UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

January 15, 2019 at 3:00 p.m.

1.	**18-23401-E-13** **MWB-6**	**PAUL/SHERI D'ANGELO** **Mark Briden**	**MOTION TO REFINANCE** **11-21-18 [57]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee and Office of the United States Trustee on November 21, 2018. [FN.1.] By the court's calculation, 55 days' notice was provided. 28 days' notice is required.

FN.1. The Proof of Service filed November 21, 2018, is signed under penalty of perjury, but does not state what November date notice was provided. At the hearing, **XXXXXXXXX**.

The Motion to Incur Debt 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 Incur Debt is denied.

Paul Ricco D'Angelo and Sheri Lynn D'Angelo ("Debtor") seeks permission to purchase real property commonly known as "100 Beaver Canyon Road, Douglas City, California," with a total purchase price of $190,000.00, and a 12 percent interest rate over 5 years. *See* Declaration, Dckt. 59.

TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on December 18, 2018. Dckt. 65. Trustee opposes the Motion on the grounds that (1) Debtor is delinquent $4,600.00 under the plan terms and Trustee has therefore filed a Motion to Dismiss (Dckt. 61); (2) Debtor's Motion mistakenly refers to "Beaver Canyon Road," and not the correct "Brown Canyon Road;" and (3) Debtor Motion states Debtors can obtain a hard-money loan at 12 percent interest over five years, but have no provided evidence in support of the allegation.

MOTION TO DISMISS

As noted by the Trustee, a Motion To dismiss was pending and heard January 9, 2018. Dckt. 79. At the hearing, the court conditionally granted the motion, with the case dismissed if Debtor is not current as of February 10, 2019, on all Plan Payments due through January 2019. *Id.*

DISCUSSION

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

Here, Debtor has filed a Motion apparently before being approved for any actual financing. Debtor indicates being eligible for a cash-money loan, presumably in the amount of $190,000 and at a rate of not more than 12 percent interest over 5 years. However, no lender has been identified for the court, no agreement provided, and no terms summarized in more than a vague pipe dream fashion.

The need for the "Hard Money Loan" is that the claim secured by the Debtor's property is due in full. On Schedule A/B Debtor states under penalty of perjury that the Property has a value of $200,000.00. Dckt. 29 at 4. The claim secured by the Property has been filed in the amount of $190,195.55. Amended Proof of Claim No. 7-2. In effect, the "hard money loan" has to be for the full amount of the value of the property (actually, less than the net value if one considers an 8% cost of sale expense).

Furthermore, the transaction is not in the best interest of Debtor. The loan calls for a substantial interest charge—12%. Where the principal loan sought is (presumably) $190,000, Debtor would be paying $63,586.70 in interest charges. While the terms of the current Mortgage are not provided by Debtor, the new terms and interest charge do not appear reasonable where unsecured claims are being paid a 0 percent dividend.

It is also very disturbing to the court that the Debtor and Debtor's counsel have hidden from the court not only the loan terms, but the identity of the purported "Hard Money Lender." It is as if Debtor and

Debtor's counsel are attempting to have the court bless what may be inappropriate, or possibly illegal, conduct.

The Motion is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Incur Debt filed by Paul Ricco D'Angelo and Sheri Lynn D'Angelo ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied.

2. 18-26708-E-13 SAYTHAMMA SAYAMNATH OBJECTION TO CONFIRMATION OF
DPC-1 Peter Macaluso PLAN BY DAVID P. CUSICK
12-18-18 [20]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on December 18, 2018. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is granted.

The Chapter 13 Trustee, David Cusick ("Trustee"), opposes confirmation of the Plan on the basis that Debtor proposes a 100 percent plan paying $500 per month over 60 months where Debtor has the ability to pay creditors immediately. Debtor's Schedules disclose a $33,000.00 property described as "Wells Fargo Portfolio- emergency fund", (Dckt. 10, Page 5, §18). Based on Debtor's testimony at the meeting of creditors, the Trustee believes the funds were life insurance proceeds from a son intended for the benefit of the Debtor's other sons who are minors.

Trustee's objection is essentially that Debtor's plan fails the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4) because creditors would notwithstanding the Chapter 13 Case be entitled to interest. The Trustee also argues that, where here the Debtor is seeking for the non-exempt funds to vest on confirmation and allow Debtor to dissipate funds, that the plan may not have been proposed in good faith as required by 11 U.S.C. § 1325(a)(3).

APPLICABLE LAW

The Bankruptcy Code provides the following:

(a) Except as provided in subsection (b), the court shall confirm a plan if--

> . . .
>
> (4) the value, **as of the effective date of the plan**, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;
>
> . . .

11 U.S.C. § 1325(a)(4)(emphasis added). Colliers provides a review of the valuation standard, which may require consideration of what interest a creditor would be entitled:

> **[b] Valuation Standard: Present Value of Deferred Payments Must Equal Liquidation Value**
>
> Section 1325(a)(4) dictates that the chapter 13 plan offer the holder of each allowed unsecured claim property, including deferred payments, of a present value not less than the liquidation value of such claim. In other words, the court must capitalize the proposed payments, by converting deferred payments offered the creditor into an equivalent capital sum as of the effective date of the plan. Section 1325(a)(4) cannot be properly applied simply by comparing the sum total of the proposed deferred payments with the likely recovery on the unsecured claim in the event of liquidation. Unless the plan proposes that all payments to unsecured creditors will be made immediately upon the effective date of the plan, the present value language in the section dictates that interest be paid to compensate for the lost time value of the money caused by the deferral of payments. Thus, if a creditor holding an allowed unsecured claim would receive full payment of its claim in a chapter 7 liquidation, a plan would not meet the best interests test unless deferred payments to the creditor paid one hundred percent of the claim plus interest. If the creditor would have received postpetition interest in a chapter 7 case because the debtor is fully solvent, then such interest, running until the effective date of the plan, must also be paid.

The principles followed in calculating present value interest under section 1325(a)(4) should be similar to those followed under section 1325(a)(5), because both sections share the goal of compensating creditors for a delay in payments they would otherwise receive immediately.

8 COLLIER ON BANKRUPTCY P 1325.05 [2][b] (16th 2018)

DISCUSSION

Trustee's objection is well-taken. Debtor proposes to pay 100 percent to unsecured claims, but does not incorporate interest into that calculation. Here, Debtor's nonexempt assets could satisfy the unsecured claims immediately were the case filed under Chapter 7. The proposed plan does not propose to compensate unsecured claims for their lost time value. Therefore, the plan fails the liquidation analysis and cannot be confirmed. 11 U.S.C. § 1325(a)(4); *See also* 8 COLLIER ON BANKRUPTCY P 1325.05 [2][b] (16th 2018).

Trustee also argues that the plan is filed in bad faith because Debtor has not explained why payments are not completed sooner where they could liquidate the Wells Fargo Portfolio to immediately satisfy claims. Presumably, this argument is tied to the failure to meet the liquidation test, as a debtor normally may make payments primarily from income rather than assets in a Chapter 13 case. 8 COLLIER ON BANKRUPTCY P 1300.01 (16th 2018).

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

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

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

3.	**14-21319-E-13** **BB-9**	**MARK/SARAH ANN HANSEN** **Bonnie Baker**	**CONTINUED MOTION FOR COMPENSATION FOR BONNIE BAKER, DEBTORS' ATTORNEY** **11-19-18 [229]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee and Office of the United States Trustee on November 19, 2018. By the court's calculation, 29 days' notice was provided. The Second Amended Proof of Service states the supplemental task billing analysis was served on the Trustee, Office of the United States Trustee, and creditors on January 8, 2019. Dckt. 246.

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 hearing on the Motion for Allowance of Professional Fees is continued to XXXXXXXXXXX to allow Applicant the opportunity to file supplemental pleadings addressing which fees sought are actually for "substantial and unanticipated work."

Bonnie Baker, the Attorney ("Applicant") for Mark Jon Hansen and Sarah Ann Monica Hansen, the Chapter 13 Debtor ("Client"), makes a Request for the Additional Allowance of Fees and Expenses in this case.

TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response to the Motion on November 28, 2018. Dckt. 234. Trustee notes the following:

1. Movant only served the Chapter 13 and U.S. Trustee and no other party in interest.

2. Movant has not provided a task billing analysis. Rather, Movant has

dumped 92 pages of raw billing statements onto the court.

3. Plan funds are available if the fees are approved.

4. Two billing statements provided by Movant are for work performed pre-filing (January and February 2014).

5. Whether Debtor has any objection to fees sought for work performed pre-confirmation (February 2016) is unclear. Trustee does not oppose those fees based on the complexity of the case.

6. Trustee notes that roughly 16 categories can be used to support a billing analysis. Trustee declines to further analyze the billings.

DECEMBER 18, 2018 HEARING

At the December 18, 2018 hearing, the court noted that included in the Motion is Applicant's raw time and billing records, which have not been organized into categories. Civil Minutes, Dckt. 240. Rather than organizing the activities that are best known to Applicant, it is left for the court, U.S. Trustee, and other parties in interest to mine the records to construct a task billing. The court declined the opportunity to provide this service to Applicant, instead leaving it to Applicant who intimately knows the work done and its billing system to correctly assemble the information.

The court also noted the Confirmed Sixth Amended Plan may not support the requested fees. The Plan in this Case requires monthly plan payments of $4,815.00 through December 2015 and then $7,046 through February 2018, and finally $9,113.00 a month for the final twenty-four months of the Plan. Dckt. 203. In addition, the non-exempt portion of proceeds from personal injury litigation will be used to fund the Plan.

In these final twenty-four months Debtor will be paying the following to creditors:

Chapter 13 Trustee Fees (Est. at 8%)	$ 792.00
Class 1 Mortgage, Current Monthly Installment	$3,412.38
Class 1 Mortgage, Arrearage	$2,691.38
Cornerstone Bank	$ 350.71
IRS Priority Claim	$1,000.00
EDD Priority Claim	$ 617.39
Post-Petition EDD Admin Expense ($10,606.67/24 months) (Admin. Expense Amendment, Dckt. 225)	$ 441.95
General Unsecured Claims (0% Dividend)	$ 0.00

The above requires $9,305.81 a month in payments, which is more than the monthly plan payment. There is no money to fund the payment of additional fees, if the court orders them to be paid through the Plan, thus dooming the plan to default and dismissal.

Rather than rather than denying the Application without prejudice, the court continued the hearing to January 15, 2019, to afford Applicant the opportunity to provide the court, U.S. Trustee, and other parties in interest requesting the information with the necessary task billing analysis.

SUPPLEMENTAL DECLARATION & EXHIBIT

On January 4, 2019, Applicant filed its Supplemental Declaration of Bonnie Baker. Dckt. 242 The Declaration provides a detailed task-billing analysis.

Applicant also filed as Exhibit A an itemized billing statement. Dckt. 243.

APPLICABLE LAW

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

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

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 General case administration and work on Debtor's loan modification, motion to approve plan, motion to value collateral, objection to claim of exemption, application to dismiss case, civil suits, and post-filing tax debts. 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. 215. 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)).

FEES AND COSTS & EXPENSES REQUESTED

Request to Convert Set Fee Agreement
To Hourly Agreement

Applicant's Supplemental Itemized Billing Statement reflects total fees of $43,965.00. Dckt. 243. The statement includes an explanation that the original request for fees of $40,564.00 was determined by crediting the $2,000 paid pre-filing and $281.00 filing fee. Applicant admits that it did not credit the $1,500.00 paid to it through the plan, and requests that the court consider unbilled fees associated with the present Motion as an offset (substantively, Applicant requests a flat fee of $1,500 for work associated with this Motion). Applicant also no longer reduces its request by the filing fee amount.

Applicant's Itemized Billing Statement describes the following main categories of work performed: General Case Administration, Loan Modification, Motion to Approve Plan, Motion to Value Collateral, Objection to Claim of Exemption, Application to Dismiss Case, Order on Motion Application to Dismiss, Civil Suits, and Post-filing Tax Debts.

Reviewing the detailed time entries provided in the Billing Statement, it is clear Applicant is not merely billing for substantial & unanticipated fees. Rather, Applicant is billing the entirety of work performed in this case, and using the "no look fee" as a retainer. Some of the work itemized in the Billing Statement includes initial consultation, preparation of documents necessary for filing, preparation and filing of the Voluntary Petition and Schedules, filing of the first proposed plan, and other services that are part of all Chapter 13 filings. Applicant's request to convert his set fee agreement into an hourly agreement for all services is not proper.

In this case, Debtor had no confirmed plan until February 18, 2016, roughly two years after filing. *See* Order, Dckt. 215. The first confirmed plan was Debtor's Sixth Amended Plan. Despite the case having been protracted along for two years without a confirmed plan, Applicant on behalf of Debtor proposed in the Sixth Amended Plan to be compensated $3,500.00 pursuant to Local Bankruptcy Rule 2016-1(c). Plan ¶ 2.06, Dckt. 196. The court in the Order Confirming Amended Plan approved those requested fees. Order, Dckt. 215.

It appears that the work involved in this case was significantly more demanding than average. However, such is not an exception to, or grounds to breach, the set fee agreement. Every consumer attorney could assert this as a grounds to ignore the agreed set fees when he or she spends more time than projected. In cases when the set fee works to be a bonus (Applicant spending less time than equal to the set fee), however, Applicant does not state that the rules require him to give the extra amount back. The set fee exists to allow Applicant to elect to accept such fees, taking the bonus in some cases and spending more time in other cases, but in the end the over and under amounts should balance out.

At some point, Applicant should have seen the writing on the wall. Unfortunately, Applicant's significant work performed prior to confirmation of the Sixth Amended Plan could not reasonably have been "unanticipated." In proposing the Sixth Amended Plan Applicant had knowledge of all the work involved in the case thus far and nevertheless opted to be paid pursuant to Local Bankruptcy Rule 2016-1(c).

However, 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. Some of the categories post-confirmation work that qualify, including:

Application to Dismiss Case

Administration

Civil Suits

Post-filing Tax Debts

The burden is on Applicant to demonstrate these fees are for "substantial and unanticipated work."

The court shall continue the hearing on the Motion to XXXXXXXXX to allow Applicant the opportunity to file supplemental pleadings addressing which fees sought are actually for "substantial and unanticipated work."

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 Bonnie Baker ("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 hearing on the Motion for Allowance of Professional Fees is continued to XXXXXXXXXXX to allow Applicant the opportunity to file supplemental pleadings addressing which fees sought are actually for "substantial and unanticipated work."

4.	**18-26531-E-13** **BLG-3**	**DANIEL/LIZBETH ALARCON** **Chad Johnson**	**MOTION TO CONFIRM PLAN** **11-16-18 [22]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on November 16, 2018. By the court's calculation, 60 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

The Motion to Confirm the 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 Plan is denied.

Daniel Alarcon and Lizbeth Alarcon ("Debtor") seek confirmation of the Plan, which would constitute the first confirmed plan in this case. The Plan proposes monthly payments of $5,000.00 and a 47.03 percent dividend to unsecured claims, totaling $265,336.25. Dckt. 18. 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 December 21, 2018. Dckt. 31. Trustee opposes confirmation on the following grounds:

1. Debtor proposes to pay Ocwen Loan Servicing (as servicer of creditor Wells Fargo Bank, N.A.) as a Class 4; however, Proof of Claim, No. 8 indicates arrearages of $14,351.05. Therefore, this claim should be treated as a Class 1.

2. Form 122C-2 shows Debtor's disposable income is $12,108.32 monthly,

where Debtor only proposes payments of $5,000.00.

3. Debtor has unreported income of $615.68 from vacation pay. Furthermore, Debtor's proposed plan provides any tax refunds over "2,00" will be paid into the plan (Trustee believes this to be an error, and does not oppose amending the plan to state "$2,000" in the order confirming).

4. Debtor's plan relies on a motion to value the collateral of the IRS and Lazer Broadcasting Corp. However, Debtor has not filed any motion to value.

5. Debtor lists property commonly known as 733 Morey Avenue, Sacramento, California on Schedules A/B. However, at the Meeting of Creditors Debtor admitted the property was owned by Debtor's client Roberto Arias. Debtor's plan reflects as a Class 4 expense, payments made to "Third Party Mortgage," but Trustee is uncertain this is actually a debt owed by Debtor.

DISCUSSION

Trustee's opposing grounds are well-taken.

Debtor proposes to treat the claim of Wells Fargo Bank, N.A. as a Class 4, paid directly outside the plan. However, Proof of Claim, No. 8 shows arrearages of $14,351.05. Proof of Claim, No. 8. The Plan currently is not feasible. 11 U.S.C. § 1325(a)(6).

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

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

The Plan proposes to pay a 47.03 percent dividend to unsecured claims, which total $265,336.25, though Debtor's projected disposable income under 11 U.S.C. § 1325(b)(2) totals $12,108.32. Furthermore, Debtor may have additional income not reported in the form of vacation pay and tax returns. Thus, the court may not approve the Plan.

A review of Debtor's Plan shows that it relies on the court valuing the secured claims of IRS and Lazer Broadcasting Corp. Debtor has failed to file any motion to value collateral, however. Without the court valuing the claim, the Plan is not feasible. 11 U.S.C. § 1325(a)(6).

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtor's plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). The Chapter 13 Trustees argument is that Debtor's plan reflects as a Class 4 expense, payments made to "Third Party Mortgage," where Trustee is uncertain this is actually a debt owed by Debtor. In the event Debtor is not actually paying this expense, Debtor would be paying less than what creditors would receive in a Chapter 7 case.

Based on the foregoing, the Plan does not comply with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is not confirmed.

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

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

5. **17-25136-E-13** **SJD-2**

JOHN MCFARLIN AND SAMANTHA ROBBINS
Susan Turner

MOTION TO MODIFY PLAN
11-28-18 [35]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on November 28, 2018. By the court's calculation, 48 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

The Motion to Confirm the Modified Plan is denied.

John Thomas McFarlin and Samantha Alexandra Robbins ("Debtor") seek confirmation of the Modified Plan because Debtor Samantha Robbins received an increase in income and the Sacramento County Utilities secured claim was not previously provided for. Dckt. 37. The Modified Plan provides for monthly payments of $1,836; provides for the secured claim of Sacramento County Utilities as a Class 2(A) with monthly payments of $29.00; and provides that a total of $24,646.00 was paid into the plan as of November 25, 2018. Dckt. 39. 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 December 27, 2018. Dckt. 41. Trustee opposes confirmation on the following grounds:

1. Debtor's proposed Modified Plan would take 128 months to complete. The remaining amounts to be paid are $206,072.00. After deducting funds held

by the Trustee, the payments of $1,836.00 would take an additional 112 months to complete the plan, and the plan is already in month 16 as of December 2018.

2. Debtor's supplemental Schedule J (Dckt. 38) reflects disposable income of $2,015.59. Debtor's proposed plan payment of $1,836.00 is not Debtor's best efforts. Furthermore, Debtor has not notified Trustee of change in employment as required by the court's prior Order confirming plan and has not provided current pay advices. Additionally, Debtor's Supplemental Schedule I increases the transportation expense from $290 to $770 without any explanation or evidentiary support.

3. Debtor filed the proposed Modified Plan using the incorrect plan form, effective December 1, 2017.

4. Debtor incorrectly captioned the date of the hearing on this Motion as January 15, 2018.

DISCUSSION

Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to the Chapter 13 Trustee, the Plan will complete in 128 months due to the remaining amounts to be paid ($206,072.00) and the monthly payment amount ($1,836.00). The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

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

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

The Plan proposes to pay a 100 percent dividend to unsecured claims, which total $57,628.62. While all claims are paid in full, no interest being afforded, they do not receive the value they would otherwise receive. Debtor's projected disposable income under 11 U.S.C. § 1325(b)(2) totals $2,015.59, which is higher than the proposed plan payments. Thus, the court may not approve the Plan.

The Chapter 13 Trustee argues that the Plan is based upon a plan form that is no longer effective now that the court has adopted a new plan form as of November 9, 2018. The Plan is based on a prior plan form, which is a violation of Federal Rule of Bankruptcy Procedure 3015.1 and General Order 17-03.

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

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

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

6. **18-21839-E-13** **FRANCISCA GARAY** **MOTION TO MODIFY PLAN**
ADR-1 **Justin Kuney** **11-14-18 [37]**

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

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

Sufficient Notice Not Provided. No Proof of Service was filed with the Motion and supporting documents establishing when and how many days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition). Without having provided evidence, the court cannot determine the sufficiency of notice, if any was provided.

At the hearing, **XXXXXXXXXXX**.

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.

Francisca Martinez Garay ("Debtor") seeks confirmation of the Modified Plan because Debtor had a disruption in income with her son being able to make his contribution as provided in the Confirmed plan. Dckt. 39. Debtor's Son has fixed issues delaying his contribution and should make those payments going forward. Dckt. 40. The Modified Plan provides for payments of $4,550.00 for months 1 through 8, and $870 in months 9 through 60; $340 monthly to Midland Mortgage Co. beginning month 14 of the plan; a single payment of $653.26 to Midfirst Bank ; and post-petition arrears of Midland Mortgage Co. in the amount of $20 monthly beginning month 14 of the plan. Dckt. 42. 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 December 27, 2018. Dckt. 45.

Trustee opposes confirmation on the following grounds:

1. Debtor is delinquent $870.00 under the proposed plan.

2. The plan proposes to pay the claim of Midfirst Bank in the amount of $653.26, but does not proposes any dividend. Trustee does not oppose the Motion if the claim is provided for in the order confirming.

3. Debtor used the wrong plan form.

DISCUSSION

Trustee's opposition is well-taken.

Debtor is $870.00 delinquent in plan payments, which represents less than one month of the $5,420.00 plan payment. Before the hearing, another plan payment will be due. The Plan calls for payments to be received by the Chapter 13 Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). The plan proposes to pay $653.26 to Midfirst Bank, but does not specify any monthly payment amount. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

The Chapter 13 Trustee argues that the Plan is based upon a plan form that is no longer effective now that the court has adopted a new plan form as of November 9, 2018. The Plan is based on a prior plan form, which is a violation of Federal Rule of Bankruptcy Procedure 3015.1 and General Order 17-03.

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

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

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

7. **18-27039-E-13** **DPC-1** **NADIA KOSTYUK** **Julia Young** **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **12-18-18 [69]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on December 18, 2018. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

A. Debtor failed to appear at the Meeting of Creditors on December 13, 2018. The Meeting was continued to January 17, 2019.

B. Debtor filed her plan using the wrong plan form, failing to use the plan effective November 8, 2018.

C. Debtor failed to provide business documents, including Questionnaire, 2 years of tax returns, 6 months of profit and loss statements, 6 months of bank statements, and proof of license and insurance or a statement no such documentation exists.

D. Debtor has not provided Trustee a tax transcript or return for the most recent pre-petitio filing year, or a statement no documentation exists.

E. A plan payment of $12,000.00 will come due December 25, 2018.

FILING OF AMENDED PLAN

On November 29, 2018, Debtor filed a second Chapter 13 Plan. It is titled "Chapter 13 Plan," and is not titled as an "Amended Chapter 13 Plan." However, given that Debtor appended an original Chapter 13 Plan to the Petition, Summary of Assets and Liabilities, Schedules A/B through J, Statement of Financial Affairs, Statement of Current Monthly Income, Disclosure of Compensation, and Certification About a Financial Management Course on November 8, 2018 (Dckt. 1), and now a second plan, the November 29, 2018 is Debtor's Amended Plan.

TERMS OF ORIGINAL CHAPTER 13 PLAN
SUBJECT TO CURRENT OBJECTION

The Original Chapter 13 Plan, Dckt. 1 at 42 - 46, states the follow terms, conditions, and provisions for payment of claims by Debtor:

A. Monthly Plan Payments....................................$0.00

B. Term of Plan.................................36 Months

C. Creditor Claims Provided For in Plan

1. Class 1 Secured..None

2. Class 2 Secured

a. Capital Mortgage $392,601 Claim..................$0.00 Dividend
b. Mortgage Lender Services, $109,084 Claim...$0.00 Dividend

3. Class 3 Secured Claims Surrender of Collateral.............None

4. Class 4 Secured Claims Direct Payment...........................None

5. Class 5 Priority Unsecured Claims...................................None

6. Class 6 Special Treatment Unsecured Claims..................None

7. Class 7 General Unsecured Claims....................................None

D. Executory Contracts and Leases..None

Chapter 13 Plan ¶¶ 2.01, 2.03, 3.09, 3.11, 3.14, 3.15, 3.17, 3.19, 3.20, 4.02.

