate.” *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). “This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer’s services.” *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A compensation award based on the lodestar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably

low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles Cty. Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of a professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). It is appropriate for the court to have this discretion "in view of the [court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437. Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis can be appropriate. See *In re Placide*, 459 B.R. at 73 (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

## **REVIEW OF APPLICANT'S PLEADINGS**

Applicant's declaration does not provide specific statements to explain why the two motions to sell were unanticipated. Further the court notes that both motions were in connection to the same underlying property, and the first motion was dismissed at the request of the Debtor due to some "discrepancies between what she [Debtor] believed was owed to her lender." Dckt. 28. Upon review of the docket, the court notes that in conjunction with Debtor's motions to sell (Dckts. 21; 32) Debtor states that sale of property is a result of unexpected health issues. Dckts. 23; 34. The Motions for Sale were brought approximately one year after the Order Confirming the Plan, supporting the contention that the sale was not anticipated.

### **At the hearing ----.**

It may be that Applicant could, consistent with Local Bankruptcy Rule 2016-1(c)(3), seek the payment of additional fees for "substantial and unanticipated work" outside of what is included in the agreed to set fee. Counsel must seek those additional fees, though, not ignore the agreed set fee and Local Bankruptcy Rule 2016-1. In seeking such additional fees, Counsel shall provide the court with the standard lodestar analysis (even if from reconstructed records), which will include a statement as to the benefit of the services to Debtor and the Estate.

Here Applicant did not state for the court the express benefit of the unanticipated motions to sell or the communications with the Real Estate Agent. However, the court notes from the Order to Sell, the estate was to receive \$50,000.00 directly from the escrow account. Dckt. 43. Moreover, the court notes from the Debtor's declaration submitted in support of the second motion to sell, this disbarment to the estate should provide for a 100% dividend to the allowed general unsecured claims and is also sufficient to fully pay the creditor secured by the subject property. The court determines that this sale was of benefit to the estate.

## **FEES AND COSTS & EXPENSES REQUESTED**

### **Fees**

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

Two Motions to Sell: Applicant spent 2.5 hours in this category. Applicant prepared and served

two different motions to sell. Dckts. 21, 32.

Communication with Debtor and Real Estate Agent: Applicant spent 1.5 hours in this category. Applicant does not provide additional detail about the nature of the communications other than they were in relation to the sale of the property.

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

<b>Names of Professionals and Experience</b>	<b>Time</b>	<b>Hourly Rate</b>	<b>Total Fees Computed Based on Time and Hourly Rate</b>
Thomas Amberg	4.0	\$250.00	\$1,000.00
<b>Total Fees for Period of Application</b>			\$1,000.00

**Costs and Expenses**

Applicant does not seek the allowance and recovery of costs and expenses.

**FEES ALLOWED**

**Fees**

~~The unique facts surrounding the case, including two unanticipated motions to sell and communications with real estate agent in connection with those sales, raise substantial and unanticipated work for the benefit of the Estate, Debtor, and parties in interest. The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. The request for additional fees in the amount of \$1,000.00 is approved pursuant to 11 U.S.C. § 330 and authorized to be paid by David Cusick (“the Chapter 13 Trustee”) from the available funds of the Plan in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.~~

~~Applicant is allowed, and the Chapter 13 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:~~

~~\_\_\_\_\_ Fees \_\_\_\_\_ \$1,000.00~~

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

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

~~\_\_\_\_\_ Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing:~~

~~\_\_\_\_\_ The Motion for Allowance of Fees and Expenses filed by Thomas L. Amberg (“Applicant”), Attorney having been presented to the court, and upon review of the pleadings, evidence,~~

arguments of counsel, and good cause appearing;

~~IT IS ORDERED~~ that Thomas L. Amberg is allowed the following fees as a professional of the Estate:

Thomas L. Amberg , Professional Employed by Penny Pelkey (“Debtor”)

Fees in the amount of \$1,000.00;

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for Debtor.

~~IT IS FURTHER ORDERED~~ that David Cusick (“the Chapter 13 Trustee”) is authorized to pay the fees allowed by this Order from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

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**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).**

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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 Debtors' Attorney on September 11, 2018. Fourteen days' notice is required. That requirement was met.

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 sustain the Objection.**

The Trustee opposes confirmation of the Plan based on the following:

A. Debtor is delinquent \$345.00, with another payment of \$345.00 due prior to the hearing. Debtor has paid a \$0.00 into the plan.

B. Debtor does not appear to have not filed all required tax returns for the four year period preceding the filing of the Petition. Claims filed by the IRS and the Franchise Tax Board reflect that returns for the tax years 2015 and 2017 have not been filed.