On its face, the original Chapter 13 Plan appended to Petition and other documents is a "Plan" to have "no plan." Nobody is paid anything for a period of three years.

DISCUSSION

Trustee's objections are well-taken.

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

Debtor's Plan is based upon a plan form that is no longer effective now that the court has adopted a new plan form as of November 9, 2018. The Plan is based on a prior plan form, which is a violation of Federal Rule of Bankruptcy Procedure 3015.1 and General Order 17-03.

Debtor has failed to timely provide the Chapter 13 Trustee with business documents including:

A. Questionnaire,
B. Two years of tax returns,
C. Six months of profit and loss statements,
D. Six months of bank account statements, and
E. Proof of license and insurance or written statement that no such documentation exists.

11 U.S.C. §§ 521(e)(2)(A)(I), 704(a)(3), 1106(a)(3), 1302(b)(1), 1302(c); FED. R. BANKR. P. 4002(b)(2) & (3). Debtor is required to submit those documents and cooperate with the Chapter 13 Trustee. 11 U.S.C. § 521(a)(3). Without Debtor submitting all required documents, the court and the Chapter 13 Trustee are unable to determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325.

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

The court's review of the "Plan," which is effectively a "No Payment Plan" does not comply with the provisions of the Bankruptcy Code and proposes relief not allowed thereunder. As sternly stated by the Supreme Court in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 1381 n.14, 176 L. Ed. 2d 158, 173 n.14 (2010), [FN. 1] a federal trial court does not grant relief merely because someone asks for it, but it must be relief shown to be allowable under the law and supported by sufficient evidence.

FN. 1. *See also Varela v. Dynamic Brokers, Inc. (In re Dynamic Brokers, Inc.)*, 293 B.R. 489, 499 (B.A.P. 9th Cir. 2003) (citing *Everett v. Perez (In re Perez)*, 30 F.3d 1209, 1213 (9th Cir. 1994)).

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

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

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

8. **[18-27039](#)-E-13** **[DPC](#)-2** **NADIA KOSTYUK** **Julia Young** **CONTINUED MOTION TO DISMISS CASE** **12-18-18 [[73](#)]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on December 18, 2018. By the court's calculation, 22 days' notice was provided. 14 days' notice is required.

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

The Motion to Dismiss is granted, and the case is dismissed.

The Chapter 13 Trustee, David Cusick ("Trustee"), seeks dismissal of the case on the basis that:

1. The debtor, Nadia Kostyuk ("Debtor"), failed to appear at the Meeting of Creditors December 13, 2018. Debtor's counsel informed Trustee she was out of town on a cruise with her spouse and requested the Meeting be continued to January 17, 2019;

2. Debtor filed her plan using EDC Form 3-080 rather than the current Form 003-080-12;

3. Debtor has not noticed interested parties of the Amended Plan;

4. Debtor failed to file business documents, including a Questionnaire, 2 years of tax returns, 6 months of profit and loss statements, 6 months of bank statements, or proof of license and insurance or a written statement that no such documentation exists.

5. Debtor failed to provide the Trustee with a tax transcript, tax return, or written statement that no such documentation exists for the most recent pre-petition filing tax year.

JANUARY 9, 2019 HEARING

At the hearing, the Trustee reported that Debtor has not provided the personal and corporate tax returns for 2016, has not received all of the bank account statements, has not received the business questionnaire, and proof of license and insurance.

Debtor's counsel said that the documents had been transmitted by email and that she had documentation of the transmission.

At the hearing the court further addressed with Debtor's counsel that merely filing a motion to confirm the existing proposed plan, which does not provide for the litigation of the dispute with the one creditor and purported to have the creditor included in Class 1 as holding a claim that is not being modified is not proper. Further, such could be misconstrued as an admission by Debtor of the secured claim that they dispute.

Debtor's counsel did not provide an adequate explanation as to why no action, even the service of the complaint, in Adversary Proceeding 18-2195 had been taken. The complaint seeks the necessary injunctive relief to stop the creditor who conducted a nonjudicial foreclosure sale of the property and purchase it at the sale day after this third bankruptcy case in the past year was filed by the Debtor (there being no automatic stay pursuant to 11 U.S.C. § 362(c)(4)(A)). Counsel's statement that the Debtor was not available because she was on a cruise did not present a credible reason for the failure to seek the necessary temporary restraining order or preliminary injunction.

Debtor's counsel stated that she now would , in January 2019, serve the Summons and Complaint in the Adversary Proceeding. The Summons was issued on December 6, 2018. Dckt. 3. As provided in Federal Rule of Bankruptcy Procedure 7004(e) the summons must be served withing seven days of it being issued. If not so timely served, then a new summons must be obtained.

Debtor's counsel also advised the court that Debtor intended to prosecute a duplicate state court action, asserting the same claims and interests as in the Adversary Proceeding. Counsel offered no explanation as to how or why creating a parallel duplicate action in another court was appropriate.

Interest of Debtor

At the hearing , the court expressed concern, in light of the two unsuccessful bankruptcy case and the lack of prosecution in this case, that merely allowing this case to linger might leave Debtor and her spouse in a continued state of blissful somnolence, believing that somehow a bankruptcy case with no stay, no plan, and no state or federal court action to rescind the foreclosure sale was somehow protecting their interests.

If Debtor's Schedules are accurate, the real property ("Property") Debtor states was improperly foreclosed on has a value of $750,000. Schedule A/B, Dckt. 37 at 1. Debtors identifies an undisputed first deed of trust securing a claim of ($392,601) against the Property. That would leave $350,000 in value at issue.

Debtor disputes the validity of the second deed of trust and obligation in the amount of $113,000 purported to be secured by it. The Complaint filed in Adversary Proceeding 18-2195, states a dozen causes of action, including: (1) the security interest is void (First Cause of Action), (2) rescission of the loan (Third Cause of Action); (3) fraud rendering the security interest unenforceable (Fourth Cause of Action), (4) cancellation of the written instrument (note) (Fifth Cause of Action), (5) unconscionability rendering the obligation unenforceable (Seventh Cause of Action), and (6) quiet title that the deed of trust is unenforceable (Eighth Cause of Action); in addition to various damages claims and avoiding the foreclosure (to the extent that the creditor has any rights and interests).

Even if Debtor is correct and the sale can be set aside, but still owes the $113,000, there would still be $225,000+ in equity in the property to be "saved." The court continues the hearing to January 15, 2019, to afford Debtor and Debtor's counsel the opportunity to provide evidence that the documents at issue were previously sent to the Trustee, as well as show the court that Debtor and counsel are actually prosecuting this case, not merely filing a nonproductive, holding action to create the appearance of, but there being no substance to, a bankruptcy case.

ADDITIONAL PLEADINGS FILED

On November 29, 2018, Debtor filed a second Chapter 13 Plan. Dckt. 46. Though not titled as such, this was Debtor's First Amended Chapter 13 Plan. This First Amended Chapter 13 Plan states the following terms and provisions for addressing claims of creditors:

A. Monthly Plan Payment..$2,000

1. In the additional provisions it is stated that the Plan Payments shall be:

   a. $2,000 per month for 59 Months

   b. $10,000 lump sum payment in month 1

2. Duration of Plan......................59 Months, plus the lump sum payment

3. Creditor Claims Provided in the First Amended Plan

   a. Class 1 Secured Claims

(1) Capital Mortgage................................$0.00 Dividend

(2) Mortgage Lender Services..................$1,759 Dividend

b. Class 2 Secured Claims.....................................None

c. Class 3 Surrendered Secured Claims..................None

d. Class 4 Direct Payment Secured Claims.............None

e. Class 5 Priority Unsecured Claims......................None

f. Class 6 Special Treatment Unsecured Claims......None

g. Class 7 General Unsecured Claims.......................None

First Amended Chapter 13 Plan ¶¶ 2.10, Additional Provisions for ¶ 2.01, 2.03, 3.07, 3.08, 3.09, 3.10, 3.12, 3.13, and 3.14.

As drafted, the only claim to be paid in the Chapter 13 case is that of Mortgage Lender Services, for which there is no stated arrearage, and which the current monthly installment is $1,759.

No bankruptcy plan is needed to make the current monthly payment to a creditor for an account on which there is no arrearage.

On Schedule D (Dckt. 1 at 17) Debtor lists two creditors with secured claims for which the collateral is Debtor's residence on Auburn Folsom Road, which is stated to have a value of $750,000:

A. Capital Mortgage

1. Amount of Secured Claim..................................$392,601

B. Mortgage Lender Services

1. Amount of Secured Claim..................................$109,084

Thus, the First Amended Chapter 13 Plan provides for payment of a $1,759 a month dividend for the secured claim of Mortgage Lender Services, and no payment to be made on the secured claim of Capital Mortgage. In doing so, while paying one claim, the other is provided for to be in default.

The First Amended Plan makes no provision for litigating the asserted disputes concerning the foreclosure on the Auburn Folsom Road Property by BBV Profit Sharing Plan. As discussed above, this is the third in a series of Chapter 13 bankruptcy cases filed by (or for) the Debtor, with the prior two being dismissed in the prior year and no automatic stay having gone into effect when this case was filed on November 8, 2018 (11 U.S.C. § 362(c)(4)(A)).

Motion to Confirm First Amended Plan

At the initial hearing on the Motion to Dismiss, the court solicited from Debtor's counsel why no motion to confirm this First Amended Plan, filed on November 29, 2018 had been filed and set for hearing. No credible response was advanced, other than counsel stating that she was waiting until the continued First Meeting of Creditors was conducted or because Debtor was not available in December 2018 because Debtor was on a cruise (this is also the reason given for why no effort has been made to obtain a temporary restraining order or preliminary injunction to stay BBV Profit Sharing Plan from acting to obtain possession of the Auburn Folsom Road Property it asserts it purchased at the foreclosure sale).

On January 11, 2019, Debtor's counsel filed a pleading titled "Motion to Confirm First Amended Chapter 13 Plan." Dckt. 90. The Motion is filed, stating that the hearing date is January 15, 2018 - four days after the Motion to Confirm was filed. No notice of hearing or any supporting evidence is filed with the Motion to Confirm. Thus, it appears that Debtor and Counsel file this as an ex parte motion, unsupported by evidence, based solely on allegations in the Motion to Confirm itself.

The Motion to Confirm the First Amended Chapter 13 Plan states with particularity (Fed. R. Bankr. P. 9013) the following grounds upon which the *ex parte*, unsupported by evidence, relief is based:

A. Debtor requests the First Amended Plan be confirmed. Motion ¶ 1, Dckt. 90.

B. The Plan provides for a lump sum payment of $10,000 in month 1 of the plan and then $2,000 a month for the remaining 59 months of the Plan. ¶ 2, *Id.*

C. Debtor has sufficient disposable income to make the Plan payments. ¶ 3, *Id.*

D. The First Amended Plan is in good faith. ¶ 4, *Id.*

E. Debtor has submitted all required documents to the Chapter 13 Trustee. ¶ 5, *Id.* [FN. 1]

F. Debtor will appear at the January 17, 2019 Continued First Meeting of Creditors. ¶ 6, *Id.*

G. Debtor requests that the First Amended Plan be confirmed. ¶ 7, *Id.*

FN. 1. This was the bone of contention at the initial hearing, with Debtor's counsel stating that all such documents had been sent by email to the Trustee. The court continued the hearing to allow counsel to file evidence, by Friday January 11, 2019, of such documents being delivered. No such evidence has been filed.

No other grounds upon which the requested relief are stated. The minimum requirements for a court to confirm a Chapter 13 Plan stated in 11 U.S.C. § 1325 and § 1322 are more than (1) Debtor has a plan, (2) Debtor will make these payments, (3) Debtor can make the payments, so confirm the plan.

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

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2)), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of "formulaic recitations of the elements of a cause of action" is insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Contested matter practice in bankruptcy court demonstrates why such pleading is necessary for motions and other contested matters. Many of the substantive legal proceedings are conducted in the bankruptcy court through contested matters. These include, sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim, abandonment of property from the estate, relief from stay, motions to avoid liens, objections to plans in Chapter 13 cases, use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding:

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.,* 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

Not pleading with particularity the grounds in a contested matter can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based. More significantly, such improper pleading tactics can be used to generate non-productive, wasteful judicial proceedings with a party merely having a wish list of desires, which are divorced from reality.

No Basis for Ex Parte Relief Provided

In filing the Motion to Confirm on January 11, 2019, Debtor and Debtor's counsel have shown no basis for the court granting such ex parte, no notice on creditors, unsupported by evidence, relief. Local Bankruptcy Rule 9014-1 requires that motions, unless ex parte relief is requested and granted, be served and noticed for hearing. Federal Rule of Bankruptcy Procedure 2002(b) expressly provides that creditors be provided with at least 28 days notice of the hearing on a motion to confirm a Chapter 13 Plan.

Motion for Stay Pending Appeal

Debtor's counsel also filed on Friday January 11, 2019, a Motion for Stay Pending Appeal. Dckt. 92. This appears to be in response to the court questioning counsel why she had not sought a temporary restraining order or preliminary injunction in Adversary Proceeding 18-2195.

The Motion for a Stay Pending Appeal relates to this court's order imposing the automatic stay in this case as to all persons except for BBV Profit Sharing Plan. Order, Dckt. 59. The court's reasoning was based on Debtor, in this one "creditor" case, seeking to use the automatic stay as an injunction to stay BBV Profit Sharing Plan from asserting rights to possession of the Auburn Folsom Road Property it asserts to have purchased at the foreclosure sale. Merely imposing the automatic stay would not address the issue of the foreclosure sale, but a state court, district court, or adversary proceeding was required. At the time of seeking to impose the automatic stay, Debtor was not pursuing such alleged rights. Debtor was not (and is not) proposing a Chapter 13 Plan which included the litigation of such issues and establishing a fund, to be used in lieu of a Federal Rule of Civil Procedure 65(c) bond, to provide for paying the claim if the foreclosure were set aside or damages caused by the ultimately determined improper enjoining of any right to possession of the Property. [FN. 2]

FN.2. See a discussion of this court allowing Debtor to use such a Plan term to afford debtors the ability to enjoin a purported purchaser, foreclosing creditor, or disputed creditor without having to obtain a bond in advance in *In re De la Salle*, Bankr. E.D. Cal. 10-29678, Civil Minutes for Motion to Dismiss or Convert (DCN: MBB-1), Dckt. 230 (Bankr. E.D. Cal. 2011), affirm., *De la Salle v. U.S. Bank, N.A. (In re De la Salle)*, 461 B.R. 593 (B.A.P. 9th Cir. 2011).

The Motion for Stay Pending Appeal is made pursuant to Federal Rule of Bankruptcy Procedure 8007. While referenced in the opening sentence of the Motion, no specific reference to the Rule is made and no points and authorities is filed in support of the Motion. In pertinent part, Federal Rule of Bankruptcy Procedure 8007(a) states:

> (a) Initial Motion in the Bankruptcy Court.
>
> > (1) In General. Ordinarily, a party must move first in the bankruptcy court for the following relief:
> >
> > > (A) a stay of a judgment, order, or decree of the bankruptcy court pending appeal;
> > >
> > > (B) the approval of a bond or other security provided to obtain a stay of judgment;
> > >
> > > (C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending; or
> > >
> > > (D) the suspension or continuation of proceedings in a case or other relief permitted by subdivision (e).

In the *ex parte*, no notice Motion for Stay Pending Appeal, Debtor expressly requests relief from this court sated as being "for a stay of this Court's Order (Doc. 59) entered by this Court in this case on December 7, 2018, granting a stay to all parties except BBV Profit Sharing Plan." Motion for Stay Pending Appeal, p. 1:20-22; Dckt. 92.

Thus, the requested relief is that Debtor seeks to have this court stay the effect of the prior order imposing the stay, leaving the case as one in which there is no order imposing the stay in the case.

The Motion for Stay Pending Appeal continues, possibly obliquely stating other relief sought. Debtor states further in the Motion:

A. The Order as issued by the bankruptcy court will "will result in irreparable injury to debtor because the Order allows creditor BBV Profit Sharing Plan to move forward with eviction." Motion ¶ 3, *Id.*

B. On December 6, 2018, Debtor filed an Adversary Proceeding to set aside the Trustee's Sale (the BBV Profiting Sharing Plan asserted purchase event) and Debtor served the Complaint on January 10, 2019. *Id.* ¶ 4. [FN. 3]

FN. 3. A review of the Docket in Adversary Proceeding 18-2195 discloses that a Certificate of Service of Summons and Complaint was filed on January 10, 2019. 18-2195, Dckt. 6. The Certificate of Services states:

1. Julia Young, attorney for the Debtor served the Summons and Complaint by mail on the various named defendants;

2. These were served on January 10, 2019.

A review of the Docket does not show a summons reissued. The Summons served by Debtor's counsel was issued on December 6, 2018. *Id.*, Dckt. 3. It states that answers or other responses to the Complaint must be filed within 30 days of December 6, 2018. The Summons and Complaint were served 35 days after the Summons was issued, the time to respond having already expired. As discussed herein, as provided in Federal Rule of Bankruptcy Procedure 7004(e), a summons must be served within 7 days of it being issued.

C. If BBV Profit Sharing Plan acts to obtain possession of the Property pending the appeal in which Debtor is seeking a reversal of the exclusion of BBV Profit Sharing Plan, then the Adversary Proceeding would become moot because in addition to obtaining possession of the Property, BBV Profit Sharing Plan could sell it to a third-party. [FN. 4.]

FN. 4. The Motion (for which there is no points and authorities) does not address the rights of any purported third-party if Debtor records a *lis pendens* to provide the world with notice of the pending litigation asserting that the foreclosure sale was not proper and the trustee's deed should be rescinded. See Cal. C.C.P. §§ 405 *et seq.* As discussed in Witkin California Procedure, Fifth Addition, § 371 (emphasis added):

> 1. [§ 371] Nature and Purpose.
>
> (1) Constructive Notice of Action. At common law a transferee or encumbrancer of land took with constructive notice of title defects asserted in any pending action. This harsh rule was designed to prevent the frustration of the court's judgment by transfers during the litigation. The lis pendens statutes are designed to provide the same safeguard in a more practical manner. The statutes provide that there is no constructive notice of the action unless a *lis pendens*, i.e., a notice of its pendency, is filed in the county where the land is situated. **Thus, a lis pendens "is the mode substituted by the legislature for the constructive notice to all the**

world of the pendency of such an action which formerly arose, ipso facto, upon the institution of the suit. … The purpose of the legislature was thus to furnish the most certain means of notifying all persons of the pendency of the action, and thereby warning them against attempting to acquire a legal or equitable interest in the property." (*Blackburn v. Bucksport & Elk River R. Co.* (1908) 7 C.A. 649, 653, 95 P. 668.)

The *lis pendens* is not a condition to the maintenance of an action; the plaintiff may freely disregard the statutory permission to record a claim. **The only effect of this failure will be that, although the plaintiff may prevail in the action, *bona fide* purchasers or encumbrancers whose rights arise after the commencement of the action and who are first of record will take free from the plaintiff's judgment.** (See *Alpha Stores, Ltd. v. Nobel* (1943) 57 C.A.2d 867, 870, 135 P.2d 625 [execution purchaser]; 25 Cal. L. Rev. 480; infra, §§ 387, 388.)

A number of practice works deal with this subject. (See C.E.B., 2 Real Property Remedies and Damages 2d, Chap. 13; 36 Hastings L. J. 255 [filing in California of *lis pendens* in connection with action in another state affecting California property]; Cal. Civil Practice, 1 Procedure, § 1:146 et seq.; Cal. Civil Practice, 1 Real Property Litigation, Chap. 6; 5 Miller & Starr 3d, § 11:134 et seq.; Rutter Group, Civil Proc. Before Trial § 9:421 et seq.; Rutter Group, Real Property Transactions § 1:600 et seq.; 8 A.L.R.2d 986 [duration as dependent on diligent prosecution of action]; 52 A.L.R.2d 1308 [right to obtain new or successive notice in same or new action after loss or cancellation of original notice]; 17 Am.Jur. P.P. Forms (2002 ed.), Lis Pendens, Form 1 et seq.; 51 Am.Jur.2d (2000 ed.), *Lis Pendens* § 1 et seq.; for implementing legislation, see infra, § 373 et seq.)

(2) No Absolute Privilege. Under former law, the recording of the notice was a publication in the course of a judicial proceeding and absolutely privileged, and could not be the basis of an action for slander of title. (*Albertson v. Raboff* (1956) 46 C.2d 375, 379, 295 P.2d 405 [construing former provision of C.C. 47].) The Legislature subsequently amended C.C. 47 to provide that a recorded *lis pendens* is not privileged unless it identifies an action (a) that was previously filed with a court of competent jurisdiction, and (b) that affects title or right to possession of real property, as authorized or required by law. (C.C. 47(b)(4); see 5 Summary (10th), Torts, § 648.) And even prior to the amendment, a nonjudicial notification of a claim of interest in the land, designed to circumvent a motion for expungement (infra, § 391 et seq.), was not privileged. (*Earp v. Nobmann* (1981) 122 C.A.3d 270, 282, 285, 175 C.R. 767, 5Summary (10th), Torts, § 648.) . . . .

With respect to the constructive notice provided by a lis pendens, the discussion in Witkin continues in § 387:

1. [§ 387] Constructive Notice.

1) In General. From the time of recording a *lis pendens*, "a purchaser, encumbrancer, or other transferee of the real property described in the notice shall be deemed to have constructive notice of the pendency of the noticed action as it relates to the real property and only of its pendency against parties not fictitiously named." (C.C.P. 405.24; but see *Lewis v. Superior Court* (1994) 30 C.A.4th 1850, 1866, 37 C.R.2d 63, infra, § 400 [*lis pendens* recorded before purchasers acquired title, but indexed afterward, was insufficient to provide them with constructive notice; see 12 Summary (10th), Real Property, § 324]; *Dyer v. Martinez* (2007) 147 C.A.4th 1240, 1243, 54 C.R.3d 907 [following *Lewis*].) (See C.E.B., 2 Real Property Remedies and Damages 2d, § 13.8 et seq.)

(2) Relation Back. "The rights and interest of the claimant in the property, as ultimately determined in the pending noticed action, shall relate back to the date of the recording of the notice." (C.C.P. 405.24.)

(3) Actual Notice. C.C.P. 405.24 is not intended to affect existing law regarding the effect of actual notice. (Real Property Law Section Comments.)

It appears that if Debtor and Counsel would utilize the rights available to the Debtor then the appeal would not be rendered moot, but it would necessitate Debtor and Counsel actively prosecute the Adversary Proceeding (or, if they prefer, a state court or district court action (but not both in parallel actions) to rescind the foreclosure sale, have the deed of trust declared void (as asserted), and Debtor's asserted rights reduced to a judgment

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D. Debtor asserts a likelihood of success on the merits of the appeal based on the assertion that "[t]he Adversary Complaint that was filed on December 6, 2018, states numerous grounds for setting aside the Trustee Sale held on November 9, 2018. Additionally, debtor has submitted a Chapter 13 Plan to pay back the lender BBV Profit Sharing Plan through the Plan." ¶ 6, *Id.*

On this point, if Debtor was actively prosecuting the Adversary Proceeding and was prosecuting a plan that incorporates such litigation and created a fund to be used in lieu of posting a bond which would be required for injunctive relief, possibly there could be stretched a "likelihood of success on the merits of the appeal." But Debtor has not and it appears Debtor has carefully avoided creating any fund to be used in lieu of a bond in the event that it various claims in the Adversary Proceeding are unsuccessful and BBV Profit Sharing Plan was improperly enjoined from obtaining the Property from Debtor.

E. Debtor is current on her first mortgage and has no other debts. ¶ 7, *Id.*

Though purported to be current, Debtor's First Amended Plan fails to make any provision for paying the claim secured by the first mortgage.

Thus, it could be argued that the Motion for Stay Pending Appeal does not ask for what is requested, "stay of this Court's Order (Doc. 59) entered by this Court in this case on December 7, 2018, granting a stay to all parties except BBV Profit Sharing Plan" and "Debtor respectfully requests that the Court stay enforcement of the judgment pending debtor's appeal;" Motion, p. 1:21-22, 2:1-2, *Id.*; but instead requesting "(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending." Fed. R. Bankr. P. 8007(1)(C).

Such an interpretation would have the court, first, rewrite the Motion and relief sought, and (2) issue an injunction against a third party without notice. No evidence of irreparable harm is provided. In fact, if Debtor is actively prosecuting the Adversary Proceeding and availing herself of her rights under State Law, her interests in the property can be protected against any third-parties.

With respect to possession of the Property, there is no evidence of there being any unlawful detainer proceeding or other state court action to obtain possession of the Property from Debtor. Presumably, the state court will require the normal procedure affording Debtor Due Process, requiring there to be a complaint filed, served, and Debtor afforded the opportunity to respond and assert her rights. Nothing supports granting such *ex parte*, no notice, no ability to present a response, and the suspension of Due Process for BBV Profit Sharing Plan.

REVIEW OF AMENDED SCHEDULE I AND J

Debtor has filed an Amended Schedule J. Debtor and her non-debtor spouse are stated under penalty of perjury to have $12,418.13 in monthly income. Dckt. 41 at 1-2. No withholding, other than $231.00 is made for federal and state taxes, Medicare, and Social Security Debtor and her non-debtor spouse.

Moving to Schedule J, Debtor lists two dependants, a son and a mother. Dckt. 42 at 1. For expenses, Debtor lists the family unit of 4 (including the non-debtor spouse) as having monthly expenses of ($4,026). *Id.* at 1-2. This includes a $2,196 monthly mortgage payment, though not provided for in the Chapter 13 Plan as a Class 4 authorized payment.

Thus, by Debtor's statement under penalty of perjury, Debtor and her non-debtor spouse have $8,392 in monthly net income - which for one year is $100,704, almost enough to pay the disputed claim of BBV Profit Sharing Plan in full; more than enough to actively pursue the Adversary Proceeding or state court litigation; more than enough to fund a bond to support a preliminary injunction while Debtor litigates the various claims asserted in the Complaint filed in the Adversary Proceeding; and more than enough to support having obtained a loan to refinance the BBV Profit Sharing Plan debt, rather than pursuing the loan modification for which Debtor hired the original counsel that led to the filing of her first bankruptcy case. FN. 5

FN. 5. While now professing that the obligation alleged to have been owed to BBV Profit Sharing Plan was invalid, unenforceable, and improper, when seeking relief from the court in this court to impose the stay, Debtor and Counsel alleged in the Motion:

> On August 28, 2018, debtor, NADIA KOSTYUK, filed a "skeletal" petition on August 28, 2018, in *pro per* under the advice of Olympia Law Group in Los Angeles, California which was a law firm she and her husband were working with to try to negotiate an agreement to pay off the second mortgage they had with Milestone Financial, LLC.

Points and Authorities (attached to the Motion), p:3:3-9; Dckt. 11. This is inconsistent with the contention now that the transaction with the BBV Profit Sharing Plan is unenforceable.

The Points and Authorities continue, alleging what can be characterized as impolite, unprofessional conduct in representative of BBV Profit Sharing Plan communicating with Counsel for Debtor.

In seeking the imposition of the automatic stay, Debtor's initial position was that if imposed, it would apply retroactively, invalidating the foreclosure sale. As the court reviewed the provisions of 11 U.S.C. § 362(c)(4)(C) providing that the stay imposed is effective only from the date of the order, not retroactively, Debtor began stating that the bankruptcy court could on the Motion to Impose the Stay vacate the sale based on the impolite, unprofessional communications.

The Points and Authorities further state that Debtor and the non-debtor spouse had made payments on the obligation to BBV Profit Sharing Plan until December 2017, when the balance was due in full. *Id.* at p. 7:13-15. The explanation continues, that Debtor made many attempts to "negotiate a payoff to settle this loan," but that when such efforts failed, Debtor started filing the bankruptcy cases. This sounds in the nature of Debtor attempting to negotiate a reduction in the amount actually due, and make a discounted payoff. With the more than $8,000 of extra money over expenses each month, Debtor could clearly have refinanced the obligation and paid what was owed. If BBV Profit Sharing Plan was demanding more than what was owed, Debtor and knowledgeable counsel could have commenced a simple state court action to determine the amount due, refinanced the property, deposited with the court adequate amounts (as determined by the court) for the amount in good faith dispute, and have thousands of dollars a month to spare.

In the Declaration of Alex Kostyuk, the non-debtor spouse, he testifies to the payments being made on the obligation owed to BBV Profit Sharing Plan by automatic payment of $703.63 a month (interest only payments). Declaration ¶ 4, Dckt. 13. He continues to testify that BBV Profit Sharing Plan asserted the right to a default rate of interest in the amount of $17.29% (increase from the non-default rate of 11.29%) due to Debtor's failure to provide a statement of the obligation secured by the senior deed of trust. ¶¶ 4-5, *Id.* Further, that BBV Profit Sharing Plan asserted in January 2018 that there was an arrearage in excess of $10,000 due to the monthly payments being less than the default interest (and possibly other matters), and that in February 2018 the obligation to BBV Profit Sharing Plan came due in full. ¶¶ 6, 8-10, *Id.*

Both the non-debtor Spouse in his Declaration (¶ 16, *Id.*) and the Debtor in her Declaration (¶ 7, Dckt. 14) state that they intend to pay the BBV Profit Sharing Plan through the Chapter 13 Plan, with no mention of any contention that there is no obligation or that any asserted obligation was unenforceable.

What stands out in a review of the issues of irreparable harm and merits is that this at worst sound like a minor dispute concerning the proper computation of interest and whether a default existed to justify the imposition of a default interest. The non-default rate of 11.29% for a loan in 2016 strikes the court as being well above that as the market rate for persons with an ability to pay their debts. This court has seen many loan modifications over the past few years, as well as loans obtained by debtors from third parties for half the non-default rate obtained by Debtor and her non-debtor Spouse.

DISCUSSION

At the hearing, **XXXXXXXXXXXX**.

Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Attendance is mandatory. 11 U.S.C. § 343. Failure to appear at the Meeting of Creditors is unreasonable delay that is prejudicial to creditors and is cause to dismiss the case. 11 U.S.C. § 1307(c)(1).

Debtor's Amended Plan is based upon a plan form that is no longer effective now that the court has adopted a new plan form as of December 1, 2017. The Amended Plan is based on a prior plan form, which is a violation of Federal Rule of Bankruptcy Procedure 3015.1 and General Order 17-03. Failure to file a plan on the current form is a delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Debtor did not properly serve the Amended Plan on all interested parties and has yet to file a motion to confirm the Amended Plan. The Amended Plan was filed after the notice of the Meeting of Creditors was issued. Therefore, Debtor must file a motion to confirm the Plan. *See* LOCAL BANKR. R. 3015-1(c)(3). A review of the docket shows that no such motion has been filed. That is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Debtor has failed to timely provide Trustee with business documents including:

A. Questionnaire,
B. Two years of tax returns,
C. Six months of profit and loss statements,
D. Six months of bank account statements, and
E. Proof of license and insurance or written statement that no such documentation exists.

11 U.S.C. §§ 521(e)(2)(A)(I), 704(a)(3), 1106(a)(3), 1302(b)(1), 1302(c); FED. R. BANKR. P. 4002(b)(2) & (3). Debtor is required to submit those documents and cooperate with Trustee. 11 U.S.C. § 521(a)(3). Without Debtor submitting all required documents, the court and Trustee are unable to determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325. That is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Debtor did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. *See* 11 U.S.C. § 521(e)(2)(A)(I); FED. R. BANKR. P. 4002(b)(3). That is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Based on the foregoing, cause exists to dismiss this case. The Motion is granted, and the case is dismissed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss the Chapter 13 case filed by The Chapter 13 Trustee, David Cusick ("Trustee"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is granted, and the case is dismissed.

9. 18-27039-E-13 NADIA KOSTYUK MOTION FOR STAY PENDING APPEAL
No DCN Provided Julia Young 12-18-18 [92]

Tentative Ruling:

Insufficient Notice and Service. The Motion for Stay Pending Appeal was filed ex parte, with no service on any person. The Motion was filed on January 11, only two work days before the hearing date listed on the face of the Motion. No basis has been given for the lack of notice, lack of service, and failure to set a noticed hearing as provided in Local Bankruptcy Rule 9014-1.

The Motion for Stay Pending Appeal is denied without prejudice.

Counsel for Nadia Kostyuk, the Debtor, filed on Friday January 11, 2019, a Motion for Stay Pending Appeal. Dckt. 92. This appears to be in response to the court questioning counsel why she had not sought a temporary restraining order or preliminary injunction in Adversary Proceeding 18-2195.

The Motion for a Stay Pending Appeal relates to this court's order imposing the automatic stay in this case as to all persons except for BBV Profit Sharing Plan. Order, Dckt. 59. The court's reasoning was based on Debtor, in this one "creditor" case, seeking to use the automatic stay as an injunction to stay BBV Profit Sharing Plan from asserting rights to possession of the Auburn Folsom Road Property it asserts to have purchased at the foreclosure sale. Merely imposing the automatic stay would not address the issue of the foreclosure sale, but a state court, district court, or adversary proceeding was required. At the time of seeking to impose the automatic stay, Debtor was not pursuing such alleged rights. Debtor was not (and is not) proposing a Chapter 13 Plan which included the litigation of such issues and establishing a fund, to be used in lieu of a Federal Rule of Civil Procedure 65(c) bond, to provide for paying the claim if the foreclosure were set aside or damages caused by the ultimately determined improper enjoining of any right to possession of the Property. [FN. 1]

FN.1. See a discussion of this court's use of such Plan term to afford debtors the ability to enjoin a purported purchaser, foreclosing creditor, or disputed creditor without having to obtain a bond in advance in *In re De la Salle*, Bankr. E.D. Cal. 10-29678, Civil Minutes for Motion to Dismiss or Convert (DCN: MBB-1), Dckt. 230 (Bankr. E.D. Cal. 2011), affirm., *De la Salle v. U.S. Bank, N.A. (In re De la Salle)*, 461 B.R. 593 (B.A.P. 9th Cir. 2011).

The Motion for Stay Pending Appeal is made pursuant to Federal Rule of Bankruptcy Procedure 8007. While referenced in the opening sentence of the Motion, no specific reference to the Rule is made and no points and authorities is filed in support of the Motion. In pertinent part, Federal Rule of Bankruptcy Procedure 8007(a) states:

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> > > (B) the approval of a bond or other security provided to obtain a stay of judgment;
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> > >
> > > (D) the suspension or continuation of proceedings in a case or other relief permitted by subdivision (e).

In the *ex parte*, no notice Motion for Stay Pending Appeal, Debtor expressly requests relief from this court sated as being "for a stay of this Court's Order (Doc. 59) entered by this Court in this case on December 7, 2018, granting a stay to all parties except BBV Profit Sharing Plan." Motion for Stay Pending Appeal, p. 1:20-22; Dckt. 92.

Thus, the requested relief is that Debtor seeks to have this court stay the effect of the prior order imposing the stay, leaving the case as one in which there is no order imposing the stay in the case.

The Motion for Stay Pending Appeal continues, possibly obliquely stating other relief sought. Debtor states further in the Motion:

a. The Order as issued by the bankruptcy court will "will result in irreparable injury to debtor because the Order allows creditor BBV Profit Sharing Plan to move forward with eviction." Motion ¶ 3, *Id.*

b. On December 6, 2018, Debtor filed an Adversary Proceeding to set aside the Trustee's Sale (the BBV Profiting Sharing Plan asserted purchase event) and Debtor served the Complaint on January 10, 2019. *Id.* ¶ 4. FN. 2

FN. 2. A review of the Docket in Adversary Proceeding 18-2195 discloses that a Certificate of Service of Summons and Complaint was filed on January 10, 2019. 18-2195, Dckt. 6. The Certificate of Services states:

i. Julia Young, attorney for the Debtor served the Summons and Complaint by mail on the various named defendants;

ii. These were served on January 10, 2019.

A review of the Docket does not show a summons reissued. The Summons served by Debtor's counsel was issued on December 6, 2018. *Id.*, Dckt. 3. It states that answers or other responses to the Complaint must be filed within 30 days of December 6, 2018. The Summons and Complaint were served 35 days after the Summons was issued, the time to respond having already expired. As discussed herein, as provided in Federal Rule of Bankruptcy Procedure 7004(e), a summons must be served within 7 days of it being issued.

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c. If BBV Profit Sharing Plan acts to obtain possession of the Property pending the appeal in which Debtor is seeking a reversal of the exclusion of BBV Profit Sharing Plan, then the Adversary Proceeding would become moot because in addition to obtaining possession of the Property, BBV Profit Sharing Plan could sell it to a third-party. [FN. 3.]

FN. 3. The Motion (for which there is no points and authorities) does not address the rights of any purported third-party if Debtor records a *lis pendens* to provide the world with notice of the pending litigation asserting that the foreclosure sale was not proper and the trustee's deed should be rescinded. See Cal. C.C.P. §§ 405 *et seq*. As discussed in Witkin California Procedure, Fifth Addition, § 371 (emphasis added):

> 1. [§ 371] Nature and Purpose.
>
> (1) Constructive Notice of Action. At common law a transferee or encumbrancer of land took with constructive notice of title defects asserted in any pending action. This harsh rule was designed to prevent the frustration of the court's judgment by transfers during the litigation. The lis pendens statutes are designed to provide the same safeguard in a more practical manner. The statutes provide that there is no constructive notice of the action unless a *lis pendens*, i.e., a notice of its pendency, is filed in the county where the land is situated. **Thus, a lis pendens "is the mode substituted by the legislature for the constructive notice to all the world of the pendency of such an action which formerly arose, ipso facto, upon the institution of the suit. … The purpose of the legislature was thus to furnish the most certain means of notifying all persons of the pendency of the action, and thereby warning them against attempting to acquire a legal or equitable interest in the property." (*Blackburn v. Bucksport & Elk River R. Co.* (1908) 7 C.A. 649, 653, 95 P. 668.)**
>
> The *lis pendens* is not a condition to the maintenance of an action; the plaintiff

may freely disregard the statutory permission to record a claim. **The only effect of this failure will be that, although the plaintiff may prevail in the action, *bona fide* purchasers or encumbrancers whose rights arise after the commencement of the action and who are first of record will take free from the plaintiff's judgment.** (See *Alpha Stores, Ltd. v. Nobel* (1943) 57 C.A.2d 867, 870, 135 P.2d 625 [execution purchaser]; 25 Cal. L. Rev. 480; infra, §§ 387, 388.)

A number of practice works deal with this subject. (See C.E.B., 2 Real Property Remedies and Damages 2d, Chap. 13; 36 Hastings L. J. 255 [filing in California of *lis pendens* in connection with action in another state affecting California property]; Cal. Civil Practice, 1 Procedure, § 1:146 et seq.; Cal. Civil Practice, 1 Real Property Litigation, Chap. 6; 5 Miller & Starr 3d, § 11:134 et seq.; Rutter Group, Civil Proc. Before Trial § 9:421 et seq.; Rutter Group, Real Property Transactions § 1:600 et seq.; 8 A.L.R.2d 986 [duration as dependent on diligent prosecution of action]; 52 A.L.R.2d 1308 [right to obtain new or successive notice in same or new action after loss or cancellation of original notice]; 17 Am.Jur. P.P. Forms (2002 ed.), Lis Pendens, Form 1 et seq.; 51 Am.Jur.2d (2000 ed.), *Lis Pendens* § 1 et seq.; for implementing legislation, see infra, § 373 et seq.)

(2) No Absolute Privilege. Under former law, the recording of the notice was a publication in the course of a judicial proceeding and absolutely privileged, and could not be the basis of an action for slander of title. (*Albertson v. Raboff* (1956) 46 C.2d 375, 379, 295 P.2d 405 [construing former provision of C.C. 47].) The Legislature subsequently amended C.C. 47 to provide that a recorded *lis pendens* is not privileged unless it identifies an action (a) that was previously filed with a court of competent jurisdiction, and (b) that affects title or right to possession of real property, as authorized or required by law. (C.C. 47(b)(4); see 5 Summary (10th), Torts, § 648.) And even prior to the amendment, a nonjudicial notification of a claim of interest in the land, designed to circumvent a motion for expungement (infra, § 391 et seq.), was not privileged. (*Earp v. Nobmann* (1981) 122 C.A.3d 270, 282, 285, 175 C.R. 767, 5Summary (10th), Torts, § 648.) . . . .

With respect to the constructive notice provided by a lis pendens, the discussion in Witkin continues in § 387:

1. [§ 387] Constructive Notice.

1) In General. From the time of recording a *lis pendens*, "a purchaser, encumbrancer, or other transferee of the real property described in the notice shall be deemed to have constructive notice of the pendency of the noticed action as it relates to the real property and only of its pendency against parties not fictitiously named." (C.C.P. 405.24; but see *Lewis v. Superior Court* (1994) 30 C.A.4th 1850, 1866, 37 C.R.2d 63, infra, § 400 [*lis pendens* recorded before purchasers acquired title, but indexed afterward, was insufficient to provide them with constructive notice; see 12 Summary (10th), Real Property, § 324]; *Dyer v. Martinez* (2007) 147 C.A.4th 1240, 1243, 54 C.R.3d 907

[following *Lewis*].) (See C.E.B., 2 Real Property Remedies and Damages 2d, § 13.8 et seq.)

(2) Relation Back. "The rights and interest of the claimant in the property, as ultimately determined in the pending noticed action, shall relate back to the date of the recording of the notice." (C.C.P. 405.24.)

(3) Actual Notice. C.C.P. 405.24 is not intended to affect existing law regarding the effect of actual notice. (Real Property Law Section Comments.)

It appears that if Debtor and Counsel would utilize the rights available to the Debtor then the appeal would not be rendered moot, but it would necessitate Debtor and Counsel actively prosecute the Adversary Proceeding (or, if they prefer, a state court or district court action (but not both in parallel actions) to rescind the foreclosure sale, have the deed of trust declared void (as asserted), and Debtor's asserted rights reduced to a judgment

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d. Debtor asserts a likelihood of success on the merits of the appeal based on the assertion that "[t]he Adversary Complaint that was filed on December 6, 2018, states numerous grounds for setting aside the Trustee Sale held on November 9, 2018. Additionally, debtor has submitted a Chapter 13 Plan to pay back the lender BBV Profit Sharing Plan through the Plan." ¶ 6, *Id.*

On this point, if Debtor was actively prosecuting the Adversary Proceeding and was prosecuting a plan that incorporates such litigation and created a fund to be used in lieu of posting a bond which would be required for injunctive relief, possibly there could be stretched a "likelihood of success on the merits of the appeal." But Debtor has not and it appears Debtor has carefully avoided creating any fund to be used in lieu of a bond in the event that it various claims in the Adversary Proceeding are unsuccessful and BBV Profit Sharing Plan was improperly enjoined from obtaining the Property from Debtor.

e. Debtor is current on her first mortgage and has no other debts. ¶ 7, *Id.*

Though purported to be current, Debtor's First Amended Plan fails to make any provision for paying the claim secured by the first mortgage.

Thus, it could be argued that the Motion for Stay Pending Appeal does not ask for what is requested, "stay of this Court's Order (Doc. 59) entered by this Court in this case on December 7, 2018, granting a stay to all parties except BBV Profit Sharing Plan" and "Debtor respectfully requests that the Court stay enforcement of the judgment pending debtor's appeal;" Motion, p. 1:21-22, 2:1-2, *Id.*; but instead requesting "(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending." Fed. R. Bankr. P. 8007(1)(C).

Such an interpretation would have the court, first, rewrite the Motion and relief sought, and (2) issue an injunction against a third party without notice. No evidence of irreparable harm is provided. In fact, if Debtor is actively prosecuting the Adversary Proceeding and availing herself of her rights under State Law, her interests in the property can be protected against any third-parties.

With respect to possession of the Property, there is no evidence of there being any unlawful detainer proceeding or other state court action to obtain possession of the Property from Debtor. Presumably, the state court will require the normal procedure affording Debtor Due Process, requiring there to be a complaint filed, served, and Debtor afforded the opportunity to respond and assert her rights. Nothing supports granting such *ex parte*, no notice, no ability to present a response, and the suspension of Due Process for BBV Profit Sharing Plan.

REVIEW OF AMENDED SCHEDULE I AND J

Debtor has filed an Amended Schedule J. Debtor and her non-debtor spouse are stated under penalty of perjury to have $12,418.13 in monthly income. Dckt. 41 at 1-2. No withholding, other than $231.00 is made for federal and state taxes, Medicare, and Social Security Debtor and her non-debtor spouse.

Moving to Schedule J, Debtor lists two dependants, a son and a mother. Dckt. 42 at 1. For expenses, Debtor lists the family unit of 4 (including the non-debtor spouse) as having monthly expenses of ($4,026). *Id.* at 1-2. This includes a $2,196 monthly mortgage payment, though not provided for in the Chapter 13 Plan as a Class 4 authorized payment.

Thus, by Debtor's statement under penalty of perjury, Debtor and her non-debtor spouse have $8,392 in monthly net income - which for one year is $100,704, almost enough to pay the disputed claim of BBV Profit Sharing Plan in full. More than enough to actively pursue the Adversary Proceeding or state court litigation. More than enough to fund a bond to support a preliminary injunction while Debtor litigates the various claims asserted in the Complaint filed in the Adversary Proceeding. More than enough to support having obtained a loan to refinance the BBV Profit Sharing Plan debt, rather than pursuing the loan modification for which Debtor hired the original counsel that led to the filing of her first bankruptcy case. [FN. 4]

FN. 4. While now professing that the obligation alleged to have been owed to BBV Profit Sharing Plan was invalid, unenforceable, and improper, when seeking relief from the court in this court to impose the stay, Debtor and Counsel alleged in the Motion:

> On August 28, 2018, debtor, NADIA KOSTYUK, filed a "skeletal" petition on August 28, 2018, in *pro per* under the advice of Olympia Law Group in Los Angeles, California which was a law firm she and her husband were working with to try to negotiate an agreement to pay off the second mortgage they had with Milestone Financial, LLC.

Points and Authorities (attached to the Motion), p:3:3-9; Dckt. 11. This is inconsistent with the contention now that the transaction with the BBV Profit Sharing Plan is unenforceable.

The Points and Authorities continue, stating what can be characterized as impolite, unprofessional conduct in representative of BBV Profit Sharing Plan communicating with Counsel for Debtor.

In seeking the imposition of the automatic stay, Debtor's initial position was that if imposed, it would apply retroactively, invalidating the foreclosure sale. As the court reviewed the provisions of 11 U.S.C. § 362(c)(4)(C) providing that the stay imposed is effective only from the date of the order, not retroactively, Debtor began stating that the bankruptcy court could on the Motion to Impose the Stay vacate the sale based on the impolite, unprofessional communications.

The Points and Authorities further state that Debtor and the non-debtor spouse had made payments on the obligation to BBV Profit Sharing Plan until December 2017, when the balance was due in full. *Id.* at p. 7:13-15. The explanation continues, that Debtor made many attempts to "negotiate a payoff to settle this loan," but that when such efforts failed, Debtor started filing the bankruptcy cases. This sounds in the nature of Debtor attempting to negotiate a reduction in the amount actually due, and make a discounted payoff. With the more than $8,000 of extra money over expenses each month, Debtor could clearly have refinanced the obligation and paid what was owed. If BBV Profit Sharing Plan was demanding more than what was owed, Debtor and knowledgeable counsel could have commenced a simple state court action to determine the amount due, refinanced the property, deposited with the court adequate amounts (as determined by the court) for the amount in good faith dispute, and have thousands of dollars a month to spare.