C. Debtors Plan relies on a Motion to Value and is otherwise not feasible. The court notes that the Motion to Value was granted at the October 16, 2018 hearing. (Dckt. 32)

**DISCUSSION:**

The October 16, 2018 hearing was continued to November 6, 2018 to permit Debtor additional time to cure the delinquencies.

On October 23, 2018, the Trustee filed a Supplemental Response stating that the Debtor is not current on Plan Payments and has not submitted evidence to demonstrate all required tax returns have been filed.

The November 6, 201 hearing was continued to December 11, 2018 to allow for additional time for the Debtor to cure the deficiencies.

**At the hearing -----.**

**DECISION:**

The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a) because Debtor has not made all required payments or filed all required tax returns. The objection is sustained and the Plan is not confirmed.

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

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

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

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

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**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).**

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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 November 14, 2018. Fourteen days' notice is required. That requirement was met.

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 sustain the Objection.**

The Trustee opposes confirmation of the Plan based on the following:

A. Debtor did not attend the First Meeting of Creditors held on November 8, 2018. The Trustee notes that the meeting was continued until December 13, 2018 at 11:00 a.m.

**DEBTOR'S RESPONSE:**

Debtor's counsel responds without a supporting declaration from his client, that Debtor apologizes for being unable to attend the First Meeting Creditors. Dckt. 33. Debtor's counsel states that Debtor has a previously planned trip to visit relatives out of state. Debtor's counsel states that Debtor will attend the continued hearing on December 13, 2018.

At the hearing -----.

Absent evidence that the Debtor will attend the continued Meeting of Creditors, the Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the Plan is not confirmed.

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

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

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

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

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**No Tentative Ruling:** The Motion to Modify 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.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 5, 2018. Thirty-five days' notice is required. That requirement was met.

The Motion to Modify 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 xxxx the Motion to Modify the Plan.**

The Trustee opposed confirmation on the basis that:

A. The Trustee is uncertain whether the Debtor is proposing the Trustee pay post-petition taxes without a proof of claim. Here, Debtor's Modified Plan proposes to increase the monthly payment to Tehama County Tax Collector in Class 2A to account for ongoing property taxes.

B. Debtor has not filed Supplemental Schedules I and J to support the income and expenses and proposed plan payment increase.

At the November 20, 2018, hearing Counsel for Debtor stated that Debtor's sons are increasing their contributions to the Plan by an additional \$600.00 a month to \$1,200.00 a month. The court continued the hearing to afford Debtor additional time to address the current financial information.

At the hearing -----.

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by 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 Modified Plan is **XXXX** and the proposed Chapter 13 Plan is **XXXX**.

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**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.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 31, 2018. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition). That requirement was met.

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

**The Motion to Confirm the Modified Plan is ~~XXXXX~~.**

Wesley Joe Lauderdale ("Debtor") seeks confirmation of the Modified Plan because he had unanticipated expenses caring for his now deceased father and is now anticipating to receive \$20,000.00. Dckt. 79 (Declaration). The Modified Plan Debtor proposes pay the \$20,000.00 into the Plan upon receipt of the funds on or before May 2019 and proposes a 100% dividend to the general unsecured creditors. Dckt. 80 (Modified Plan). 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

### CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on November 26, 2018. Dckt. 90. The Trustee opposes confirmation based on the following:

A. The Plan requires more than 60 months to complete. The Trustee states that Plan payments would need to increase to \$2,230.00 over the remaining 34 months of the Plan.

B. Uncertainty concerning retirement loans taken out by Debtor against his 401(k) plan. While Debtor budgets \$435.39 for loan repayments, Debtors pay stubs reflect that Debtor is repaying \$660.51. This is an issue raised in the first Motion to Modify. Dckts. 66, 67, 68. Additionally, the Trustee raised the

issue that Debtor appears to have paid off the original retirement loans on May 28, 2017 according to information received at the 341 Meeting of Creditors. In the prior motion Debtor stated that the loan repayment completion date was incorrect; however, in this Motion states that he did in fact take out a second 401(k) loan to assist in paying back taxes for his father. Additional details regarding the loan are not provided by the Debtor.

C. Debtors Schedules I and J are marked both amended and supplemental and include decreases in monthly expenses from \$5,612.14 to \$2,984.03 that the Trustee believes are not reasonable to for a family size of 6 people.

#### **DEBTOR'S RESPONSE:**

Debtor responds that he is agreeable to increasing the plan payments to \$2,230.00 to allow for the Plan to complete in the required 60 months. Debtor clarifies that the Schedules I and J are supplemental not amended.