In the Declaration of Alex Kostyuk, the non-debtor spouse, he testifies to the payments being made on the obligation owed to BBV Profit Sharing Plan by automatic payment of $703.63 a month (interest only payments). Declaration ¶ 4, Dckt. 13. He continues to testify that BBV Profit Sharing Plan asserted the right to a default rate of interest in the amount of $17.29% (increase from the non-default rate of 11.29%) due to Debtor's failure to provide a statement of the obligation secured by the senior deed of trust. ¶¶ 4-5, *Id.* Further, that BBV Profit Sharing Plan asserted in January 2018 that there was an arrearage in excess of $10,000 due to the monthly payments being less than the default interest (and possibly other matters), and that in February 2018 the obligation to BBV Profit Sharing Plan came due in full. ¶¶ 6, 8-10, *Id.*

Both the non-debtor Spouse in his Declaration (¶ 16, *Id.*) and the Debtor in her Declaration (¶ 7, Dckt. 14) state that they intend to pay the BBV Profit Sharing Plan through the Chapter 13 Plan, with no mention of any contention that there is no obligation or that any asserted obligation was unenforceable.

What stands out in a review of the issues of irreparable harm and merits is that this at worst sound like a minor dispute concerning the proper computation of interest and whether a default existed to justify the imposition of a default interest. The non-default rate of 11.29% for a loan in 2016 strikes the court as being well above that as the market rate for persons with an ability to pay their debts. This court has seen many loan modifications over the past few years, as well as loans obtained by debtors from third parties for half the non-default rate obtained by Debtor and her non-debtor Spouse.

APPLICABLE LAW

Requests for stays pending appeals are not a common occurrence and the court begins with a review as discussed in the COLLIER BANKRUPTCY PRACTICE GUIDE:

¶ 117.12 Stays Pending Appeal

The issuance of a stay pending appeal is often necessary to avoid prejudicing the rights of the appealing party or mooting the appeal. Such a stay will ordinarily be granted only on motion. A temporary stay pending the hearing on the motion may be essential in certain cases.

. . .

[2] Moving for the Stay Pending Appeal

The procedure for obtaining a stay pending appeal is relatively simple. Regardless of whether an appeal is taken from (1) the bankruptcy court to the district court or a designated bankruptcy appellate panel, (2) the district court or bankruptcy appellate panel to the court of appeals or (3) the bankruptcy court directly to the court of appeals as provided in 28 U.S.C. § 158(d)(2), a stay pending appeal will ordinarily be granted only on motion. The procedure and criteria for obtaining a stay pending appeal are substantively identical in all cases. A stay pending appeal is in the nature of a preliminary injunction, and will only be granted upon a showing that:

(1) The petitioner is likely to prevail on the merits of its appeal;

(2) Without a stay, the petitioner will suffer irreparable injury;

(3) Other interested persons will suffer no substantial harm; and

(4) The public interest will not be harmed.

The Supreme Court has explained that the first two factors are the "most critical" factors, with the likelihood of success being the more important consideration in some Circuits. The party seeking a stay should first apply to the court from which the appeal is taken. When an appeal is taken from an order of the bankruptcy court, the parties have a unique opportunity for making a separate record on the issue of whether a stay pending appeal should be granted. The bankruptcy judge has the discretion to conduct an evidentiary hearing if issues of fact are present even if the moving party moves by order to show cause with a supporting affidavit. Given the applicable criteria for the issuance of a stay pending appeal, the parties may very well want an evidentiary hearing on the motion for the stay, particularly when a party is able to make a record showing irreparable injury or substantial harm. Counsel for the moving party should always be prepared to go forward with such an evidentiary hearing.

The moving party should move by order to show cause so as to bring the motion on for a prompt hearing. Pending a hearing on the motion for a stay itself, the moving party may also ask for a temporary stay when the adversary will not consent to such a stay. If counsel for the appellant intends to seek a temporary stay, then counsel should advise his or her adversary, at least by telephonic notice, of this intent. In fact, counsel may obtain a short stay from opposing counsel merely by making a telephonic request, and, if unsuccessful, can then advise counsel that an application for a temporary stay will be made.

6 COLLIER BANKRUPTCY PRACTICE GUIDE P 117.12 (2018).

The Supreme Court provides a comprehensive review of stays pending appeal in *Nken v. Holder*, 556 U.S. 418, 433-435 (2009), stating:

> "A stay is not a matter of right, even if irreparable injury might otherwise result." *Virginian R. Co.*, 272 U.S., at 672, 47 S. Ct. 222, 71 L. Ed. 463. It is instead "an exercise of judicial discretion," and "[t]he propriety of its issue is dependent upon the circumstances of the particular case." *Id.*, at 672-673, 672, 47 S. Ct. 222, 71 L. Ed. 463; *see Hilton*, *supra*, at 777, 107 S. Ct. 2113, 95 L. Ed. 2d 724 ("[T]he traditional stay factors contemplate individualized judgments in each case"). The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion. *See, e.g., Clinton v. Jones*, 520 U.S. 681, 708, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997); *Landis v. North American Co.*, 299 U.S. 248, 255, 57 S. Ct. 163, 81 L. Ed. 153 (1936).
>
> The fact that the issuance of a stay is left to the court's discretion "does not mean that no legal standard governs that discretion. . . . '[A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139, 126 S. Ct. 704, 163 L. Ed. 2d 547 (2005) (quoting *United States v. Burr*, 25 F. Cas. 30, 35, F. Cas. No. 14692d (No. 14,692d) (CC Va. 1807) (Marshall, C. J.)). As noted earlier, those legal principles have been distilled into consideration of four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton, supra*, at 776, 107 S. Ct. 2113, 95 L. Ed. 2d 724. There is substantial overlap between these and the factors governing preliminary injunctions, *see Winter v. NRDC, Inc.*, 555 U.S. 7, 24, 129 S. Ct. 365, 370, 172 L. Ed. 2d 249, 256 (2008); not because the two are one and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined.
>
> The first two factors of the traditional standard are the most critical. It is not enough that the chance of success on the merits be "better than negligible." *Sofinet v. INS*, 188 F.3d 703, 707 (CA7 1999) (internal quotation marks omitted). Even petitioner acknowledges that "[m]ore than a mere 'possibility' of relief is required." Reply Brief for Petitioner 21 (quoting Brief for Respondent 47). By the same token, simply showing some "possibility of irreparable injury," *Abbassi v. INS*, 143 F.3d 513, 514 (CA9 1998), fails to satisfy the second factor. As the Court pointed out earlier this Term, the "'possibility' standard is too lenient." *Winter*, *supra,* at ___, 129 S. Ct. 365, 172 L. Ed. 2d 249.
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> . . .
>
> Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest. . . .

The Seventh Circuit Court of Appeals addressed the granting or denial of a stay pending appeal in *A&F Enters., Inc. II v. IHOP Franchising LLC (In re A&F Enters., Inc. II)*, 742 F.3d 763, 766, (7th Cir. 2014), noting that the standard for granting or denying a stay pending appeal mirrors the standards used in granting or denying preliminary injunctions. The Seventh Circuit described the "sliding scale" of likelihood of success and possible harm as follows:

> To determine whether to grant a stay, we consider the moving party's likelihood of success on the merits, the irreparable harm that will result to each side if the stay is either granted or denied in error, and whether the public interest favors one side or the other. *See Cavel Int'l, Inc. v. Madigan*, 500 F.3d 544, 547-48 (7th Cir. 2007); *Sofinet v. INS*, 188 F.3d 703, 706 (7th Cir. 1999); *In re Forty-Eight Insulations*, 115 F.3d at 1300. As with a motion for a preliminary injunction, a "sliding scale" approach applies; the greater the moving party's likelihood of success on the merits, the less heavily the balance of harms must weigh in its favor, and vice versa. *Cavel*, 500 F.3d at 547-48; *Sofinet*, 188 F.3d at 707.

Id.

DENIAL WITHOUT PREJUDICE OF MOTION FOR STAY PENDING APPEAL

On its face, the express language Debtor's Motion merely requests that the court stay its order and have no stay under 11 U.S.C. § 362(c)(4)(B) go into effect until after the appeal is completed. A "creative" reading of the Motion could lead one to believe that what Debtor would/should have requested is a stay in the form of a preliminary injunction/temporary imposition of the § 362(c)(4)(B) stay pending conclusion of the appeal.

Even if the latter were to be constructed by the court, and the express relief requested in the Motion ignored, Debtor has not provided the court with a basis for granting such relief. First, Debtor is seeking to move secretly, by *ex parte*, no notice motion. Debtor seeks to strip the concept of Due Process from these proceedings.

Second, Debtor has not shown any irreparable harm. The imposition of the stay pursuant to 11 U.S.C. § 362(c)(4)(B) will not invalidate the foreclosure sale by which BBV Profit Sharing Plan asserts it purchased the Auburn Folsom Road Property. Such setting aside of the purported foreclosure sale must be accomplished through the Adversary Proceeding or, if the Debtor so desires, a state court or district court action.

With respect to possible third-party purchasers, Debtor's diligent prosecution of the action to set aside the foreclosure sale, including recording a *lis pendens*, would protect Debtor's interests. The fact that Debtor chooses not to record a lis pendens and create the possibility that an innocent, good faith third-party purchaser may acquire superior title to the Property does not irreparable harm make.

Debtor has also not shown that there is irreparable harm be being evicted from the Property. First, there are no allegations or evidence of BBV Profit Sharing Plan pursuing an unlawful detainer. No evidence has been presented that an unlawful detainer action for the Property has been filed and Debtor is being forced to litigate that issue.

In substance, with no irreparable injury on the horizon, Debtor argues for the *ex parte*, no notice, enjoining of the rights of BBV Profit Sharing Plan.

Debtor does not show a likelihood of prevailing on the merits - overcoming the presumption of bad faith in having filed this third bankruptcy case with there having been two prior cases dismissed within the year preceding the filing of this third case. Even with the filing of this case, Debtor and her non-debtor Spouse stated under penalty of perjury that their intention was to pay the BBV Profit Sharing Plan debt. They now say there is no debt owed to BBV Profit Sharing Plan.

According to the financial information on Amended Schedules I and J, Debtor and here non-debtor Spouse have an extra $8,000+ a month to fund the effective prosecution of the prior two bankruptcy cases, which got dismissed due to failure to prosecute. That weighs heavily against rebutting the bad faith presumption.

On its face, the bankruptcy is an unnecessary expense and waste of judicial resources. Debtor has to actively litigate an action to set aside the sale, which as Debtor has filed the Adversary Proceeding not only sets aside the sale but seeks to have it determined that there is no obligation owed to BBV Profit Sharing Plan.

The original Plan filed by Debtor, appended to the Petition, Schedules, and Statement of Financial Affairs, provided for no month payment by Debtor and no payments to creditors. Dckt. 1 at 42-46. That does not bode well for rebutting the presumption of bad faith, when the purposes of Chapter 13 is for the debtor to fund a plan that provides for paying creditors as permitted by the Bankruptcy Code.

The First Amended Chapter 13 Plan filed by Debtor fares little better. Dckt. 46. The First Amended Chapter 13 Plan now requires a $10,000 lump sum payment in month one of the plan and then $2,000 a month for an additional 59 months. The only payment to be made pursuant to the Plan is $1,759 a month, apparently to BBV Profit Sharing Plan. No provision is made for payment of the obligation secured by the obligation secured by the senior deed of trust on Debtor's Auburn Folsom Road Property.

The First Amended Plan states that the regular post-petition monthly payment due BBV Profit Sharing Plan is $1,759 a month. However, Debtor's non-debtor Spouse stated under penalty of perjury in his Declaration that the BBV Profit Sharing Plan was all due in February 2017. Declaration ¶ 10, Dckt. 13.

To the extent that the Debtor seeks to use the bankruptcy plan to use the § 362 stay in lieu of an injunction, the First Amended Plan makes no provision for such litigation. No provision is made for providing a funding mechanism through the plan in lieu of a bond being required in the Adversary Proceeding or litigation to rescind the foreclosure sale in another forum. See a discussion of this court allowing debtors to use such a Plan term to afford debtors the ability to enjoin a purported purchaser, foreclosing creditor, or disputed creditor without having to obtain a bond in advance in *In re De la Salle*, Bankr. E.D. Cal. 10-29678, Civil Minutes for Motion to Dismiss or Convert (DCN: MBB-1), Dckt. 230 (Bankr. E.D. Cal. 2011), affirm., *De la Salle v. U.S. Bank, N.A. (In re De la Salle)*, 461 B.R. 593 (B.A.P. 9th Cir. 2011).

The filing of a plan ignoring the foreclosure and the litigation do not show good faith to rebut the presumption of bad faith (11 U.S.C. § 362(c)(4)(C)) arising from the multiple filing of bankruptcy case that have been dismissed.

Though the case was filed November 8, 2018, and the First Amended Plan filed on November 29, 2018, Debtor took no action to confirm that Plan, until facing dismissal of the case, Debtor's counsel filed an ex parte motion, unsupported by evidence, not served on anyone, on January 11, 2019. Dckt. 90. On the face of the Motion to Confirm, a hearing date of January 15, 2018, two business days after the Motion was filed.

This does not indicate that Debtor is prosecuting a bankruptcy in good faith.

In the Adversary Proceeding in which Debtor is requesting injunctive relief, though filed on December 6, 2018, no attempt has been made to obtain a temporary restraining order or preliminary injunction. Adv. 18-2195. The Complaint filed in the Adversary Proceeding states twelve causes of action, seeking not only to rescind the foreclosure sale, but to also have it determined that there is no obligation owed to BBV Profit Sharing Plan. 18-2195; Complaint, Dckt. 1. [FN. 5.]

FN. 5. The twelve Causes of Action are titled: 1. Injunctive Relief and/or Equitable Relief To Set Aside Foreclosure Sale; 2. Contractual Breach of Implied Covenant of Good Faith and Fair Dealing; 3. Rescission; 4. Unfair and Deceptive Acts and Practices [False or Fraudulently Procured Document; 5. Cancellation of Written Instrument; 6. Breach of Fiduciary Duty; 7. Unconscionability; 8. Quiet Title; 9. Wrongful Foreclosure; 10. Slander of Title; 11. Inadequate Sale Price; and 12. TILA/RESPA Violations.

In addition to not taking any action to obtain a temporary restraining order or preliminary injunction in the Adversary Proceeding if Debtor was facing some irreparable harm, Debtor made no attempt to serve the summons and complaint until January 10, 2019, thirty-five days after the Summons which was served was issued. There is nothing indicating any "irreparable harm" in Debtor's conduct. (Additionally, because the Adversary Proceeding was not diligently prosecuted, the summons served was stale (Fed. R. Bankr. P. 7004(d), requiring service within seven days, which can easily be satisfied since service can be effectuated by First Class Mail, Fed. R. Bank. P. 7004(b)), and served after the thirty-day period stated in the summons had expired.

Again, this inactivity in prosecution of the bankruptcy case and the Adversary Proceeding do not show a likelihood of prevailing on the rebutting of the presumption of bad faith as it relates to BBV Profit Sharing Plan.

At the end of the day, the bankruptcy case appears to be an unnecessary appendage which only wastes time and money. Debtor needs to prosecute an action to rescind the foreclosure sale and adjudicate Debtor's contention that BBV Profit Sharing Plan is owed no obligation by Debtor. If the financial information in Amended Schedules I and J are accurate, Dckts. 41 and 42, Debtor and her non-debtor Spouse have more than $8,000 a month extra money after paying all expenses to fund the litigation against BBV Profit Sharing Plan, obtain a new loan to pay the obligation, if any, owed to BBV Profit Sharing Plan if the foreclosure is rescinded, and Debtor and BBV Profit Sharing Plan go their separate ways.

Considering the four factors as enunciated by the Supreme Court:

(1) Is the petitioner (the Debtor) likely to prevail on the merits of its appeal.

The court, as discussed above, answers this factor no. Here, Debtor offers no additional evidence in support of this Motion. Debtor has not shown a basis for rebutting the presumption of bad faith.

(2) Without a stay, the petitioner (the Debtor) will suffer irreparable injury.

Again, the answer is no. Debtor has not provided any evidence of any possible irreparable injury. Debtor can protect herself from innocent third-party purchases if BBV Profit Sharing Plan attempts to transfer title by recording a *lis pendens*. There is no evidence of any pending unlawful detainer or eviction proceeding, or that Debtor is facing imminent loss of possession. Debtor can protect herself, based on the merits of her ability to set aside the foreclosure sale by obtaining a temporary restraining order or preliminary injunction in the action (whether the Adversary Proceeding or action in another forum). Additionally, Debtor is well funded to pursue the litigation, as opposed to most debtors who have little monthly net income after expenses (here, Debtor has more than $8,000 a month) and are buried under a mountain of debt (here, Debtor has none to divert her from her litigation).

(3) Other interested persons will suffer no substantial harm.

Debtor specifically appears to be seeking to enjoin BBV Profit Sharing Plan from asserting its rights and interest in the Auburn Folsom Road Property that it purports to have purchased at the foreclosure sale. Debtor seeks to so restrict BBV Profit Sharing Plan's rights without any Due Process, notice, or hearing to defend against such relief. BBV Profit Sharing Plan, asserting ownership of the Auburn Folsom Road Property will suffer substantial harm by being denied its rights without a hearing.

(4) The public interest will not be harmed.

Denial of the Motion, without prejudice will not harm the public interest. To the contrary, granting the relief would harm the public, demean the judicial system, and place Debtor above the law. The law allows Debtor several avenues to assert her rights and interests, and if a temporary state or preliminary injunction is necessary to protect Debtor from an identified irreparable harm, obtain such relief. The court denies the present Motion without prejudice so as to protect the Debtor and not have her lose her rights through an improper motion.

Therefore, the Motion for Stay Pending Appeal is denied without prejudice.

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

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

The Motion For Stay Pending Appeal filed by Nadia Kostyuk having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion For Stay Pending Appeal is denied without prejudice.

10. 18-27039-E-13 NADIA KOSTYUK MOTION TO CONFIRM AMENDED PLAN
No DCN Provided Julia Young 12-18-18 [90]

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.

Insufficient Notice and Service. The Motion to Confirm Amended Plan was filed ex parte, with no service on any person. The Motion was filed on January 11, only two work days before the hearing date listed on the face of the Motion. No basis has been given for the lack of notice, lack of service, and failure to set a noticed hearing as provided in Federal Rule of Bankruptcy Procedure 2002(b) and Local Bankruptcy Rules 3015-1, 9014-1.

The Motion to Confirm Amended Plan is Denied.

On November 29, 2018, Debtor filed a second Chapter 13 Plan. Dckt. 46. Though not titled as such, this was Debtor's First Amended Chapter 13 Plan. This First Amended Chapter 13 Plan states the following terms and provisions for addressing claims of creditors:

A. Monthly Plan Payment..$2,000

1. In the additional provisions it is stated that the Plan Payments shall be:

a. $2,000 per month for 59 Months

b. $10,000 lump sum payment in month 1

2. Duration of Plan......................59 Months, plus the lump sum payment

3. Creditor Claims Provided in the First Amended Plan

a. Class 1 Secured Claims

(1) Capital Mortgage...............................$0.00 Dividend

(2) Mortgage Lender Services.................$1,759 Dividend

b. Class 2 Secured Claims....................................None

c. Class 3 Surrendered Secured Claims.................None

d. Class 4 Direct Payment Secured Claims............None

e. Class 5 Priority Unsecured Claims.....................None

f. Class 6 Special Treatment Unsecured Claims......None

g. Class 7 General Unsecured Claims......................None

First Amended Chapter 13 Plan ¶¶ 2.10, Additional Provisions for ¶ 2.01, 2.03, 3.07, 3.08, 3.09, 3.10, 3.12, 3.13, and 3.14.

As drafted, the only claim to be paid in the Chapter 13 case is that of Mortgage Lender Services, for which there is no stated arrearage, and which the current monthly installment is $1,759.

No bankruptcy plan is needed to make the current monthly payment to a creditor for an account on which there is no arrearage.

On Schedule D (Dckt. 1 at 17) Debtor lists two creditors with secured claims for which the collateral is Debtor's residence on Auburn Folsom Road, which is stated to have a value of $750,000:

A. Capital Mortgage

1. Amount of Secured Claim..................................$392,601

B. Mortgage Lender Services

1. Amount of Secured Claim..................................$109,084

Thus, the First Amended Chapter 13 Plan provides for payment of a $1,759 a month dividend for the secured claim of Mortgage Lender Services, and no payment to be made on the secured claim of Capital Mortgage. In doing so, while paying one claim, the other is provided for to be in default.

The First Amended Plan makes no provision for litigating the asserted disputes concerning the foreclosure on the Auburn Folsom Road Property by BBV Profit Sharing Plan. As discussed above, this is the third in a series of Chapter 13 bankruptcy cases filed by (or for) the Debtor, with the prior two being dismissed in the prior year and no automatic stay having gone into effect when this case was filed on November 8, 2018 (11 U.S.C. § 362(c)(4)(A)).

<u>Motion to Confirm First Amended Plan</u>

At the initial hearing on the Chapter 13 Trustee's Motion to Dismiss this case, the court solicited from Debtor's counsel why no motion to confirm this First Amended Plan, filed on November 29, 2018 had been filed and set for hearing. No credible response was presented, other than counsel stating that she was waiting until the continued First Meeting of Creditors was conducted or because Debtor was not available in December 2018 because Debtor was on a cruise (this is also the reason given for why no effort has been made to obtain a temporary restraining order or preliminary injunction to stay BBV Profit Sharing Plan from acting to obtain possession of the Auburn Folsom Road Property it asserts it purchased at the foreclosure sale).

On January 11, 2019, Debtor's counsel filed a pleading titled "Motion to Confirm First Amended Chapter 13 Plan." Dckt. 90. The Motion is filed, stating that the hearing date is January 15, 2018 - four days after the Motion to Confirm was filed. No notice of hearing or any supporting evidence is filed with the Motion to Confirm. Thus, it appears that Debtor and Counsel file this as an ex parte motion, unsupported by evidence, based solely on allegations in the Motion to Confirm itself.

The Motion to Confirm the First Amended Chapter 13 Plan states with particularity (Fed. R. Bankr. P. 9013) the following grounds upon which the *ex parte*, unsupported by evidence, relief is based:

A. Debtor requests the First Amended Plan be confirmed. Motion ¶ 1, Dckt. 90.

B. The Plan provides for a lump sum payment of $10,000 in month 1 of the plan and then $2,000 a month for the remaining 59 months of the Plan. ¶ 2, *Id.*

C. Debtor has sufficient disposable income to make the Plan payments. ¶ 3, *Id.*

D. The First Amended Plan is in good faith. ¶ 4, *Id.*

E. Debtor has submitted all required documents to the Chapter 13 Trustee. ¶ 5, *Id.* [FN. 1]

F. Debtor will appear at the January 17, 2019 Continued First Meeting of Creditors. ¶ 6, *Id.*

G. Debtor requests that the First Amended Plan be confirmed. ¶ 7, *Id.*

FN. 1. This was the bone of contention at the initial hearing, with Debtor's counsel stating that all such documents had been sent by email to the Trustee. The court continued the hearing to allow counsel to file evidence, by Friday January 11, 2019, of such documents being delivered. No such evidence has been filed.

No other grounds upon which the requested relief are stated. The minimum requirements for a court to confirm a Chapter 13 Plan stated in 11 U.S.C. § 1325 and § 1322 are more than (1) Debtor has a plan, (2) Debtor will make these payments, (3) Debtor can make the payments, so confirm the plan.

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

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Contested matter practice in bankruptcy court demonstrates why such pleading is necessary for motions and other contested matters. Many of the substantive legal proceedings are conducted in the bankruptcy court through contested matters. These include, sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim, abandonment of property from the estate, relief from stay, motions to avoid liens, objections to plans in Chapter 13 cases, use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.,* 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." (Emphasis added). The standard for

> "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

Not pleading with particularity the grounds in a contested matter can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based. More significantly, such improper pleading tactics can be used to generate non-productive, wasteful judicial proceedings with a party merely having a wish list of desires, which are divorced from reality.

<u>No Basis for Ex Parte Relief Provided</u>

In filing the Motion to Confirm on January 11, 2019, Debtor and Debtor's counsel have shown no basis for the court granting such ex parte, no notice on creditors, unsupported by evidence relief. Local Bankruptcy Rule 9014-1 requires that motions, unless ex parte relief is requested and granted, be served and noticed for hearing. Federal Rule of Bankruptcy Procedure 2002(b) expressly provides that creditors be provided with at least 28 days notice of the hearing on a motion to confirm a Chapter 13 Plan.

The proposed Plan does not comply with the provisions of 11 U.S.C. § 1325 and § 1322 for confirmation of a plan, and the Motion is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the First Amended Plan (Dckt. 46) filed by Nadia Kostyuk, the Debtor, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Confirm the First Amended Plan is denied.

11. **17-24543-E-13** **WW-2**

MATTHEW BORRE
Mark Wolff

CONTINUED OBJECTION TO CLAIM OF BANK OF AMERICA, N.A., CLAIM NUMBER 6-1 AND/OR OBJECTION TO NOTICE OF POSTPETITION MORTGAGE FEES, EXPENSES, AND CHARGES
10-29-18 [25]

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

Local Rule 3007-1 Objection to Claim—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on October 29, 2018. By the court's calculation, 50 days' notice was provided. 44 days' notice is required. FED. R. BANKR. P. 3007(a) (requiring thirty days' notice); LOCAL BANKR. R. 3007-1(b)(1) (requiring fourteen days' notice for written opposition).

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Objection to Proof of Claim Number 6 of Bank of America, N.A held by Carrington Mortgage Services, LLC, its assignees and/or successors in interest, is granted, and the pre-petition arrears on Proof of Claim, No. 6 are $0.00, and Overruled with respect to the proof of claim and review of plan fees.

Matthew Borre, Chapter 13 Debtor, ("Objector") requests that the court disallow the claim of Bank of America, N.A., which is now held by Carrington Mortgage Services, LLC, its assignees and/or successors in interest ("Creditor"), Proof of Claim No. 6 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be secured in the amount of $179,866.29, and states prepetition arrears are $1,440.33. Proof of Claim, No. 6. Objector asserts that Creditor's Proof of Claim incorrectly states a pre-petition arrearage and charges unreasonable high fees for bankruptcy related services.

Debtor filed this case on July 11, 2018. Debtor argues he made the payment due July 15, 2018 to Creditor by telephone transaction, the payment clearing July 18, 2018. Declaration, Dckt. 27 at ¶ 4.

Along with its Proof of Claim, Creditor filed a Form 410S2 Notice of Postpetition Mortgage Fees, Expenses, and Charges. The Notice provides charges of $550 for "Bankruptcy/Proof of claim fees" and $350 for "review of plan." Debtor argues "proof of claim" fees are unnecessary in this case because the Debtor was current on the loan. Motion, Dckt. 25. Debtor also argues the "review of plan" fees are unreasonably high. *Id*.

Debtor requests the amount of pre-petition arrearages be determined to be $0.00, that the fees stated in Creditor's Form 410S2 be disallowed as unreasonably high, and that attorney's fees incurred bringing this Objection be awarded to Debtor.

CREDITOR'S OPPOSITION

Creditor filed an Opposition on December 4, 2018. Dckt. 30. Creditor argues Debtor has presented no admissible evidence to show that the prepetition payments owed to Secured Creditor were current at the time of filing on July 11, 2017; that the payment which cleared July 18, 2017 was made and posted prior to the Filing Date on July 11, 2017; and that such payment ($1,070.64) was of a sufficient amount to bring the account current through July 2017. Therefore Creditor argues Debtor has not carried his burden of proof to negate the *prima facie* validity of Secured Creditor's prepetition arrears claim.

Creditor argues further there is no dispute as to the allowance of attorney's fees for its actions to enforce its loan and protect its rights thereto, or that a Form 410S2 was required to be filed. Creditor believes fees charged were reasonable, and explains the charges here were a flat rate fees ($300 for filing a proof of claim, $250 for filing the 410A, and $350 for plan review). Creditor argues that notwithstanding whether Debtor is current, Creditor must review any Chapter 13 debtor's plan to ensure proper treatment of its claim.

Finally, Creditor argues Debtor has not cited any legal authority entitling Debtor to attorney's fees.

DECEMBER 18, 2018 HEARING

At the December 18, 2018, hearing, the court continued the hearing on the Motion to allow the parties to file supplemental pleadings establishing what payments have been made in regard to Proof of Claim, No. 6. Dckt. 33.

DEBTOR'S SUPPLEMENTAL DECLARATION AND EXHIBIT

On December 21, 2018, Debtor filed the Declaration of Matthew Borre. Dckt. 34. Debtor states under penalty of perjury that prior to filing this case, he would make mortgage payments in the regular amount the last payday prior to the 16th day of the month due date. *Id*. at ¶ 2. Debtor states further he made a payment of $1,430.00 over the phone July 17, the payment having been delayed because of the bankruptcy filing. *Id*. at ¶ 4.

Debtor also testifies his monthly payment prior to filing this case was $1,421.00. *Id*. at ¶ 10. Beginning August 2018, payments increased to $1,530.19 after Bank of America increased the amount due to an escrow shortage. *Id*. at ¶ 17.

Debtor reasserts his argument that the fees charged by Creditor pursuant to this case having been filed are unreasonable given Debtor was not delinquent in payments. *Id*. at ¶¶ 18-19.

Along with Debtor's Declaration, Debtor filed Exhibits B through G which consist of Debtor's bank statements and transaction detail statements. Dckt. 35. Exhibit B indicates a withdrawal on July 18, 2018, of $1,430.00 by Bank of America. Exhibit B, Dckt. 35. Exhibits E through G reflect payments of $1,421.00 made to Bank of America in the months of August 2017 through July 2018, and payments of $1,530.19 in the months of August 2018 through November 2018. Exhibits E-G, Dckt. 35.

DEBTOR'S SUPPLEMENTAL REPLY AND ADDITIONAL EXHIBITS

Debtor filed a Supplemental Reply on January 15, 2018. Dckt. 36. Debtor argues the following:

1. The evidence filed supports Debtor having made the July 2018 payment despite Bank of America having locked Debtor out of his account. Debtor further argues the evidence supports that the monthly payment owing was $1,421.00.

2. California Civil Code section 1717 provides for prevailing party attorney's fees here.

3. Creditor failed to provide notice of a payment change when it changed the amount owing in August 2018. Debtor argues Bankruptcy Rule 3002.1 requires notice no later than 21 days before the due date of the new payment.

4. Creditor's fees associated with review of this case are unreasonable and have not been supported with evidence. Debtor states Creditor's flat fee rates–one for a proof of claim, and one for review , analysis, and filing of the court mandated 410A mortgage proof of claim, are duplicative. Debtor asserts the failure of Creditor to provide notice of the change to mortgage

payment evinces that the fees are were unreasonable.

5. Debtor incurred $2,625.00 in attorney's fees in bringing this Objection; $2,065.00 represents time spent at and after the December 18, 2018 court appearance as a result of Creditor's request for additional evidence.

Debtor requests in its Reply that the court sustain Debtor's Objection and award Debtor's attorney's fees.

Along with Debtor's Reply, Debtor filed Exhibit H, a bank transaction statement showing increase in mortgage payments (Exhibit H, Dckt. 37); Exhibit I, an itemized billing statement from Debtor's counsel (Exhibit I, Dckt. 35); and Exhibit J, a monthly mortgage statement from Carrington Mortgage Services, LLC. Exhibit J, Dckt. 35.

CREDITOR'S SUPPLEMENTAL DECLARATION RE: STATUS OF DEBTOR'S OBJECTION

On December 27, 2018, Creditor filed a Declaration (of Bonni Mantovani) Re: Status of Debtor's Objection To Claim. Dckt. 39. The Declaration states the following:

1. This court tentatively ruled that prepetition arrears for Proof of Claim, No. 6 should be zero based on evidence provided by Debtor. Dckt. 39 at ¶ 9.

2. The court tentatively overruled Debtor's objection to the Secured Creditor's Notice of Postpetition Fees that had been filed and Debtor's counsel's request for attorney fees. *Id.* at ¶ 10.

3. At the December 18th hearing, Debtor and Creditor submitted to the Tentative Ruling on all issues except the Objection to Claim. *Id.* at ¶ 11.

4. Creditor requested the court allow informal resolution of the dispute. *Id.* at ¶ 12.

5. After receiving evidence from Debtor on December 21, 2018, by email, Creditor confirms Debtor paid the full amount of the July 2017 payment. *Id.* at ¶¶ 17, 20.

6. Creditor intends to file an Amended Claim to resolve the objection. *Id.* at ¶ 21.

DISCUSSION

A review of the docket shows no Amended Claim for Proof of Claim, No. 6 having been filed.

Amount of Pre-Petition Arrears

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of a proof of claim, and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

From the evidence provided, both parties now in agreement, the payment due July 16, 2017 was $1,421.00. The evidence further shows, and the parties do not dispute, that Debtor paid the July 2017 payment in July 2017.

Certification of Nonfrivilous Argument

In filing pleadings before the court, the Federal Rules of Bankruptcy Procedure set the following requirements:

> (b) Representations to the Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
>
> > (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> >
> > (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> >
> > (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> >
> > (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

FED. R. BANKR. P. 9011(emphasis added).

In its tentative ruling, the court noted the evidence demonstrated that July 2017 payment was made by Debtor as is provided for in the Debtor's then proposed Chapter 13 Plan filed on July 11, 2017.

Plan ¶ 2.11, Class 4 Debtor direct payments; Dckt. 5; Declaration, Dckt. 27 at ¶ 27.

Also in its tentative ruling, the court also noted that while Creditor's Proof of Claim noted there was an arrearage of $1,440.33, Creditor also conceded in its Opposition that Creditor received a payment of $1,070.64. Rather than concede with Debtor that at best, the could be an arrearage of $369.69 ($1,440.33 less the $1,070.64 Creditor believed was paid), Creditor argued the Objection should be overruled in its entirety.

At the December 18, 2018 hearing, Creditor acknowledged it was uncertain what was paid by Debtor. Creditor stated that it did not receive detailed documentation from the previous creditor Bank of America showing what payments were made , and therefore was relying on the Proof of Claim (without any actual evidence to support that reliance, and in the face of Debtor's Declaration establishing evidence Debtor made the full payment).

Rather than accept Debtor's declaration, Creditor continued to advance its position (without evidence) that Debtor owed arrearages of $1,440.33 (despite also conceding Debtor paid $1,070.64) and put the onus on Debtor to "prove-up." Essentially, Creditor has determined it was more cost-effective in this Contested Matter to have Debtor perform the reasonable investigation at Debtor's rather than Creditor's expense.

At the December 18 hearing, the presiding Judge Christopher M. Klein conspicuously noted to Creditor that further proceedings would result in greater incurred attorney's fees, which if the objection were sustained Creditor would bore. Despite having no evidence to support its position, Creditor insisted the hearing be continued.

At the hearing, **XXXXXXXXXX**.

Fees Incident to Filing

Debtor asserts that Creditor's fees of $550 for "Bankruptcy/Proof of claim fees" and $350 for "review of plan" are unreasonably high. The court disagrees with this premise. The rationale for requiring the filing of a formal proof of claim or interest in accordance with section 501 is based upon ensuring that "all those involved in the proceeding will be made aware of the claims against the debtor's estate." 4 COLLIER ON BANKRUPTCY P 501.01[1] (16th 2018).

A Creditor is entitled to enforce its loan and protect its rights. Creditor's do not merely file proofs of claim where arrearages are owing. This argument is also not persuasive.

Duplicative Fees

In its Reply, Debtor continues to argue the $550 fee is unreasonable. In its Opposition, Creditor argued the $550.00 flat fee is broken down into two components: a $300.00 flat fee for the POC and a $250.00 flat fee for preparing review, analysis, and filing of the court mandated 410A Mortgage Proof of Claim. Dckt. 30 at p.5:1-3. Debtor in its Reply argues these fees are duplicative, as it consists of two flat fees for filing the proof of claim.

In its Supplemental Declaration, Creditor seems to argue this court's tentative ruling overruling Debtor's objection to these fees should have preclusive effect. Dckt. 39 at ¶ 10.

At the hearing, XXXXXXXXXXXXXXXXXXX.

Request for Attorney's Fees

Debtor argues in its Reply that prevailing party attorney's fees are available here pursuant to the contract between the parties and California Civil Code section 1717.

As with its argument on fees incident to filing, Creditor seems to argue this court's tentative ruling overruling Debtor's objection as to its request for attorney's fees should have preclusive effect. Dckt. 39 at ¶ 10.

In contested matters, generally the request for attorney's fees may be made by a "post-judgement (order)" motion. Fed. R. Bankr. P. 9014, 7054, and Fed. R. Civ. P. 54. Here, Debtor is the prevailing party in this Contested Matter.

In Opposing the Objection and sustaining its contention that there was a prepetition arrearage, Creditor filed its Opposition. Dckt. 30. In the Opposition Creditor admitted receiving the July 17, 2017 payment, but contended,

> "Debtor has presented no admissible evidence to show that the prepetition payments owed to Secured Creditor were current at the time of filing on July 11, 2017. Debtor has failed to produce admissible evidence to show that the payment which cleared July 18, 2017 was made and posted prior to the Filing Date on July 11, 2017."

Objection, p. 3:23-27; Dckt. 30. But the Proof of Claim was filed in September 2017, when Creditor had clearly known that it had received the July 17, 2017 payment, and that when Proof of Claim No. 6 was filed in September 2017, Creditor clearly knew that the July 2017 was not an arrearage. Creditor knew as of the September 13, 2017 filing of Proof of Claim No. 6 that there was no "Amount necessary to cure any default as of the date of the Petition." This is the actual language in Part 2, ¶ 9 of the Proof of Claim form. It does not ask, "What hypothetical amount would be the pre-petition arrearage, as of the filing of the proof of claim, if there was a pre-petition arrearage if payment had not been made to the creditor."

Debtor provided his testimony, which is both admissible and credible, of the payment being made in July 2017, specifically identifying the date and making the payment by phone. Clearly a 21st Century bank could quickly compare the admissible testimony to its records. Creditor did not so act.

In the Opposition Creditor acknowledges the ephemeral nature of the prima facie effect of a proof of claim. Opposition, p. 3:7-16; Dckt. 30. It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the *prima facie* validity of a proof of claim and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); see also *United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

> "Inasmuch as Rule 3001(f) and section 502(a) provide that a claim or interest as to which proof is filed is "deemed allowed," the burden of initially going forward with the evidence as to the validity and the amount of the claim is that of the objector to that claim. In short, the allegations of the proof of claim are taken as true. If those allegations set forth all the necessary facts to establish a claim and are not self-contradictory, they *prima facie* establish the claim. Should objection be taken, the objector is then called upon to produce evidence and show facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim themselves. But the ultimate burden of persuasion is always on the claimant. Thus, it may be said that the proof of claim is some evidence as to its validity and amount. It is strong enough to carry over a mere formal objection without more."

Wright v. Holm (In re Holm), 931 F.2d 620, 623 (9th Cir. 1991) (quoting 3 L. King, Collier on Bankruptcy § 502.02, at 502-22 (15th ed. 1991)). The presumptive validity of the claim may be overcome by the objecting party only if it offers evidence of equally probative value in rebutting that offered by the proof of claim. *Holm* at 623; *In re Allegheny International, Inc.*, 954 F.2d 167, 173-74 (3rd Cir. 1992).

What Creditor ignores is that the burden then shifts back to the claimant to produce evidence meeting the objection and establishing the claim. *In re Knize*, 210 B.R. 773, 779 (Bankr. N.D. Ill. 1997). While Creditor may not want to find admissible and credible testimony under penalty of perjury that the payment was made, merely stating "Nope, haven't show us it was" does not a winning opposition make.

California Civil Code § 1717 addresses substantive state law making contractual attorney's fees provisions reciprocal, stating:

> (a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then **the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees** in addition to other costs.
>
> . . .
>
> (b)
>
> (1) **The court**, upon notice and motion by a party, **shall determine** who is **the party prevailing** on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2) [dismissals], the **party prevailing** on the contract **shall be the party who recovered a greater relief in the action** on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section.

The Debtor is the party who recovered the greater relief in this Contested Matter.

Debtor shall file, thereby incurring additional attorney's fees, a post-judgment motion for attorney's fees (as they relate to the claims Debtor prevailed on) and costs in this Contested Matter, including in the request costs that would be included in a Bill of Costs.

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

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

The Objection to Claim of Bank of America, N.A. held by Carrington Mortgage Services, LLC, its assignees and/or successors in interest ("Creditor"), filed in this case by Matthew Borre, Chapter 13 Debtor, ("Objector") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection to Proof of Claim Number 6 of Bank of America, N.A. held by Carrington Mortgage Services, LLC, its assignees and/or successors in interest is sustained, and the pre-petition arrears in Proof of Claim, No. 6 are $0.00.

IT IS FURTHER ORDERED that the Objection is Overruled as to the relief requesting disallowance of fees stated by Creditor in its Form 410S2 Notice of Postpetition Mortgage Fees, Expenses, and Charges.

Debtor Matthew Borre, as the prevailing party, shall file a motion as provided in Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 9014, 7054 for attorney's fees (as they relate to the claims Debtor prevailed on) and costs in this Contested Matter, including in the request costs that would be included in a Bill of Costs.

12. 15-22747-E-13 PLC-8 | **GARY/VICTORIA TEDFORD Peter Cianchetta** | **MOTION TO EMPLOY JOY MICHELLE MAHRLE AS REALTOR 12-24-18 [121]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on December 24, 2018. By the court's calculation, 22 days' notice was provided. 14 days' notice is required.

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

The Motion to Employ is granted.

Gary Franklin Tedford and Victoria Dawn Tedford (" Debtor") seeks to employ Joy Michelle Mahrle ("Broker") pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor seeks the employment of Broker to market and sell Debtor's residence.

Joy Michelle Mahrle, the real estate broker, testifies she does not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

Pursuant to § 327(a), a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate and be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

Taking into account all of the relevant factors in connection with the employment and compensation of Broker, considering the declaration demonstrating that Broker does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Joy Michelle Mahrle as Broker for the Chapter 13 Estate on the terms and conditions set forth in the Listing Agreement filed as Exhibit B, Dckt. 123. Approval of the commission is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

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 Employ filed by Gary Franklin Tedford and Victoria Dawn Tedford ("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 Employ is granted, and Debtor is authorized to employ Joy Michelle Mahrle as Broker for Debtor on the terms and conditions as set forth in the Listing Agreement filed as Exhibit B, Dckt. 123.
>
> **IT IS FURTHER ORDERED** that no compensation in the amount of a 4% commission computed on the gross sales price (which may be divided between the seller's broker and the buyer's broker) is authorized, subject to the provisions of 11 U.S.C. § 328 and allowance pursuant to 11 U.S.C. § 330 (which may be included in the motion for authorization to sell the property).
>
> **IT IS FURTHER ORDERED** that except as otherwise ordered by the Court, all funds received by the broker in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

13.	**18-27047-E-13** **DPC-1**	**MONNALISSA O'DELL** **Joseph Angelo**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **12-18-18 [13]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on December 18, 2018. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

The Chapter 13 Trustee, David Cusick ("Trustee"), opposes confirmation of the Plan on the basis that the plan proposes unfair discrimination against general unsecured claims because it does not value the collateral securing the claim of American Honda Finance Corporation ("Creditor"). Debtor purchased the 2013 Honda fit in August 2013. The Vehicle is valued at $7,039.00, which is less than the claim owing in the amount of $8,329.00. Where Debtor is paying a 0 percent dividend to unsecured claims, Debtor is paying more to Creditor than necessary.

Trustee's objection is well-taken. Where Debtor is paying a 0 percent dividend to unsecured claims, and Debtor proposes to pay the Class 2 secured debt in full for a vehicle that appears to be eligible for valuation under 11 U.S.C. § 506(a), the plan cannot be confirmed. *See* 11 U.S.C. § 1322(b)(1).

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

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

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

14. **[18-23750](18-23750)-E-13** **LEE NEWTON** **MOTION TO CONFIRM PLAN**
NSV-1 **Joseph Sandbank** **11-20-18 [36]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on November 20, 2018. By the court's calculation, 56 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is denied.

Lee Ann Newton ("Debtor") seeks confirmation of the Amended Plan, which would constitute the first confirmed plan in this case. The Amended Plan provides for monthly payments of $850 for the first four months, and $2,189.11 for the next 56 months; the plan also delays payment of the administrative attorney's fee until month 5. Dckt. 34. 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 December 19, 2018. Dckt. 41. Trustee opposes confirmation on the following grounds:

1. Debtor admitted during the Meeting of Creditors that $500 of her income is from anticipatory rental income. Even with a $500.00 contribution from her spouse, Debtor would be $200 short on her budget without rent income.

Furthermore, Debtor has indicated she missed her first two payments due to decrease income during the summer.

2. Debtor's rental income is merely anticipatory. If Debtor is not receiving rental income, this is a non-business case and the no-look fee of $6,000.00 provided for in the proposes Amended Plan is not permitted by Local Bankruptcy Rule 2016-1(c).

3. Trustee argues Debtor's current plan proposes to pay less to-date than what Debtor has already paid, and therefore is not proposed in good faith.

DISCUSSION

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor admitted at the Meeting of Creditors that her rental income was anticipatory and no further explanation has been provided. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

Furthermore, without Debtor having rental income, this would be a non-business case. Local Bankruptcy Rule 2016-1(c) permits a "no-look" fee of $6,000.00 (as provided through the plan here) only in a business case.

Additionally, Debtor's current plan proposes to pay less to-date than what Debtor has already paid. This suggests the proposed plan is not Debtor's best efforts (11 U.S.C. § 1325(b)(1)), and is not proposed in good faith. 11 U.S.C. § 1325(a)(3).

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

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

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

15.	**18-25150-E-13**	**RICHARD GREENE**	**MOTION TO CONFIRM PLAN**
	LBG-2	**Lucas Garcia**	**11-15-18 [60]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 15, 2018. By the court's calculation, 61 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is denied.

Richard Sterling Greene ("Debtor") seeks confirmation of the Amended Plan, which would constitute the first confirmed plan in this case. The Amended Plan provides for monthly payments of $250 for 12 months, $750 for 48 months, and a lump sum payment of $2000,000.00 by month 12. Dckt. 64. 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 December 27, 2018. Dckt. 72. Trustee opposes confirmation on the following grounds:

1. Debtor is $250.00 delinquent in plan payments and another payment will become due before the date of this hearing.

2. The IRS filed Proof of Claim, No. 3, which indicates Debtor has not filed his 2015 and 2017 tax returns. While Debtor has provided copies of each

tax return to Trustee, the documents are not endorsed and may not have been filed.

3. The proposed plan does not account for the claim of the Franchise Tax Board. The FTB filed Proof of Claim, No. 6 indicating secured tax claim amounting to $15,214.64.

4. Debtor has not indicated how Debtor will make the stepped-up payments of $750. Debtor is on fixed income, receiving social security and rental income.

5. The proposed plan relies on the sale of Debtor's partnership interest in Enterprise Group Partnership, which is disputed by Aronowitz Lyon.

DISCUSSION

Debtor is $270.00 delinquent in plan payments, which represents one month of the $270.00 plan payment. Before the hearing, another plan payment will be due. According to the Chapter 13 Trustee, the Plan calls for payments to be received by the Chapter 13 Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Proof of Claim, No. 3 filed by the IRS indicates that the federal income tax return for the 2015 and 2017 tax year have not been filed still (despite having been provided to Trustee). Filing of the return is required. 11 U.S.C. §§ 1308, 1325(a)(9). Failure to file a tax return is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

The FTB filed Proof of Claim, No. 6 indicating secured tax claim amounting to $15,214.64. Without accounting for that secured claim, the proposed plan may not be feasible. 11 U.S.C. § 1325(a)(6).