Debtor is silent as to the Trustee's concerns regarding the 401(k) loan and decrease in monthly expenses. Debtor merely offers the statement that the proposed plan provides for a 100% dividend to all creditors, that Debtor is current under the proposed plan payments, and is willing to agree to the increased monthly payments.

At the hearing -----.

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

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

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

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

~~**IT IS ORDERED** that the Motion is granted, and Debtor's Modified Chapter 13 Plan filed on October 31, 2018, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to David Cusick ("the Chapter 13 Trustee") for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.~~

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**No 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.

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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 Debtors' Attorney on September 26, 2018. Fourteen days' notice is required. That requirement was met.

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 ~~XXXXX~~ the Objection.**

The Trustee opposes confirmation of the Plan based on the following:

A. Debtor's Plan may fail liquidation under 11 U.S.C. § 1325(a)(4). The Trustee questions whether the Debtor has approximately \$104,614.00 in non-exempt equity in property located at 163 Wellfleet Drive, Folsom, CA. The Debtor's Schedule D lists the property as sold to Debtor's ex-fiancé however, the Trustee's review of the property records did not identify a deed transferring title to the ex-fiancé.

B. Debtor may have not listed all sources of income.

C. Debtor did not disclose lease signed for the current residence.

D. Debtor did not list current employer's address on Schedule I upon request of the Trustee.

**DEBTOR'S RESPONSE:**

Debtor responds to the Trustee's Oppositions as follows:

A. Debtor states that she testified at the Meeting of Creditors that she purchased the 163 Wellfleet Drive property with her now ex-fiancé, Tim Eshelman. Eshelman provided the down payment for the home's purchase. When the relationship ended, Debtor and Eshelman negotiated a sales price, as disclosed on Schedule A/B (Dckt. 1, pg. 11), Debtor exchanged her interest in the property for \$22,000.00 in cash along with his assumption of approximately \$13,000.00 in shared credit card debt. Dckt. 25, Decl Debtor. Debtor no longer claims to have control or access to the property and signed a Quitclaim deed recorded with Sacramento County Recorder on July 17, 2018. Exh. 1, Decl. Debtor.

B. Debtor disputes the Trustee's claim that Debtor did not list all sources of income. Debtor claims that the transfer of the real property identified above for cash and assumption of debt is merely a change of character of assets rather than income.

C. Debtor concedes that she did not disclose her lease on Schedule G. On October 5, 2018, Debtor filed an amended Schedule G to reflect the lease. Dckt. 21, Exhibit 4.

D. Debtor concedes that she did not provide her employer's address on Schedule I. On October 5, 2018, Debtor filed an amended Schedule I to reflect the address. Dckt. 21, Exhibit 5.

#### **DEBTOR'S SUPPLEMENTAL DECLARATION:**

On November 16, 2018, the Debtor filed Supplemental Declaration. Dckt. 32. The Debtor states that:

A. The subject property was purchased in February of 2015 with her ex-fiancé. Debtor states that the ex-fiancé paid the down payment of \$45,000.00 and that Debtor did not pay any part of the down payment or closing costs.

B. Debtor states in June of 2017 the home was refinanced paying of Debtor's car loan debt of \$15,000.00 and \$10,000.00 of debt associated with Debtor's ex-fiancé.

C. Debtor states that she and the ex-fiancé ended their relationship and Debtor wanted to sell her interest to the ex-fiancé. The sale of Debtor's interest is stated to have occurred on May 17, 2018. Debtor states they determined the value of the home to be \$575,000.00.

D. Debtor states that she determined she had \$35,000.00 of equity in the property after accounting for the mortgage and the ex-fiance's interest in the property (the down payment, improvements, and benefit from the refinance). Debtor further states that she accepted \$22,000.00 in cash for her stated \$35,000.00 of equity and the assumption by the ex-fiancé of \$13,000.00 of their joint credit card debt.

E. Debtor states that the transfer occurred more than 90 days prior to the filing of the bankruptcy petition and that the actual transfer of funds were executed through several installments. This was because the cashier's check provided to Debtor bounced and the ex-fiancé made installment payments on May 23, 2018 and May 25, 2018 (within the 90 day period prior to the filing of the petition on August 20, 2018 which started on May 22, 2018). Additionally, the ex-fiancé did not pay off Debtor's credit card debt until June 2018.

F. Debtor states that as of June 2018, she has not resided in the home.

### **TRUSTEE'S STATUS REPORT:**

The Trustee filed a status report on December 4, 2018. Dckt. 35. The Trustee states that the Objections based on Debtor's incomplete Statement of Affairs, failure to disclose lease, and incomplete Schedule J have all been resolved through additional filings made by the Debtor.