Debtor proposes to make stepped-up plan payments, but has not explained what expected change in disposable income is pending. Furthermore, the plan relies on a lump sum resulting from proceeds of the sale of Debtor's partnership interest, which is currently disputed. Without an accurate picture of Debtor's financial reality, the proposed plan does not appear to be feasible.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Amended Chapter 13 Plan filed by Richard Sterling Greene ("Debtor") having been presented to the court, and upon review of

the pleadings, evidence, arguments of counsel, and good cause appearing,

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

16. 18-26952-E-13 SLE-2 ANTHONY/CANDIE SANDOVAL Steele Lanphier MOTION TO CONFIRM PLAN 11-30-18 [18]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on November 30, 2018. By the court's calculation, 30 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

The Motion to Confirm the 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 Plan is denied.

Anthony Adrian Sandoval and Candie Robin Sandoval ("Debtor") seek confirmation of the Plan, which would constitute the first confirmed plan in this case. The Plan provides for monthly payments of $310.00, and a 10 percent dividend to unsecured claims totaling $48,000.00. Dckt. 20. 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 December 18, 2018. Dckt. 27. Debtor opposes confirmation on the ground that the plan term is only 36 months, where Debtor is above median income and is only providing a 10 percent dividend to unsecured claims.

The Trustee directs the court to Form 122C-1, Statement of Current Monthly Income, in which Debtor is shown to have over median income (Dckt. 24 at 34-36).

Trustee's Opposition is well-taken. The Plan violates 11 U.S.C. § 1325(b)(4)(B) because the Plan will complete in less than the permitted sixty months for this over median income Debtor without providing full payment of all allowed unsecured claims.

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

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

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

17. 18-26455-E-13 DPC-1 | **ROBERT/JUDY FROST Bruce Dwiggins** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 12-17-18 [16]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on December 17, 2018. By the court's calculation, 29 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

A. The Meeting of Creditors was held on December 13, 2018, but was continued to January 10, 2019, because Debtor's Schedules and Statements require numerous corrections.

B. Debtor's plan does not provide for the potential claims of Warren Charles and Granada Irrigation District, both of which Debtor acknowledged as claims owing at the Meeting of Creditors.

C. At the Meeting of Creditors, a representative of creditor Farm Service Agency appeared and notified Trustee that Debtor is delinquent on its claim. If Debtor is delinquent, the plan improperly treats the claim as a

Class 4.

D. Trustee is concerned Debtor has not disclosed all assets, having listed no household goods & furnishings, electronics, sports or hobby equipment, firearms, clothing, jewelry, cash, bank accounts, retirement accounts, life insurance policies, or claims against parties.

E. Debtor failed to file a business budget detailing business income and expenses.

F. Debtor failed to provide all required documents the Trustee, including business documents (a full 6 months of bank statements for all accounts, proof of liability insurance for Debtor's business, prof of vehicle insurance, corrected profit and loss statements, and a 2016 tax return); Pay advices, and Class 1 Checklist/Authorization Forms.

DISCUSSION

Trustee's objections are well-taken.

The Meeting of Creditors was continued to January 10, 2019. At the hearing, Trustee indicated Debtor did appear at the continued Meeting.

Debtor admitted at the Meeting of Creditors to claims of Warren Charles and Granada Irrigation District, neither provided for in the proposed plan. Therefore, the plan is not feasible. 11 U.S.C. § 1325(a)(6).

At the Meeting of Creditors, a representative of creditor Farm Service Agency appeared and notified Trustee that Debtor is delinquent on its claim. Therefore, the proposed plan incorrectly provides for the claim as a Class 4. This further indicates the plan is not feasible.

Debtor fails to list assets which Debtor likely possesses, including household goods & furnishings, cash, and bank accounts. This further indicates the plan is not feasible.

Debtor has failed to timely provide the Chapter 13 Trustee with business documents including:

A. Questionnaire,
B. Two years of tax returns,
C. Six months of (corrected) profit and loss statements,
D. Six months of (all) bank account statements, and
E. Proof of license and insurance or written statement that no such documentation exists.

11 U.S.C. §§ 521(e)(2)(A)(I), 704(a)(3), 1106(a)(3), 1302(b)(1), 1302(c); FED. R. BANKR. P. 4002(b)(2) & (3). Debtor is required to submit those documents and cooperate with the Chapter 13 Trustee. 11 U.S.C.

§ 521(a)(3). Without Debtor submitting all required documents, the court and the Chapter 13 Trustee are unable to determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325.

Debtor has not provided the Chapter 13 Trustee with employer payment advices for the sixty-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv); FED. R. BANKR. P. 4002(b)(2)(A). That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

Furthermore, Local Bankruptcy Rule 3015-1(b)(6) requires a Chapter 13 Debtor file Forms EDC 3–086 (Class 1 Checklist) and EDC 3–087 (Authorization to Release Information to Trustee Regarding Secured Claims to be Paid by the Trustee). Debtor has not provided these documents.

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

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

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

18. 16-24661-E-13 RONNETTE ROGERS RUNNINGS MOTION TO REFINANCE
DAO-4 Dale Orthner 12-15-18 [69]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on December 15, 2018. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

The Motion to Incur Debt 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 Incur Debt is granted.

Ronnette Lorea Rogers Runnings ("Debtor") seeks permission to refinance two loans secured by Debtor's principal residence. Debtor is currently paying $1,586.00 per month to PNC Bank through the Confirmed Plan, and $962.94 per month directly to Green Tree, for a total of $2,548.94 per month. Dckt. 69 at ¶ 2. Debtor has obtained a quote to refinance both mortgages for a total of $828.01 per month principal and interest, on a new 30 year loan, at 4.75% interest, with $104.00 mortgage insurance, $42.26 homeowner's insurance, and $134.08 property taxes, all per month. *Id.* at ¶ 3.

Contingent on this Motion being granted, Debtor will seek a modified plan to shorten the plan term. *Id.* at ¶ 6.

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

The court finds that the proposed credit, based on the unique facts and circumstances of this case, is reasonable. Trustee having filed a Response indicating non-opposition, there being no opposition from any other party in interest, and the terms being reasonable, 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 Incur Debt filed by Ronnette Lorea Rogers Runnings ("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 Ronnette Lorea Rogers Runnings is authorized to incur debt pursuant to the terms of the agreement, Exhibit A, Dckt. 72.

19. **18-25364-E-13** **GARY BROWN** **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK**
DPC-1 **Helga White** **10-9-18 [24]**

No Appearance of Debtor or Debtor's Counsel is Required If They Concur With Sustaining the Objection (Response, Dckt. 37)

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on October 9, 2018. By the court's calculation, 42 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

A. Debtor is delinquent $500.00 in plan payments, having paid $0.00 into the plan to date.

B. Debtor has an annual income of $84,000.00 and is above the median income for a household of 1, but has not accurately completed the Current

Monthly Income form.

C. The plan's loan modification treatment process for Class 1 claim of Upland/Carrington does not meet "Ensminger adequate protection provisions" previously approved by this court.

D. Debtor has not filed a business budget reflecting business income and expenses.

E. Debtor failed to provide Trustee a copy of Debtor's tax transcript or return for the most recent pre-petition filing year, or a statement that no such documentation exists.

F. Debtor failed to provide Trustee with business documents, including questionnaire, two years of tax returns, six months of profit and loss statements, six months of bank account statements, and proof of license and insurance or written statement that no such documentation exists.

DEBTOR'S NON-OPPOSITION

Debtor filed a Response indicating non-opposition to Trustee's Objection on November 3, 2018. Dckt. 37.

DISCUSSION

The Chapter 13 Trustee asserts that Debtor is $500.00 delinquent in plan payments, which represents one month of the $500.00 plan payment. Before the hearing, another plan payment will be due. According to the Chapter 13 Trustee, the Plan calls for payments to be received by the Chapter 13 Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Debtor has not filed a business budget reflecting business expenses and income. Without an accurate picture of Debtor's financial situation, the plan does not appear feasible. 11 U.S.C. § 1325(a)(5).

Further, Debtor proposes to provide the Class 1 claim of Upland/Carrington with adequate protection payments of $360.65 until a reverse mortgage is obtained. However, proposed plan is bare and does not specify terms normally including as an "Ensminger provision," including events on default. Without this, the plan does not appear feasible. 11 U.S.C. § 1325(a)(5).

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

Debtor has failed to timely provide the Chapter 13 Trustee with business documents including:

A. Questionnaire,
B. Two years of tax returns,
C. Six months of profit and loss statements,
D. Six months of bank account statements, and
E. Proof of license and insurance or written statement that no such documentation exists.

11 U.S.C. §§ 521(e)(2)(A)(i), 704(a)(3), 1106(a)(3), 1302(b)(1), 1302(c); FED. R. BANKR. P. 4002(b)(2) & (3). Debtor is required to submit those documents and cooperate with the Chapter 13 Trustee. 11 U.S.C. § 521(a)(3). Without Debtor submitting all required documents, the court and the Chapter 13 Trustee are unable to determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325.

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

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

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

20. 18-25364-E-13 PPR-1 — GARY BROWN, Helga White

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY WILMINGTON SAVINGS FUND SOCIETY, FSB
9-28-18 [17]

No Appearance of Debtor or Debtor's Counsel is Required If They Concur With Sustaining the Objection (Response, Dckt. 35)

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on September 28, 2018. By the court's calculation, 53 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

Wilmington Savings Fund Society, FSB, as trustee of Upland Mortgage Loan Trust NC.241-7569 NF ("Creditor") holding a secured claim opposes confirmation of the Plan on the basis that Debtor'S plan fails to provide for Creditor's secured claim, provides the incorrect pos-petition amount, fails to provide any payment for property taxes and insurance, is not feasible, and is not Debtor's best efforts.

DEBTOR'S NON-OPPOSITION

Debtor filed a Response indicating non-opposition to Creditor's Objection on November 3, 2018. Dckt. 35.

DISCUSSION

Creditor's objections are well-taken, and the Debtor does not oppose the Objection.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by Wilmington savings Fund Society, FSB, as trustee of Upland Mortgage Loan Trust NC.241-7569 NF ("Creditor") holding a secured claim] having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

21. **18-23867-E-13** **FIAZ JAVED** **Robert McCann** **MOTION TO VACATE DISMISSAL OF CASE 12-18-18 [72]**

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

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

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

The court set the hearing for January 15, 2019. Dckt. 75.

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

The Motion to Vacate is XXXXXXXXXX.

On June 19, 2018, Debtor Fiaz Javed commenced this Chapter 13 case with the assistance of counsel, Robert McCann ("Counsel"). Debtor filed a prior Chapter 13 case on September 7, 2017, which was dismissed on January 22, 2018. CH 13 Case 17-25942 ("2017 Chapter 13 Case"). The Plan in the 2017 Chapter 13 Case, filed with the assistance of Counsel, provided for monthly plan payments of only $150.00 a month. *Id.*; Plan, Dckt. 13. The plan document was largely blank, making no provision for various classes of claims, other than paying one creditor $150.00 a month. *Id.*

In the current case, Debtor filed a Chapter 13 Plan on July 19, 2018. Dckt. 28. The Plan in the current case provides for monthly payments of $188.00 for a period of thirty-six months. Plan ¶ 2.01. On Schedule I, Debtor lists having combined gross monthly income with her non-debtor spouse of $6,124.00. Dckt. 17. The income sources listed are: Blue Shield of California for Debtor and Debtor's counsel for the non-debtor spouse. From this gross income, Debtor and her non-debtor spouse have only $89.00 withheld for federal and state income taxes, medicare, and Social Security.

On Schedule J, Debtor lists monthly expenses of ($4,188.44) for her household of two adults.

Of this, ($,1,137.94) is for the monthly mortgage payment(s). In addition, Debtor lists ($450.00) for property taxes and ($57.50) for homeowner's insurance. After subtracting expenses, Debtor lists having $1,683.44 in Monthly Net Income, one-half of the proposed plan payment.

The Chapter 13 Plan filed in the current case provides first for payment of $3,000.00 in fees for Debtor's counsel. Plan ¶ 3.05 *Id.* Additionally, $50.00 a month for other administrative expenses (at 8%, the Chapter 13 Trustee fees from a $188.00 a month payment would be $15.04).

As with the Plan in the 2017 Chapter 13 Case, the Plan filed in the Current Case makes no provision for payment of any other claims, with most of the claim provisions left blank.

The Plan then requires a monthly payment of $188.00 to Bank of America, N.A. Plan ¶ 3.07(c), *Id.* On its face, there are inadequate monies to fund the proposed Plan.

Plan Payment	$188.00
Chapter 13 Trustee Fees (8%)	($ 15.04)
Debtor Counsel's Fees ($3,000 amortized over 36 months)	($ 83.33)
Class 1 Bank of America Payment	($188.00)
Over/Under Funding of Proposed Plan	($ 98.37)

Due to facially defective pleadings in light of this case being one subject to 11 U.S.C. § 362(c)(3), the court ordered a Chapter 13 Status Conference. Order, Dckt. 34. As noted by the court, the Motion to Extend the Automatic Stay pursuant to 11 U.S.C. § 362(c)(3)(B) so that it would not terminate as to the Debtor was filed on July 20, 2018. Dckt. 30. The Motion was filed thirty-one days after the case was filed, which precluded the court from conducting a hearing and issuing an order on such motion within the thirty-day period mandated by 11 U.S.C. § 362(c)(3)(B).

The Status Conference was conducted on August 21, 2018, at which the Debtor's Counsel and the Chapter 13 Trustee reported that Debtor was current on plan payments. Civil Minutes, Dckt. 47.

The Chapter 13 Trustee filed his Motion to Dismiss this case on September 26, 2018. Motion, Dckt. 57. The Motion alleged, and the Trustee presented evidence of (Declaration, Dckt. 59), that Debtor was $1,050.02 in default in plan payments, with a further payment of $475.34 being due on October 25, 2018. The Motion alleges that payments of $376.00 had been made to date (which would equal two payments of $188 each). The court cannot identify any other Plan filed by Debtor in this case providing for a payment of $475.34 in this case.

Motion to Vacate

The grounds stated in the *Pro Se Ex Parte* Motion to Vacate are:

A. This is Debtor's second bankruptcy case filed with Debtor. Mtn ¶ 1.

B. Debtor is "now in contact with an experienced Chapter 13 attorney to represent me in my bankruptcy case." *Id.* Though "in contact with," no such represented "experienced Chapter 13 attorney" has substituted in to represent Debtor in this case.

C. Debtor was current in making $188.00 a month plan payments and was not aware of a change in plan payments. The court notes that on October 2, 2018, Debtor filed a Notice of Mortgage Payment Change which stated that the payment on Bank of America N.A.'s claim increased to $463.66 effective October 25, 2018. Registry of Claim, Notice of Mortgage Payment Change for Claim No. 8. The Notice states that the then current payment was $470.22 (not the $188 stated in the Plan).

D. Debtor disputes that any money is owing to Bank of America, N.A. Mtn ¶ 3.

E. The "account" upon which Bank of America, N.A. asserts a claim is alleged to have been sold to ABS LOAN Trust V, effective November 30, 2018. A November 30, 2018 transfer was after this bankruptcy case was dismissed. Debtor also makes the comment that the transfer was made "despite the fact that the estate of debtor was protected." Mtn ¶ 6. No grounds are stated how the filing of bankruptcy limits a creditor's rights, even if the case was pending, to transfer the alleged obligation/claim to another entity.

F. The loan servicer identified by Debtor is Select Portfolio Servicing, Inc. Debtor states that no proof of claim has been filed in this dismissed bankruptcy case for the alleged obligation stated to have been transferred November 30, 2018 (after the November 16, 2018 dismissal). Mtn ¶ 7.

G. Debtor has lost contact with her attorney, stating she is informed that Counsel has moved to Reno, Nevada. Mtn ¶ 10.

H. Debtor is on the verge of losing her home. Mtn ¶ 13.

I. Debtor will have a Chapter 13 Attorney represent her. Mtn ¶ 14.

J. Debtor wants to object to the Bank of America, N.A. claim and that being asserted by any transferee of the Bank. Mtn ¶ 15.

In her Declaration in support of the *Ex Parte* Motion, Debtor states that “My finances have changed and I now have enough income to afford my chapter 13 plan.” Dckt. 68. However, Debtor provides no testimony as to what changes exist and the actual financial amounts. The Declaration continues with Debtor stating her various legal conclusion, which may or may not be accurate statements of the law.

Applicable Law

The court reconsidering or vacating a judgment or order is governed by Federal Rule of Civil

Procedure 60(b), as made applicable in this case by Federal Rule of Bankruptcy Procedure 9024, which incorporates minor modifications that do not apply here. Grounds for relief from a final judgment, order, or other proceeding are limited to:

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

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

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

(4) The judgment is void;

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

(6) Any other reason that justifies relief.

Fed. R. Civ. P. 60(b). The court uses equitable principles when applying Rule 60(b)Fed. R. Civ. P. 60(b). See 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2857 (3rd ed. 1998). A precondition to the granting of such relief is that the movant show that he or she has a meritorious claim or defense. See 12-60 Moore's Federal Practice Civil § 60.24; *Brandt v. American Bankers Insurance Company of Florida,* 653 F.3d 1108, 111 (9th Cir. 2011); *Falk v. Allen*, 739 F.2d 461, 462 (9th Cir. 1984) ("We agree with the Third Circuit that three factors should be evaluated in considering a motion to reopen a default judgment under Rule 60(b): (1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default. See *Gross v. Stereo Component Systems*, 700 F.2d 120, 122 (3d Cir. 1983) ("Gross"); see also *United Coin Meter v. Seaboard Coastline R.R.*, 705 F.2d 839, 845 (6th Cir. 1983) (adopting Third Circuit test).")

Additionally, the Ninth Circuit Court of Appeals has instructed in *Aurich American Insurance Company v. International Fibercom, Inc. (In re International Fibercom, Inc.*) 503 F.3d 933, 941. (9th Cir. 2007),

> We have stated in the past that Rule 60(b)(6) should be "liberally applied," *Hammer*, 940 F.2d at 525, "to accomplish justice." *Yanow v. Weyerhaeuser S.S. Co.*, 274 F.2d 274, 284 (9th Cir. 1959) (quoting *Klapprott v. United States*, 335 U.S. 601, 615, 69 S. Ct. 384, 93 L. Ed. 266 (1949)). At the same time, "[j]udgments are not often set aside under Rule 60(b)(6)." *Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1103 (9th Cir. 2006). Rather, Rule 60(b)(6) should be "'used sparingly as an equitable remedy to prevent manifest injustice' and 'is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment.'" *United States v. Washington*, 394 F.3d 1152, 1157 (9th Cir. 2005) (quoting *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993)). Accordingly, a party who moves for such relief

"must demonstrate both injury and circumstances beyond his control that prevented him from proceeding with . . . the action in a proper fashion." *Cmty. Dental Servs. v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 2002).

Interim Order Granting Relief

On December 21, 2018, the court issued an Order granting the Motion to Vacate on an interim basis, and continuing the hearing on the Motion to Vacate to January 15, 2019. Dckt. 75. The court further continued the hearing on the Trustee's Motion to Dismiss (DCN: DPC-2) to the same date, and ordered that Debtor and his "experienced" bankruptcy counsel, and each of them, shall appear at the January 15, 2019 hearing, in person - No Telephonic Appearances Permitted for the persons ordered to appear. *Id.*

DISCUSSION

As of the court's January 13, 2019, review of the Docket, no attorney has substituted in to represent Debtor.

At the hearing, **XXXXXXXXXX**.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Vacate filed by Fiaz Javed ("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 **XXXXXXXXXX**.

22. **18-23867-E-13** **FIAZ JAVED** **MOTION TO DISMISS CASE**
DPC-2 **Robert McCann** **9-26-18 [57]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on October 17, 2018. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion to Dismiss is granted, and the case is dismissed.

David Cusick (the "Chapter 13 Trustee") seeks dismissal on the basis that Kevin Bridges ("Debtor") is delinquent $1,000.00 in plan payments.

DEBTOR'S OPPOSITION

Debtor filed an Opposition to Trustee's Motion on October 25, 2018. Dckt. 61. In his supporting declaration, Debtor asserts the reason for his delinquency was the cost he incurred retaining an attorney to defend against criminal charges filed against him. Dckt. 62. Debtor testifies that he made his regularly scheduled payment of $500.00 on October 23, 2018 and intends to pay the delinquent $1000.00 no later than November 17, 2018. *Id.*

ORDER GRANTING MOTION TO DISMISS

On November 16, 2018, the court issued an Order granting the Motion to Dismiss the bankruptcy case. Vacated Order, Dckt. 68.

EX PARTE MOTION TO VACATE AND
ORDER GRANTING RELIEF

The Debtor, in *Pro Se*, filed an Ex Parte Motion To Vacate Dismissal on December 18, 2018. Dckt. 72.

On December 21, 2018, the court issued an Order granting the Motion to Vacate on an interim basis, and continuing the hearing on the Motion to Vacate to January 15, 2019. Order, Dckt. 75. The court further continued the hearing on the Trustee's Motion to Dismiss (DCN: DPC-2) to the same date, and ordered that Debtor and his "experienced" bankruptcy counsel, and each of them, shall appear at the January 15, 2019 hearing, in person - No Telephonic Appearances Permitted for the persons ordered to appear. *Id.*

DISCUSSION

At the hearing, **XXXXXXXXXX**.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss the Chapter 13 case filed by David Cusick ("the Chapter 13 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is **XXXXXXXXXX**.

23. **18-27870-E-13** **TLA-1**

STACEY BURGESS
Thomas Amberg

MOTION TO EXTEND AUTOMATIC STAY
12-24-18 [11]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on December 24, 2018. By the court's calculation, 22 days' notice was provided. 14 days' notice is required.

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

The Motion to Extend the Automatic Stay is granted.

Stacey Kristine Burgess ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(a) extended beyond thirty days in this case. This is Debtor's second bankruptcy petition pending in the past year. Debtor's prior bankruptcy case (No. 14-22498) was dismissed on May 9, 2018, after Debtor sought voluntary dismissal. *See* Order, Bankr. E.D. Cal. No. 14-22498, Dckt. 40, May 9, 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 was unable to step up payments (her plan being in its fourth year) after it was determined she had previously understated claims to be paid by several thousand dollars.

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 Stacey Kristine Burgess ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and the automatic stay is extended pursuant to 11 U.S.C. § 362(c)(3)(B) for all purposes and parties, unless terminated by operation of law or further order of this court.

24. 18-24173-E-13 PGM-2 **FERRIC/STACY COLLONS Peter Macaluso** **CONTINUED MOTION TO VALUE COLLATERAL OF WELLS FARGO DEALER SERVICES 10-6-18 [68]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, creditors, parties requesting special notice, and Office of the United States Trustee on October 6, 2018. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

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

The Motion to Value Collateral and Secured Claim of Wells Fargo Bank ("Creditor") is granted, with the court determining that Creditor's claim is oversecured.

The Motion filed by Ferric J. and Stacy C. Collons ("Debtor") to value the secured claim of Wells Fargo Bank, N.A., dba Wells Fargo Dealer Services ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2015 Ford F150, VIN ending in 19494 ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $20,000.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

TRUSTEE'S RESPONSE

David P. Cusick, ("the Chapter 13 Trustee") filed a Response to Debtor's Motion to Value Collateral on October 18, 2018. Dckt. 89. The Chapter 13 Trustee reports that Creditor filed a secured claim on September 8, 2018 (Claim #14-1), which indicates the value of the property to be $29,500.00. *Id.*

CREDITOR'S OPPOSITION

Creditor filed an Opposition to Debtor's Motion on October 23, 2018. Dckt. 93. Creditor disputes the valuation of the Vehicle, asserting the Vehicle should be valued at $29,500.00. Creditor requests the court find its claim is therefore fully secured for the $25,222.13 owing.

In support of its Opposition, Creditor filed the Declaration of Jessica Rapp (Dckt. 101) and a properly authenticated copy of the NADA Guide. Exhibit C, Dckt. 95.

DEBTOR'S REPLY

Debtor filed a Reply to Creditor's Opposition on October 30, 2018. Dckt. 103. Debtor argues (1) Creditor's evidence is hearsay because the Jessica Rapp lacks personal knowledge as to the Vehicle and therefore is inadmissable, (2) Debtor's valuation is based on personal knowledge of the Vehicle and its condition, (3) because Creditor's evidence is inadmissable there is no dispute of fact, and (4) Debtor requests Creditor perform a personal inspection appraisal to assess the value of the Vehicle.

NOVEMBER 6, 2018, HEARING

At the November 6, 2018 hearing, the court continued the hearing on the Motion to allow Creditor to inspect the Vehicle. Dckt. 107.

STIPULATION FOR CONTINUANCE

The parties filed a Stipulation on December 4, 2018. Dckt. 121. The Stipulation states due to Debtor's refusal to make the Vehicle available for Creditor's inspection, that the parties agree to continue the hearing on the Motion to January 15, 2018.

The court issued an Order granting the Stipulation and continuing the hearing on December 6, 2018. Dckt. 130.

CREDITOR'S SUPPLEMENTAL APPRAISAL

On January 3, 2019, Creditor filed the Declaration of Adam Zacher along with Mr. Zacher's Appraisal identified as Exhibit E. Dckts. 138, 139. Creditor subsequently noticed an incomplete draft of the Zacher Declaration was filed, and filed a complete version. Dckt. 142.

The Zacher Declaration identifies Mr. Zacher as an Auto Inspection Property Appraiser with 16 years' experience and over 16,000 inspection. Dckt. 142 at ¶ 1. Based on Mr. Zacher's personal inspection of the Vehicle, Mr. Zacher value the Vehicle at retail value of $30,227.67. *Id.* at ¶ 6. Mr Zacher's Appraisal provides a detailed overview and analysis of the factors considered in valuing the Vehicle. *See* Exhibit E, Dckt. 138.

DISCUSSION

Value of the Vehicle

The lien on the Vehicle's title secures a purchase-money loan incurred on August 31, 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 $25,222.13.

Creditor has provided a detailed appraisal by an experienced professional in the field of automobile appraisals.

Based on the evidence presented, the court determines that the value of the vehicle is $30,227.67. Therefore, Creditor's claim secured by a lien on the asset's title is fully-collateralized. Creditor's secured claim is determined to be in the amount of $25,222.13, the full value of Creditor's claim (being less than the value of the collateral). *See* 11 U.S.C. § 506(a). The valuation motion is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value Collateral and Secured Claim filed by Ferric J. and Stacy C. Collons ("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 court determines that the Claim of Wells Fargo Bank, N.A. secured by a 2015 Ford F150, VIN ending in 19494, filed in the amount of $25,222.13 is oversecured, the Ford F150 having a value of $30,227.67.

25. 18-24173-E-13 FERRIC/STACY COLLONS CONTINUED MOTION TO CONFIRM PLAN
PGM-3 Peter Macaluso 11-12-18 [108]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on November 12, 2018. By the court's calculation, 36 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is denied, and the plan is not confirmed.

Ferric Jason Collons and Stacy Christine Collons ("Debtor") seek confirmation of the Amended Plan, which would be the first confirmed plan in this case. The Amended Plan provides for $1,650 to be paid through November 2018, 21 payments of $930 starting December 2018, and 35 payments of $2,200 for the remainder of the Plan. Dckt. 111. 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 December 3, 2108. Dckt. 118. Trustee opposes the Motion on the basis that the proposed plan relies on a Motion to Value Collateral of Wells Fargo (Dckt. 69) set to be heard December 11, 2018. Trustee further opposes the Motion because Debtor deducts $620 in expenses for storage units, which Trustee is not certain are necessary expenses.

CREDITOR'S OPPOSITION

Wells Fargo Bank, N.A., dba Wells Fargo Dealer Services ("Creditor") filed an Opposition on December 4, 2018. Dckt. 122. Creditor opposes the Motion on the grounds that the valuation of its collateral is too low, the proposed plan does not provide an adequate protection payment, and the proposed plan provides only a 4 percent interest rate.

Creditor requests the Motion be denied, or the Contested Matter be set for evidentiary hearing as Creditor does not consent to Federal Rule of Civil Procedure 43(c).

DEBTOR'S REPLY

Debtor filed a Reply on December 11, 2018. Dckt. 131. Debtor notes the hearing on the Motion to Value (Dckt. 69) was continued to January 15, 2018, at 3:00p.m. *See* Order, Dckt. 130.

DECEMBER 18, 2018 HEARING

Noting that the proposed Amended Plan relies on the outcome of a Motion To Value collateral of Creditor, the court continued the hearing on this Motion to January 15, 2018, at 3:00p.m. to be heard alongside the Motion to Value. Order, Dckt. 136.

DISCUSSION

Trustee and Creditor's oppositions are well-taken.

A review of the Docket shows Debtor's Motion to Value Creditor's collateral was heard the same day as the hearing on this Motion, and it was determined that Creditor's claim was oversecured, the collateral having a value of $30,227.67 (not the $20,000 advocated by Debtor) and Creditor's secured claim was $25,222.13. Without the court valuing the claim at Debtor's lower amount, the Plan is not feasible. 11 U.S.C. § 1325(a)(6).

The Motion to Confirm the Amended Plan is denied, and the plan is not confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Amended Chapter 13 Plan filed by Ferric Jason Collons and Stacy Christine Collons ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Confirm the Amended Plan is denied, and the plan is not confirmed.

26. 18-24173-E-13 FERRIC/STACY COLLONS CONTINUED MOTION TO DISMISS CASE
DPC-2 Peter Macaluso 10-24-18 [97]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on October 24, 2018. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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

The Motion to Dismiss is XXXXXXXXXX.

David Cusick (the "Chapter 13 Trustee") seeks dismissal of the case on the basis that Ferric and Stacy Collons ("Debtor") are $1,620.00 delinquent in plan payments, and have failed to file an amended plan and set the plan for confirmation.

DEBTOR'S DECLARATION

Debtor filed the Declaration of Ferric and Stacy Collons on November 7, 2018. Dckt. 105. The Declaration identifies itself as being "In Opposition to Motion to Dismiss." The court notes that there is not an opposition filed by Debtor for which the Declaration provides evidentiary support. Fortunately for Debtor, the Motion was not one requiring written opposition and presumably counsel for Debtor will state an opposition at the hearing. *See* Local Bankruptcy Rule 9014-1(f)(2).

The Declaration states Debtor fell delinquent due to the cost of rent, including having to pay $4,200.00 for the first and last month of rent, and $500 for a deposit. Debtor also states that Debtor has been forced to live with a family member on a temporary basis, and that the issues with the storage units in this case have been addressed to an extent (Debtor downsizing to a single unit).

NOVEMBER 14, 2018 HEARING

At the November 14, 2018, hearing the court continued the hearing on the Motion to December

18, 2018, to be heard alongside the Motion to Confirm the Amended Plan. Dckt. 117.

DECEMBER 18, 2018 HEARING

At the December 18, 2018 hearing the court continued the hearing on this Motion to January 15, 2018, at 3:00p.m. again to be heard alongside the Motion to Confirm Amended Plan

DISCUSSION

On Debtor's Schedule J, Debtor lists having 3 dependent children, aged 8, 10, and 13. Schedule J, Dckt. 12 at p. 1. Therefore, Debtor is seeking housing for a household of 5.

The rent expense described in Debtor's Declaration may be reasonable. However, Debtor has not provided the court with Amended or Supplemental Schedules which could be used to make such a determination. Debtor's current Schedules provide for a rental/housing expense of $0.00. Schedule J, Dckt. 12. Even without any rent/housing expense, Debtor estimates a monthly disposable income of $812.83 (the gross income estimated at $5,046.38 and expenses estimated at $4,233.55). *Id*. It is unclear how Debtor is going to propose a confirmable plan where Debtor's expenses seem prohibitively high.

Furthermore, Debtor has not explained what the temporary living situation was and what circumstances changed. Debtor states in Debtor's Declaration they "were able to locate a house to rent at the last minute before our family had enough of us." Dckt. 105 at ¶4. Debtor has not provided evidence demonstrating this added expense was necessary or reasonable.

It is unclear why Debtor chose to represent they had no expenses for rent/housing on the filed Schedules which formed the basis of the proposed plan. Debtor knew a rental expense was necessary in this chapter 13 plan; Debtor could have saved money not expended on rent/housing while Debtor searched for a rental (to prepare for the upcoming, very clearly anticipated expenses), but chose not to.

Debtor has not commenced making plan payments and is $1,620.00 delinquent in plan payments, which represents multiple months of the $810.00 plan payment. Another payment became due on October 25, 2018. 11 U.S.C. § 1307(c)(4) permits the dismissal or conversion of the case for failure to commence plan payments.

The hearing was previously continued to be heard alongside Debtor's Motions to value collateral and confirm Amended Plan. A review of the docket shows that both of those motions have been denied.

At the hearing, **XXXXXXXXXX.**

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

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

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

IT IS ORDERED that the Motion to Dismiss is **XXXXXX**

27.	**18-26673-E-13** **DPC-1**	**JAMES BIGGART** **Stephan Brown**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **12-3-18 [14]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on December 3, 2018. By the court's calculation, 43 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is XXXXXXXXX.

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

A. Debtor owns and operates a business Veterinary Surgery Services, Inc., but has not listed expenses for the business. Trustee is concerned Debtor will not be able to make plan payments.

Trustee also notes Debtor is current under the proposed plan, with the most recent payment of $2,000.00 due December 25, 2018.

DEBTOR'S OPPOSITION

Debtor filed an Opposition to the Objection on January 7, 2019. Dckt. 18. Debtor states in his Opposition, which is further supported by Debtor's Declaration (Dckt. 19 at ¶ 5), that Debtor is in the process of dissolving the corporation and will no longer have financial duties to the corporation.

DISCUSSION

Trustee's objection is well-taken. Debtor has not listed expenses for his business, which presently is ongoing. While Debtor intends to dissolve the corporation, specifics as to the status and timeline of dissolution have not been provided. Until the date the corporation is dissolved, there may still be business expenses which render the plan not feasible. Without an accurate picture of Debtor's financial situation, the court cannot confirm the plan. See 11 U.S.C. § 1325.

However, a review of Schedule lists Debtor's income to come from two main sources: (1) retirement income of $7,702 and (2) Social Security of $1,739, with an additional $307 in interest/dividend monthly income. Dckt. 1 at 30-31. Debtor's proposed Plan provides for a 100% dividend to creditors holding general unsecured claims. Plan ¶ 3.14, Dckt. 2. On Schedule J Debtor lists having monthly net income (after paying all expenses) of $2,890. Dckt. 1 at 32-33. However, no objection has been made to Debtor not providing the additional $890 a month to the plan to shorten the plan term from 60 months. (This may be because the $890 is being used for the business wind down expenses and may be available only later.)

At the hearing, **XXXXXXXXXXXXX**.

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

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

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

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

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

28. 18-26681-E-13 DPC-1 | **SOPHIE MAYCHROWITZ** Peter Macaluso | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 12-3-18 [18]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on December 3, 2018. By the court's calculation, 43 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

A. On Form 122C-1, Debtor reports she is unmarried. However, on Schedule J she deducts $166 for her significant other's bankruptcy payment. Debtor informed Trustee at the Meeting of Creditors that Debtor's significant other is Gary Dixon who resides with Debtor. Gary Dixon filed case 17-26589 on October 3, 2017, and dismissed on April 26, 2018. Trustee believes that Debtor at least has an extra $166 to provide towards the plan.

The court notes that Mr. Dixon's attorney is the same one representing Debtor in this case. It is curious that counsel would have Debtor erroneously state in October 2018 that she is making a $166 a month payment for a bankruptcy plan of Gary Dixon in a case that was dismissed in April 2018 - six months earlier.

Such “misstatement” under penalty of perjury by Debtor on Schedule J (Dckt. 1 at 29-30) does not bode well for the court to: (1) find that the Debtor has filed the case and is prosecuting a plan in good faith, and (2) that Debtor’s other statements under penalty of perjury are credible.

B. Debtor admitted at the Meeting of Creditors her house was foreclosed before filing this case. Debtor further leaves no expense for house or rental payments.

C. Debtor’s plan states her attorney was paid $1,000.00 prefiling, whereas the Debtor’s Rights and Responsibilities and the Disclosure of Compensation of Attorney for Debtor indicate $1,025.00 was paid.

DISCUSSION

Trustee’s arguments are well-taken.

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

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

Debtor has at least $166.00 more to contribute towards the plan. Debtor listed on Schedule J an expense for her significant other’s bankruptcy filing, and that case has now been dismissed. Therefore, Debtor is not contributing all disposable income.

Further, Debtor does not appear to afford herself a housing/rental expense, her home having been foreclosed on. Such an expense is usually significant. Without an accurate picture of Debtor’s financial circumstance, the plan does not appear feasible. 11 U.S.C. § 1325(a)(5).

Debtor also lists conflicting amounts paid to Debtor’s attorney. Where the amounts stated as paid to Debtor’s attorney do not seem accurate, the court cannot confirm the plan.

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

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

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

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

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

29.	**18-20885-E-13** **PGM-2**	**ANTHONY/WENDY GIANOLA** **Peter Macaluso**	**CONTINUED MOTION TO CONFIRM PLAN** **10-30-18 [57]**

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

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

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

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

The Motion to Confirm the Amended Plan is denied.

Anthony Paul Gianola and Wendy Elaine Gianola ("Debtor") seek confirmation of the Amended Plan, which would be the first confirmed plan in this case. Dckt. 59. The Amended Plan provides for payments of $600 for 8 months, and $3,650.00 for 52 months. Dckt. 60. 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 13, 2018. Dckt. 62. Trustee objects on the basis that the plan term may exceed 60 months because Debtor does not fully account for the Internal Revenue Service's claim amounting to $32,785.29, because Debtor is only paying $1,669.00 towards the Class 1 claim of Nationstar Mortgage (an amount not providing adequate protection), and because Debtor increased the unsecured dividend to 70 percent amounting to $45,275 to be paid out through the plan. Trustee further opposes confirmation of the proposed plan on the grounds that Debtor's Schedule J reflects only $600 in disposable income (far below the proposed monthly payment), and that Debtor has failed to file taxes for the 2014, 2015, and 2017 years.

DEBTOR'S REPLY

Debtor filed a Reply to Trustee's Opposition on November 27, 2018. Dckt. 68. Debtor states that tax returns have been filed for 2014 and 2015, that Amended Schedules I and J were filed on November 15, 2018, and that Debtor requests that the Chapter 13 payment be increased to $4,075.0 in the order confirming plan to ensure payment to creditors under the terms of the proposed plan.

DECEMBER 4, 2018 HEARING

At the December 4, 2018, hearing, the court continued the hearing on the Motion to December 18, 2018 to allow the Debtor and Trustee to work out final plan amendments. Dckt. 70.

DECEMBER 18, 2018 HEARING

At the December 18 hearing, the court continued the hearing on the Motion to January 15, 2019. Dckt. 71.

TRUSTEE'S STATUS UPDATE

On December 27, 2018, Trustee filed an Updated Status In Support of Opposition. Dckt. 72. Trustee asserts the following:

1. The plan remains overextended and will not complete in 60 months because it does not account for the claim of the IRS.

2. Debtor does not provide for the correct payment to Nationstar Mortgage–$2,380.22 as opposed to $1,669.00.

3. Debtor does not explain when Debtor moved to Seattle for a new job, who the employer is, and why Debtor moved where the income received is similar to Debtor's prior job

4. Debtor has not reported filing the 2017 tax return.

DEBTOR'S REPLY TO TRUSTEE'S UPDATED STATUS

Debtor filed a Reply to Trustee's Updated Status on January 8, 2019. Dckt. 75. Debtor argues Claim #5-1 filed by the Internal Revenue Service shows tax debt owed by each individual Debtor even though they file their returns jointly, effectively doubling the amount owed. Dckt. 75 at ¶ 1.

DISCUSSION

No evidence was filed showing Debtor filed tax returns for 2017. Filing of the returns is required. 11 U.S.C. §§ 1308, 1325(a)(9). Failure to file a tax return is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

Debtor filed Amended/Supplemental Schedules I and J on November 15, 2018. Dckt. 65. The Amendment removes the mortgage payment, modestly increases income, and increases other expenses to arrive at a disposable income of $4,527.12. Debtor's Declaration in support of the Amended Schedules explains some of the increased expenses as "new living situation," further explaining Co-Debtor Anthony Gianola moved to Seattle for a new job. Debtor has not explained why this move was necessary.

Debtor's lack of an explanation causes concern where there has been no or virtually no increase to expenses for electricity/heating/gas and water/sewer/garbage. Food and housekeeping costs have been reduced from $800 to $600. Transportation costs have been reduced from $600 to $375.

Furthermore, the Declaration characterizes several expenses as being increased that have actually been reduced or remained constant, including clothing ($200 to $150), personal care ($200 to $150), and heat/electric ($455.33, unchanged). Failure to provide accurate expenses suggests the plan is not feasible. 11 U.S.C. § 1325(a)(6).

Debtor also states it is waiting for the Internal Revenue Service to amend its claim based on duplicative charges, but has not provided evidence suggesting that any claim should be amended. Because the proposed plan does not account for the IRS' higher claim amount, the proposed plan would exceed the maximum sixty months allowed under 11 U.S.C. § 1322(d).

Debtor also failed to address Trustee's argument Debtor is underpaying the claim of Nationstar Mortgage. Where the plan is not properly providing for this claim, the plan does not appear feasible.

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 Anthony Paul Gianola and Wendy Elaine Gianola ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Confirm the Amended Plan is denied.

30. 18-24689-E-13 MEV-1 | **DAVID SHELTON Marc Voisenat** | **MOTION TO CONFIRM PLAN 11-24-18 [36]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 24, 2018. By the court's calculation, 52 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is denied.

David T. Shelton ("Debtor") seeks confirmation of the Amended Plan because Plan, which would constitute the first confirmed plan in this case. The Amended Plan requires monthly plan payments of $2,235.19 for one month, $2,450 for two months, and then $2,752.53 for fifty-seven months. Dckt. 35.

For the Class 1 Claims, Select Portfolio servicing will be paid its $1,046.00 current monthly mortgage payment, and cure payments on the $55,837.40 arrearage, which tier up to $984.41 a month beginning in February 2019 and continuing through the end of the Plan. In Class 2 a vehicle claim and the Homeowner's Association secured claims are paid over the life of the Plan. The Plan provides in Class 3 for surrendering the 2015 Chevy Cruz securing the claim of Townsgate Capital. There is a 0 percent dividend for creditors holding general unsecured claims in Class 7.

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 December 19, 2018. Dckt. 40. Trustee Opposes the Motion on the grounds Debtor is delinquent $4,899.53 in plan payments.

CREDITOR'S OPPOSITION

Lakeside Community Association ("Creditor") filed an "Objection" on January 1, 2019, which the court interprets to be an Opposition to the present Motion. Dckt. 43. Creditor argues the Motion should be denied on the following grounds:

1. The Plan is silent as to both the Debtor's intentions and the effect of the Plan on Lakeside's rights and the Debtor's obligations under the covenants and restrictions, including the Debtor's obligations to pay monthly homeowners association dues and Lakeside's rights and remedies. Dckt. 43 at p. 2:5.5-10.

2. The Plan because the Plan is silent as to the Debtor's intentions with regard to making future homeowners association payments to Lakeside. *Id.* at 2:14.5-17.

3. Lakeside contends that the recorded CC&R's is an executory contract that must be assumed by the Debtor if the Debtor wants to retain possession of the property. Lakeside therefore objects to the Plan for failing to assume the contract and provide for a prompt cure of the arrears. *Id*. at 2:18-21.5.

4. Failure to provide for prompt cure of all delinquent assessments necessarily shifts the obligation to pay the Debtor's share of these costs to other unit owners, who do not have any agreement to cover the Debtor. *Id*. at 3:3-5.5.

DISCUSSION

The Chapter 13 Trustee asserts that Debtor is $4,899.53 delinquent in plan payments, which represents multiple months of the plan payment. Before the hearing, another plan payment will be due. According to the Chapter 13 Trustee, the Plan calls for payments to be received by the Chapter 13 Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Creditor argues the Amended Plan is silent as to its treatment in the plan. This is not so. The Amended Plan specifically provides "Any executory contract or unexpired lease not listed in the table below is rejected." Plan ¶ 4.02, Dckt. 35. Where Debtor is not providing for the amount of Creditor's claim which is secured by Debtor's primary residence (*See* Schedule D, Dckt. 1; Proof of Claim, No. 1), the plan simply does not appear feasible. 11 U.S.C. § 1325(a)(5).

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

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

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

31.	**18-22497-E-13** **RSM-5**	**ROBERT MAC BRIDE** **Pro Se**	**MOTION TO APPROVE LOAN MODIFICATION** **12-17-18 [109]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on December 15, 2018. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

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

The Motion to Approve Loan Modification is granted.

The Motion to Approve Loan Modification filed by Robert S. Mac Bride ("Debtor") seeks court approval for Debtor to incur post-petition credit. Deutsche Bank National Trust Company, as Trustee for Morgan Stanley ABS Capital I Inc. Trust 2007-HE3 Mortgage Pass-Through Certificates Series, 2007- HE3 ("Creditor"), whose claim the proposes Plan provides for in Class 1, has agreed to a loan modification that will reduce Debtor's mortgage payment from the current $1,848.65 per month to $1,155.25 per month. The modification provides for a new principal balance of $409,016.58; an interest rate of 3.75 percent; monthly payments of $1,155.25; a monthly escrow of $427.26; and a balloon payment of $208,976.00 on September 1, 2036. Exhibit A, Dckt. 112.

The Motion is supported by the Declaration of Debtor. Dckt. 111. The Declaration affirms Debtor's desire to obtain the post-petition financing and provides evidence of Debtor's ability to pay this claim on the modified terms.

TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response on December 27, 2018. Dckt. 117. Trustee notes Proof of Claim, No. 3 does not match up completely with details asserted in the Motion, but believes the delinquent amount is correctly stated. Trustee notes that the principal sum is being reduced by $122,016.58, which Trustee believes may reduce significantly the balloon payment amount due.

DISCUSSION

Though the motion does not comply with the requirements of Federal Rule of Bankruptcy Procedure 4001(c)(1)(B), the court will overlook the defect because the Declaration filed in this matter provides much of the information. The moving party is well-served to ensure that future filings comply with the Federal Rules of Bankruptcy Procedure.

However, the Trustee has expressed concern that the balloon payment seems larger than what may actually be due.

Court's Review of the Loan Modification Agreement

The court reads the Loan Modification Agreement filed as Exhibit A (Dckt. 112) to state the following economic terms:

A. Maturity Date..September 1, 2036

B. Pre-Modification Unpaid Principal Balance.......$359,999.43

   1. Modified New Principal Balance...$409,016.58
      a. Includes arrearages

C. Forgiveness of New Principal Balance Upon Completion of Payments under the Modified Loan..($122,016.58)

D. Interest Bearing Principal Balance is $287,000.00
Under the Modified Loan, interest will accrue on the $122,016.58 that is to be forgiven, if all of the payments, including the balloon payment, under the Modified Loan. If all payments not made, then the $122,0166.58 plus interest will not be forgiven.

E. Interest Rate...3.75% per annum

1. Monthly principal and interest payments............$1,155.25

Using the Microsoft Excel Simple loan calculator, a $287,000 principal balance, with a 3.75% interest rate and monthly payments of $1,155.25 is computed to be a loan fully amortized over 40 years. Here, the Modified Loan begins on December 1, 2018 and is due September 1, 2036 - which is a 17 year, 9 month period = 213 month period. Using the Excel Loan Calculator, the principal balance at 213 months would be $208,976.

F. Balloon Payment of $208,976 is stated to be due when the loan matures in September 2036. This is consistent with the court's calculation of paying a $287,000 principal amount, with monthly payments of $1,155.25.