The Trustee still opposes confirmation based on the following:

A. Debtor's transfer of her stated interest in the subject property may be an avoidable transfer given that payments were made within the 90 days prior to the filing of the petition.

B. The payment of certain credit card debt within the 90 days prior to the filing of the petition are preferential payments subject to avoidance actions by the Trustee. The Trustee notes six different payments totaling \$17,779.26 made within this 90 day period.

### **DEBTOR'S RESPONSE TO TRUSTEE'S STATUS REPORT:**

Counsel for the Debtor responded to the Trustee's Status Report on December 6, 2018. Dckt. 38. Counsel for the Debtor states that because the proposed Plan provides for a dividend to the Unsecured Creditors in an amount "no less than a 2% dividend" the possibility of future avoidance actions to recover preferential payments should not prevent confirmation.

### **DISCUSSION:**

Debtor has satisfied several of the Trustee's concerns regarding the omission of information in Debtor's schedules with her amended Schedules G and I filed on October 5, 2018. Debtor also submitted a quit claim deed in support of her contention that title of the property was transferred prior to the filing of the petition. Remaining are the Trustee's contentions that the transfer of the property and payments to certain creditors were completed within the 90 period prior to filing the petition, subjecting the transactions to avoidance actions.

Debtor's Supplemental Declaration attempts to provide more clarity about the transfer of the property. Debtor claims that on May 17, 2018, she "exchanged" her interest in the property in exchange for \$22,000.00 of cash and \$13,000.00 of debt assumption. Dckt. 32. However, Debtor does not provide a contract memorializing this agreement, nor does the evidence support Debtor's contention for two main reasons.

First, the Quitclaim Deed transferring Debtor's interest in the property was not only recorded on July 27, 2018 but it was also *executed* on July 27, 2018. Dckt. 26, Exhibit 1. Accordingly, while Debtor may have had an "agreement" to exchange her interest in the property for cash and assumption of debt on May 17, 2018, Debtor did not actually execute the transfer until July 2018. As such, the transfer of Debtors property interest occurred within the 90 day period before the filing of the petition.

Second, Debtor claims that the assumption of debt similarly occurred on May 17, 2018, despite the actual payments being made in June. However, Debtor's statement contradicts with the Statement of Financial Affairs in which Debtor claims that she made the payments albeit "via balance

transfer to ex-fiancé.” Accordingly, the court agrees with the Trustee that the identified transfers in the 90 day period appear to be subject to avoidance actions because they constitute preferential payments.

At the hearing ----.

~~—————The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a) because Debtor has not listed all required assets. The objection is sustained and the Plan is not confirmed.~~

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

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

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

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

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## FINAL RULINGS

19. [17-21384-C-13](#)      **HARRY/KAYLA KUPER**      **CONTINUED MOTION TO MODIFY PLAN**  
[NBC-3](#)                      **Eamonn Foster**                      **9-17-18 [49]**

Thru #20

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**Final Ruling:** No appearance at the November 6, 2018 hearing is required.  
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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 17, 2018. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition). That requirement was met.

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

**The Motion to Confirm the Modified Plan is granted.**

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. Harry Thomas Kuper and Kayla Breanne Kuper ("Debtors") have filed evidence in support of confirmation. No opposition to the Motion has been filed by David Cusick (the Chapter 13 Trustee) or by creditors. David Cusick ("the Chapter 13 Trustee") filed a Response indicating that he does not oppose the proposed modified plan and that Debtors are current under the proposed Plan. Dckt. 64. The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by Harry Thomas Kuper and Kayla Breanne Kuper (“Debtors”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is granted, and Debtors’ Modified Chapter 13 Plan filed on September 17, 2018, is confirmed. Debtors’ Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to David Cusick (“the Chapter 13 Trustee”) for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

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20. [17-21384-C-13](#) HARRY/KAYLA KUPER CONTINUED OBJECTION TO CLAIM OF  
[NBC-4](#) Eamonn Foster LOBEL FINANCIAL CORP., CLAIM  
NUMBER 4  
9-24-18 [[56](#)]

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**No appearance at the December 11, 2018 hearing is necessary. The Objection to Claim of Lobel Financial Corp., Claim Number 4-1 was resolved by stipulation and an Order resolving the Objection to claim was entered on November 29, 2018. Dckt. 68.**

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See also Tentative Ruling #2 and Final Ruling # 22

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**Final Ruling:** No appearance at the December 11, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, Creditor, creditors, parties requesting special notice, and Office of the United States Trustee on November 7, 2018. 28 days’ notice is required. That requirement was met.