The Trustee's concern having been addressed and the Modification being necessary for Debtor's Plan, the court grants the 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 Approve Loan Modification filed by Robert S. Mac Bride ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and the Debtor is authorized to enter into the Loan Modification with Deutsche Bank National Trust Company, as trustee for Morgan Stanley ABS Capital I Inc. Trust 2007-HE3 Mortgage Pass-through Certificates, Series 2007-HE3 on the terms set forth in the Loan Modification Agreement filed as Exhibit A, Dckt. 112.

32. 18-22497-E-13 RSM-6 | **ROBERT MAC BRIDE Pro Se** | **MOTION TO CONFIRM PLAN 12-17-18 [103]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on December 15, 2018. By the court's calculation, 31 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is xxxxxxxxxx

Robert Stuart Mac Bride ("Debtor") seeks confirmation of the Amended Plan, which would continue the first confirmed plan in this case. The Amended Plan provides for monthly payments of $75.00 from May through December 2018, and payments of $1,918.43 thereafter. Dckt. 107. 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 December 20, 2018. Dckt. 114. Trustee opposes confirmation on the following grounds:

1. Debtor's plan is contingent on approval of a loan modification.

2. Debtor is delinquent $125.00 in plan payments with another payment of $75.00 coming due by the date of this hearing.

3. Debtor's loan modification is contingent on a motion for approval of loan

modification.

4. Debtor’s plan provides for payments of only $75.00 where Debtor’s disposable income is as much as $5,699.00. Debtor’s plan pays 100 percent of claims, but does not pay interest.

5. Debtor Motion to Confirm Third Amended Plan indicates a possible interest in a one-acre property in Sacramento, California. Debtor has not amended Schedules to reflect this interest.

DEBTOR’S REPLY

Debtor filed a Reply on January 8, 2019. Dckt. 120. Debtor replies arguing the following:

1. If the loan modification is not approved, Debtor will surrender his residence and pay the deficiency through the plan.

2. Debtor made a payment of $200.00 on December 20 to become current.

3. Debtor's current monthly net income is $5,114.82. 23. With the loan modification, Debtor's expenses will be approximately $2,836.00 for monthly house payments and $427.26 for escrow.

4. Debtor has amended Schedule A/B to include property located off Howe Avenue in Sacramento, California. Debtor is still unable to locate the deed for the subject property to determine how the subject property was held; however, the realtor for the County of Sacramento indicates that there is no value in the property as there are several utility easements burdening the property.

DISCUSSION

Debtor’s has provided testimony under penalty of perjury that the delinquency was cured and the property recently acquired by him has no value. Dckt. 121 at ¶¶ 5, 9.

However, the plan currently relies on a motion to approve loan modification. If the motion is denied, the plan is not feasible. 11 U.S.C. § 1325(a)(5). Debtor’s statement he would surrender the property is not supported by the current proposes Amended Plan. This has been resolved by the court having granted the Motion to Approve Loan Modification.

Furthermore, Debtor’s disposable income is $5,114.82. 23. With Debtor loan modification is approved, a review of the proposed loan modification filed with the court (Exhibit A, Dckt. 112) shows the new payment including escrow would be $1,582.51. That would leave Debtor with a disposable income of $3,532.31. While Debtor proposes a 100 percent plan, no interest is being provided to offer creditors the present value they would get in a Chapter 7 case. **Therefore, Debtor’s plan fails the Chapter 7**

Liquidation Analysis under 11 U.S.C. § 1325(a)(4) and is not Debtor's best efforts as required by 11 U.S.C. § 1325(b)(1).

It also appears that with the Loan Modification approved, Deutsche Bank National Trust Company, as Trustee, holds a claim for which there is no arrearage and need not be classified as a Class 1 Claim, but as a Class 4 claim. That leaves only slightly more than $5,000 in unsecured priority and general unsecured claims. Debtor should, in light of his disposable income have a plan that last months, not years.

At the hearing, **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**

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

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

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

33. 18-22497-E-13 DPC-3 | **ROBERT MAC BRIDE Pro Se** | **CONTINUED MOTION TO DISMISS CASE 6-11-18 [27]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) and Office of the United States Trustee on June 11, 2018. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Debtor (*pro se*) has not filed opposition. If the *pro se* Debtor appears at the hearing, the court shall consider the arguments presented and determine if further proceedings for this Motion are appropriate.

The Motion to Dismiss is xxxxxxxxxxxxxxx.

David Cusick ("the Chapter 13 Trustee") argues that Robert Mac Bride ("Debtor") did not commence making plan payments and is $3,073.00 delinquent in plan payments, which represents one month of the $3,073.00 plan payment. Before the hearing, another plan payment will be due. 11 U.S.C. § 1307(c)(4) permits the dismissal or conversion of the case for failure to commence plan payments. Debtor did not present any opposition to the Motion.

Debtor has not provided the Chapter 13 Trustee with employer payment advices for the period of sixty days preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv); FED. R. BANKR. P. 4002(b)(2)(A). That is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

A review of the court's files discloses that the present Chapter 13 case is not Debtor's only recent bankruptcy case. In Chapter 7 case no.17-22283 filed on April 5, 2017, Debtor received his discharged on February 21 2018. Case No. 17-22283 was originally filed as a Chapter 13 case. That case was converted to one under Chapter 7 on Debtor's oral motion in open court on November 14, 2017. 17-22283; Civil Minutes, Dckt. 88.

Prior to that, Debtor filed Chapter 13 case No. 16-24396 on July 6, 2016, which was dismissed on April 3, 2017. The court's bases for dismissing case No. 16-24396 are stated in the Civil Minutes for the hearing on that Chapter 13 Trustee's Motion to Dismiss that prior case.

Debtor's Chapter 13 Plan filed in this case requires $3,073.00 in monthly plan payments for sixty months. Dckt. 13. Under the terms of the Plan, the following payments are to be made:

A. Class 1

1. Home Mortgage Creditor Deutsche Bank

a. Post-Petition Current Payment........................$1,846.65

b. Pre-Petition Arrearage Payment......................$ 609.00

B. Class 2 Secured Claims

1. Sacramento County Utilities..........................$ 25.00

On Schedule I, Debtor lists monthly take home income of $5,361.50 (including a "benefit" in the amount of $150 "by eating at my fiancee's house). Dckt. 12 at 29. On Schedule J, Debtor lists having only $900 per month in expenses. *Id.* at 30–32. To get to $900 per month in expenses, some of the questionable expenses include: $0.00 for dental and medical expenses, $10 for clothing and laundry, $57 for transportation (for Debtor's two vehicles, a 1984 Toyota Landcruiser and 1982 Toyota Landcruiser), and $15 for entertainment per month for sixty months.

JULY 11, 2018, HEARING

At the July 11, 2018, hearing, the court continued the hearing on the Motion to Dismiss to September 5, 2018, at 10:00a.m. Dckt. 37.

TRUSTEE'S RESPONSE

Trustee filed a Response on August 16, 2018. Dckt. 42. Trustee informs the court that Debtor has not resolved grounds for dismissal, and has paid $0 to the Trustee to date.

SEPTEMBER 5, 2018 HEARING

At the September 5, 2018, hearing on the Motion, the court noted a Motion to Confirm Amended Plan (Dckt. 47) had recently been filed. Dckt. 55. Therefore, the court continued the hearing to November 14, 2018. Dckt. 57.

NOVEMBER 14, 2018 HEARING

At the November 14, 2018 hearing, the court continued the hearing on the Motion to be heard alongside Debtor's Motion to Confirm Plan. Dckt. 102.

DISCUSSION

Debtor has not filed timely supplemental pleadings since the prior hearing on the Motion. Debtor's Motion to Confirm plan heard prior to the November 14, 2018 hearing was denied in part on delinquency in payments. Order, Dckt. 96. The court continued the hearing on this Motion to allow it to be heard alongside Debtor's newly filed Amended Plan and Motion to Confirm that Plan. Order, Dckt. 102.

However, Debtor has now filed a Third Amended Plan without a motion to confirm that plan. Amended Plan, Dckt. 107. Fortunately for Debtor, in *Pro Se*, the court set the hearing on Debtor's Motion to Confirm Third Amended Plan for the same date as the hearing on this Motion.

A review of the docket shows the court has denied the Motion to Confirm Third Amended Plan. Among the reasons for denial is Debtor's failure to provide disposable income into the plan, and failure to meet the liquidation test. Debtor's failure to propose a viable plan is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

January 8, 2019 Debtor Reply

Debtor states that in late November 2018, Debtor was approved for a loan modification. Reply, p. 1: 28, 2:1-3; Dckt. 120.

The court has granted the Motion to Approve Loan Modification.

At the hearing, xxxxxxxxxxxxxxxxxxx

~~Cause exists to dismiss this case. The Motion is granted, and the case is dismissed.~~

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss the Chapter 13 case filed by David Cusick ("the Chapter 13 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is xxxxxxxxxx.

34. [18-22497](#)**-E-13** **ROBERT MAC BRIDE** **MOTION TO CONFIRM PLAN**
[RSM](#)**-4** **Pro Se** **11-14-18 [**[97](#)**]**

Final Ruling: No appearance at the January 15, 2019, hearing is required.

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

Sufficient Notice Not Provided. No Proof of Service was filed with the Motion and supporting documents establishing when and how many days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition). Without having provided evidence, the court cannot determine the sufficiency of notice, if any was provided.

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

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

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Subsequent to the filing of this Motion, Robert Stuart Mac Bride ("Debtor") filed a Third Amended Plan (without corresponding Motion to Confirm) on December 17, 2018. Dckts. 107. Filing a new plan is a de facto withdrawal of the pending plan. The Motion to Confirm the Amended Plan is denied as moot, and the plan is not confirmed.

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

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

Chapter 13 Plan is not confirmed.

FINAL RULINGS

35. 18-24198-E-13 GTB-1 | **ANDRE ABERNATHY George Burke** | **MOTION TO CONFIRM PLAN 11-10-18 [24]**

Final Ruling: No appearance at the January 15, 2019, hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 10, 2018. By the court's calculation, 66 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Andre L Abernathy ("Debtor") has provided evidence in support of confirmation. David Cusick ("the Chapter 13 Trustee") filed an Amended Response indicating non-opposition on January 7, 2019. Dckt. 32. The Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

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

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

IT IS ORDERED that the Motion is granted, and Debtor's Chapter 13 Plan filed on November 10, 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.

36. 18-24308-E-13 **ADORA EVANS** **MOTION TO CONFIRM PLAN**
AFE-1 **Pro Se** **11-16-18 [29]**

Final Ruling: No appearance at the January 15, 2019, hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on November 9, 2019. By the court's calculation, 67 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Adora Ferma Evans ("Debtor") has provided evidence in support of confirmation. David Cusick ("the Chapter 13 Trustee") filed a Non-Opposition December 21, 2018. Dckt. 36. The Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by Adora Ferma Evans ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Debtor's Chapter 13 Plan filed on November 16, 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.

37. **13-35315-E-13** **WSS-8** | **STUART/TAMMIE CLARK** **W. Steven Shumway** | **MOTION TO MODIFY PLAN** **11-28-18 [118]**

Final Ruling: No appearance at the January 15, 2019, hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on November 28, 2018. By the court's calculation, 48 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy 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. Stuart Lee Clark and Tammie Lynn Clark ("Debtor") have filed evidence in support of confirmation. David Cusick ("the Chapter 13 Trustee") filed a Response indicating non-opposition on December 28, 2018. Dckt. 124. 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 Stuart Lee Clark and Tammie Lynn Clark ("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 November 28, 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.

38. 18-26334-E-13 MAC-1 **AMY EVERSON Marc Carpenter** **MOTION TO CONFIRM PLAN 11-27-18 [22]**

Final Ruling: No appearance at the January 15, 2019, hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on November 27, 2018. By the court's calculation, 49 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Amy Everson ("Debtor") has provided evidence in support of confirmation. David Cusick ("the Chapter 13 Trustee") filed a Response indicating non-opposition on December 21, 2018. Dckt. 32. The Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by Amy Everson ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Debtor's Chapter 13 Plan filed on November 27, 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.

39.	**18-25141-E-13** **BLG-3**	**BLAKE HARBIN** **Chad Johnson**	**MOTION TO EMPLOY SEQUOIA REAL ESTATE AS BROKER(S)** **11-28-18 [43]**

Final Ruling: No appearance at the January 15, 2019,hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 28, 2018. By the court's calculation, 48 days' notice was provided. 28 days' notice is required.

The Motion to Employ 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 Employ is granted.

Blake Harbin ("Debtor") seeks to employ Sequoia Real Estate ("Broker") pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor seeks the employment of Broker to establish a fair market value for and market Debtor's real property commonly known as 4000 Madeline Ct, Vacaville, California ("Property").

In consideration for Broker's services, the Broker will receive, upon consummation of any sale, a real estate broker's commission equal to 5 percent of the purchase price.

John Pickney, a real estate agent employed by Broker, testifies that he has met with Debtor to discuss valuation and sale of the Property. Pickney testifies further he and the firm do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the

U.S. Trustee, any party in interest, or their respective attorneys.

Pursuant to § 327(a), a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate and be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

Taking into account all of the relevant factors in connection with the employment and compensation of Broker, considering the declaration demonstrating that Broker does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Sequoia Real Estate as Broker for the Chapter 13 Estate on the terms and conditions set forth in the Listing Agreement filed as Exhibit A, Dckt. 46. Approval of the commission is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

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 Employ filed by Blake Harbin ("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 Employ is granted, and Debtor is authorized to employ Sequoia Real Estate as Broker for Debtor on the terms and conditions as set forth in the Listing Agreement filed as Exhibit A, Dckt. 46.
>
> **IT IS FURTHER ORDERED** that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.
>
> **IT IS FURTHER ORDERED** that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

40. **18-20243-E-13** **MRL-5**

JOHN HATZIS
Mikalah Liviakis

MOTION FOR COMPENSATION BY THE LAW OFFICE OF MIKALAH RAYMOND LIVIAKIS FOR MIKALAH R.LIVIAKIS, DEBTOR'S ATTORNEY(S) 11-26-18 [60]

Final Ruling: No appearance at the January 15, 2019,hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 26, 2018. By the court's calculation, 50 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Allowance of Professional Fees is granted.

Mikalah Raymond Liviakis, the Attorney ("Applicant") for John Chris Hatzis, the Chapter 13 Debtor ("Client"), makes a Request for the Additional Allowance of Fees in this case.

Fees are requested for the period August 12, 2018 through November 26, 2018. The order of the court approving employment of Applicant was entered on May 24, 2018. Dckt. 40. Applicant requests fees in the amount of $2,512.50.

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 Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

APPLICABLE LAW

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner,

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

Further, the court shall not allow compensation for,

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

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

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the attorney exercise reasonable billing judgment?

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

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

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

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

A review of the application shows that Applicant's services for the Estate include those incident to settling Debtor's state court claims. 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. 40. Applicant prepared the order confirming the Plan.

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.

Asset Disposition: Applicant spent 6.7 hours in this category. Applicant's services included drafting a motion to approve settlement, motion to file documents under seal, and a motion to employ litigation attorney.

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

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
Mikalah Liviakis	6.7	$375.00	$2,512.50
Total Fees for Period of Application			$2,512.50

FEES AND COSTS & EXPENSES ALLOWED

Fees

The unique facts surrounding the case and settlement of Debtor's civil claims, including drafting a motion to approve settlement, motion to file documents under seal, and a motion to employ litigation attorney, 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 $2,512.50 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.

The court authorizes the Chapter 13 Trustee to pay the fees allowed by the court.

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

Fees $2,512.50

pursuant to this Application as final fees and costs 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 Mikalah Raymond Liviakis ("Applicant"), Attorney for John Hatzis, Chapter 13 Debtor, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Mikalah Raymond Liviakis is allowed the following fees and expenses as a professional of the Estate:
>
> Mikalah Raymond Liviakis, Professional employed by Chapter 13 Debtor
>
> Fees in the amount of $2,512.50
>
> as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for Chapter 13 Debtor.
>
> **IT IS FURTHER ORDERED** that 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.

41. 18-26945-E-13 **ARACELY RIVAS** **MOTION TO VALUE COLLATERAL OF**
PGM-2 **Peter Macaluso** **WELLS FARGO BANK, N.A.**
12-18-18 [25]

Final Ruling: No appearance at the January 15, 2019,hearing is required.

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

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

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

The Motion to Value Collateral and Secured Claim of Wells Fargo Bank, N.A. ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $3,721.00.

The Motion filed by Aracely Rivas ("Debtor") to value the secured claim of Wells Fargo Bank, N.A. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2015 Kia Rio ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $3,721.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The lien on the Vehicle's title secures a purchase-money loan incurred on February 9, 2016, which is (at approximately 997 days) more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $14,793.42. 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 $3,721.00, 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 Aracely Rivas ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of Wells Fargo Bank, N.A. ("Creditor") secured by an asset described as 2015 Kia Rio ("Vehicle") is determined to be a secured claim in the amount of $3,721.00, 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 $3,721.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

42. **18-27147-E-13** **TAG-1**

CHERYL/ANTHONY HEARNS
Aubrey Jacobsen

MOTION TO VALUE COLLATERAL OF FIRST TECH FEDERAL CREDIT UNION
12-11-18 [13]

Final Ruling: No appearance at the January 15, 2019,hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, creditors, and Office of the United States Trustee on December 11, 2018. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The Motion to Value Collateral and Secured Claim of First Tech Federal Credit Union ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $17,562.00.

The Motion filed by Cheryl Louise Hearns and Anthony Edward Hearns ("Debtor") to value the secured claim of First Tech Federal Credit Union ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2013 Nissan Frontier ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $17,562.00 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 Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response on December 27, 2018. Dckt. 25. The Response notes that Proof of Claim, No. 4 filed by Creditor indicates the value of the vehicle is $18,000.00, and that Debtor does not provide specific information as to the condition of the Vehicle which Debtor might base Debtor's valuation. Trustee also summarizes treatment of Creditor's claim in the proposed plan.

The lien on the Vehicle's title secures a purchase-money loan incurred in June 2014, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $22,154.41. Proof of Claim, No. 4. 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 $17,562.00, 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 Cheryl Louise Hearns and Anthony Edward Hearns ("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 First Tech Federal Credit Union ("Creditor") secured by an asset described as 2013 Nissan Frontier ("Vehicle") is determined to be a secured claim in the amount of $17,562.00, 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 $17,562.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

43. **18-27147-E-13** **TAG-2**

CHERYL/ANTHONY HEARNS
Aubrey Jacobsen

MOTION TO VALUE COLLATERAL OF GOLDEN ONE CREDIT UNION
12-11-18 [18]

Final Ruling: No appearance at the January 15, 2019,hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, creditors, and Office of the United States Trustee on December 11, 2018. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The Motion to Value Collateral and Secured Claim of Golden One Credit Union ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $6,251.00.

The Motion filed by Cheryl Louise Hearns and Anthony Edward Hearns ("Debtor") to value the secured claim of Golden One Credit Union ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2012 Ford Focus ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $6,251.00 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 Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response on December 27, 2018. Dckt. 28. The Response notes that Debtor does not provide specific information as to the condition of the Vehicle which Debtor might base Debtor's valuation, and that Creditor does not specify a value in its Proof of Claim, No. 1. Trustee also summarizes treatment of Creditor's claim in the proposed plan.

The lien on the Vehicle's title secures a purchase-money loan incurred in the year 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 $9,029.34. 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 $6,251.00, 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 Cheryl Louise Hearns and Anthony Edward Hearns ("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 Golden One Credit Union ("Creditor") secured by an asset described as 2012 Ford Focus ("Vehicle") is determined to be a secured claim in the amount of $6,251.00, 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 $6,251.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

44. 18-24449-E-13 STEVEN SMITH MOTION TO CONFIRM PLAN
AF-3 Arasto Farsad 11-16-18 [42]

Final Ruling: No appearance at the January 15, 2019, hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on November 16, 2018. By the court's calculation, 60 days' notice was provided. 42 days' notice is required. FED. R. BANKR. P. 2002(b); LOCAL BANKR. R. 3015-1(d)(1).

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

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

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Subsequent to the filing of this Motion, Steven Claude Smith ("Debtor") filed a Third Amended Plan on December 21, 2018. Dckt. 58. Filing a new plan is a de facto withdrawal of the pending plan. The Motion to Confirm the Amended Plan is denied as moot, and the plan is not confirmed.

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

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

45. 17-27077-E-13 PLC-4 | **MICHAEL SCALLIN Peter Cianchetta** | **MOTION TO CONFIRM PLAN 11-30-18 [89]**

Final Ruling: No appearance at the January 15, 2019,hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on November 30, 2018. By the court's calculation, 46 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Michael Everett Scallin ("Debtor") has provided evidence in support of confirmation. David Cusick ("the Chapter 13 Trustee") filed a Non-Opposition on December 18, 2018. Dckt. 96. The Amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Amended Chapter 13 Plan filed by Michael Everett Scallin ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Debtor's Amended Chapter 13 Plan filed on November 30, 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.

46. 18-25186-E-13 SLH-1 | **ROSEMARY MENDOZA AQUINO Seth Hanson** | **MOTION TO CONFIRM PLAN 11-9-18 [22]**

Final Ruling: No appearance at the January 15, 2019, hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, and creditors on November 9, 2018. By the court's calculation, 67 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Rosemary Cadavona Mendoza Aquino ("Debtor") has provided evidence in support of confirmation. David Cusick ("the Chapter 13 Trustee") filed a Response indicating non-opposition on December 18, 2018. Dckt. 27. The Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by Rosemary Cadavona Mendoza Aquino ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Debtor's Chapter 13 Plan filed on , 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.

47. 18-27132-E-13 STUART KOPPLE
Pro Se

MOTION TO VALUE COLLATERAL OF UNITED AUTO CREDIT CORPORATION
11-27-18 [10]

Final Ruling: No appearance at the January 15, 2019, hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor and Office of the United States Trustee on November 27, 2018. By the court's calculation, 49 days' notice was provided. 28 days' notice is required.

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

The hearing on the Motion To Value Collateral Of United Auto Credit Corporation is continued to January 22, 2019 at 1:00p.m. to be heard by the Honorable Christopher D. Jaime in courtroom 32.

The debtor, Stuart Kopple ("Debtor"), filed this Motion To Value Collateral of United Auto Credit Corporation ("Creditor") on November 27, 2018. Dckt. 10.

On January 14, 2018, the court recognized a conflict and issued an Order Transferring Case, transferring the case to the **United States Bankruptcy Court, Sacramento Division, Department B, The Honorable Christopher D. Jaime** presiding**.**

The court shall continue the hearing on the Motion to January 22, 2019 at 1:00p.m. in courtroom 32 to be heard by the newly assigned presiding judge.

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 of United Auto Credit Corporation filed by Stuart Kopple ("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 hearing on the Motion To Value Collateral Of United Auto Credit Corporation is continued to January 22, 2019 at 1:00p.m. to be heard by the Honorable Christopher D. Jaime in courtroom 32.

48.	**18-25798-E-13** **TOG-1**	**EVERARDO PEREZ** **Thomas Gillis**	**MOTION TO CONFIRM PLAN** **12-4-18 [23]**

Final Ruling: No appearance at the January 15, 2019 Hearing is required**.**

- - - - - - - - - - -

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on December 7, 2018. By the court's calculation, 39 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is denied.

Everardo Perez ("Debtor") filed the present Motion seeking confirmation of the First Amended Plan. *See* Amended Plan, Dckt. 25. 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 December 18, 2018. Dckt. 33. Trustee's sole ground for opposition is Debtor's delinquency in plan payments.

DEBTOR'S NON-OPPOSITION

Debtor filed a Statement of Non-Opposition to Trustee's Opposition on January 1, 2019. Dckt. 36.

DISCUSSION

Debtor is delinquent in plan payments and does not oppose Trustee's Opposition to the Motion. Delinquency in plan payments indicates the plan is not feasible. 11 U.S.C. § 1325(a)(6). The Amended Plan does not comply with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is not confirmed.

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

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