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

**The Motion to Value Collateral and Secured Claim of the Internal Revenue Service is granted, and Creditor’s secured claim is determined to have a value of \$9,377.28.**

The Motion filed by Charlotte Mathias (“Debtor”) to value the secured claim of the Internal Revenue Service (“IRS” or “Creditor”) is accompanied by Debtor’s declaration. Debtor is the owner of personal property described as: 2008 Honda Civic, household goods, electronics, books and pictures, sports and hobby equipment, fire arms, wearing apparel, jewelry, 10 cats, cash on hand, two Bank of America accounts, EppiCard, Charlotte A. Mathias CSR, Inc., Northwestern Mutual Life Insurance, and court reporter supplies (collectively hereinafter “Property”). Debtor seeks to value the Property at a replacement value of \$9,377.28 as of the petition filing date. As the owner, Debtor’s opinion of value is evidence of the asset’s value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

Creditor the IRS has not yet filed a proof of claim. Debtor states that the IRS has a secured claim by virtue of recorded Notice of Federal Tax Liens (NFTL) reflecting unpaid income tax obligations for the tax years 2006 through 2009. Dckt. 11, Exhibit C. The unpaid liability reflected on the NFTL is \$31,524.12, however, this amount does not include additional penalties, interests, and other statutory

additions. Debtor does not claim that the liability is not less than \$31,524.12.

The court notes that Debtor has filed a second Motion to Value Collateral and Secured Claim of IRS listing the same personal property. Dckts. 18. Additionally, Debtor states that the IRS has a secured claim by virtue of recorded Notice of Federal Tax Liens (NFTL) reflecting unpaid income tax obligations for the tax years 2010 through 2016. Dckt. 21, Exhibit C. The unpaid liability reflected on the NFTL is \$69,909.96. The Debtor's second Motion to Value also notes that there is a intervening lien with priority over the IRS second NFTL, specifically the liabilities reflected in the State Tax Lien of California Franchise Tax Board (Dckt. 16, Exhibit C); however, since the value of the collateral is exhausted by the first NFTL filed by the IRS, the court does not need to allocate value amongst the other liabilities.

While the IRS has two separate NFTLs the unpaid liabilities reflected in those NFTLs would be reporting on one proof of claim filed by the creditor. Accordingly, the court consolidates the two motions and will provide one ruling for both.

Upon review of the evidence, the court determines the value of the secured claim of the IRS to be \$9,377.28, with the balance to be treated as unsecured claims (whether priority or general unsecured claims).

The Motion is granted.

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

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

The Motion to Value Collateral and Secured Claim filed by Charlotte Mathias ("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 ("IRS" or "Creditor") secured by an asset described as: 2008 Honda Civic, household goods, electronics, books and pictures, sports and hobby equipment, fire arms, wearing apparel, jewelry, 10 cats, cash on hand, two Bank of America accounts, EppiCard, Charlotte A. Mathias CSR, Inc., Northwestern Mutual Life Insurance, and court reporter supplies ("Property") is determined to be a secured claim in the amount of \$9,377.28, and the balance of the claim is an unsecured claim (whether priority or general unsecured claim) to be paid through the confirmed bankruptcy plan.

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See also Tentative Ruling #2 and Final Ruling # 21

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**Final Ruling:** No appearance at the December 11, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, Creditor, creditors, parties requesting special notice, and Office of the United States Trustee on November 7, 2018. 28 days’ notice is required. That requirement was met.

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

**The Motion to Value Collateral and Secured Claim of the Internal Revenue Service is denied without prejudice as moot.**

The Motion filed by Charlotte Mathias (“Debtor”) to value the secured claim of the Internal Revenue Service (“IRS” or “Creditor”) is denied as moot because the court consolidated this motion with another Motion to Value (Dckt. 8) and the relief requested in this motion is addressed in the Order for that motion.

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

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

The Motion to Value Collateral and Secured Claim filed by Charlotte Mathias (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Value Collateral and Secured Claim of the IRS is denied without prejudice as moot, the court having determined the

value of the IRS secured claim pursuant to a prior filed Motion (DCN: MS-2).

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**Final Ruling:** The Debtor having filed a "Withdrawal of Motion" for the pending Motion to Confirm, the "Withdrawal" being consistent with the opposition filed to the Motion, the court interpreting the "Withdrawal of Motion" to be an *ex parte* motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rule of Bankruptcy Procedure 9014 and 7041 for the court to dismiss without prejudice the Motion to Confirm, and good cause appearing, the court dismisses without prejudice the Debtor's Motion to Confirm.

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

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

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

**IT IS ORDERED** that the Motion to Confirm is dismissed without prejudice.

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