

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Christopher M. Klein
Chief Bankruptcy Judge
Sacramento, California

February 3, 2015 at 2:00 P.M.

1. [14-23313](#)-C-13 PAUL/LYNDA FANFELLE CONTINUED MOTION FOR RELIEF
ANF-2 Peter Macaluso FROM AUTOMATIC STAY
7-21-14 [[31](#)]

PAWNEE LEASING CORPORATION
VS.

Also #2

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on July 21, 2014. Fourteen days' notice is required. That requirement was met.

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

The Motion for Relief From the Automatic Stay is granted.

PRIOR HEARINGS

The court held an initial hearing on the Motion on August 5, 2014. At the hearing, the parties indicated that they were close to reaching terms for providing for this claim through Debtors' plan. The court continued the hearing on the motion to allow for continued negotiations.

At the August 19, 2014 hearing, Debtors and Movant represented that they were nearing a stipulated resolution. The court granted a further continuance per parties' request.

Debtors filed a Supplemental Opposition on September 2, 2014, which is incorporated into the court's current tentative ruling.

A continued hearing was held on September 9, 2014. During that hearing, the parties requested a continuance to complete settlement negotiations or to determine that no settlement was possible. The court granted a continuance to September 30, 2014.

At the hearing on September 30, 2014, the court granted a further continuance to October 28, 2014. The parties announced at the hearing that they had reached a stipulated agreement that would be "documented in the next few days." See Civil Minutes (Dkt. 62).

STIPULATION TO CONTINUE

On October 14, 2014, Debtors uploaded to the court's docket (Dkt. 72) a Stipulation with Creditor to continue the hearing on Debtors' Motion to Confirm to December 16, 2014, as Debtors and Pawnee Leasing wanted time to obtain appraisals for the secured equipment. The court finds it safe to assume the secured equipment referenced in that stipulation is the same secured equipment which is subject to this current Motion for Relief from Stay.

On October 16, 2014, the court entered an order approving the Stipulation to continue the Motion to Confirm to December. The Court subsequently continued the matter to February 3, 2015.

As of February 3, 2015, no new documents appear on the court's docket. The court has yet to see a stipulated resolution to this motion and reverts to its previous decision to grant the Motion for Relief from the Automatic Stay.

DISCUSSION

Pawnee Leasing Corporation seeks relief from the automatic stay with respect to the personal property commonly known as a Soft Serve Freezer and 87" Dipping Cabinet. The moving party is seeking to exercise its lawful rights and remedies under the written Lease Agreement entered into with Debtors. Movant provides the Declaration of Sandi Carr to introduce evidence (Dkt. 33).

The Carr Declaration states that on September 16, 2013, Innovative Capital Corp., as Lessor, entered into a Lease Agreement with Crazy for Yogurt Inc. Pursuant to the terms of the Lease Agreement, Innovative Capital Corp. Leased to Crazy for Yogurt a Soft Serve Freezer and 87" Dipping Cabinet. On September 16, 2013, Debtors executed a Guaranty whereby they guaranteed payment by Crazy for Yogurt of all sums to be paid under the

terms of the Lease Agreement (Exh. 1), together with costs and attorneys' fees incurred in the collection and enforcement of the Guaranty. (Exh. 2).

Prior to Debtors filing for bankruptcy protection, Innovative Capital Corp. assigned its Lease Agreement to Movant, Pawnee Leasing Corporation. The Assignment is attached as Exh. 3 to Movant's Motion. Movant filed a UCC-1 Filing Statement on the personal property with the California Secretary of State's office (Exh. 4).

The Lease Agreement provides that if the Lessee defaults in the performance of any of its obligations, the Movant may repossess the personal property. Movant alleges that Debtors and Lessee failed to pay the pre-petition March 1, 2014 payment and post-petition April-June 2014 payments. In total, the amount due to cure the default is \$4,535.72. The total balance due under the terms of the Lease Agreement is \$35,968.08.

The declaration offered by Pawnee Leasing Corporation states that it is under penalty of perjury and that the statements are "true and correct to the best of my knowledge and believe [sic]." This could be read two ways. The first is that "whatever I have said is true, to the extent that I have any knowledge about what I am talking about." The second interpretation is that "I am telling you the truth to the best of my ability to testify in this proceeding."

Movant has provided the court with Exhibits demonstrating the leasing and guaranty relationships. Exhibit 1 to the deficient declaration is the Lease Agreement executed between Innovative Capital Corp. and Crazy For Yogurt, Inc. The Lease Agreement is signed by Lynda Fanfelle as "President" of Lessee and dated September 16, 2013. Exhibit 2 to the declaration is the Guaranty executed by Lynda and Paul Fanfelle. The language of the Guaranty provides that the "Guarantor(s) now hereby individually, jointly and severally, absolutely and unconditionally guaranty to the Lessor (and any person or firm the Lessor may transfer its interest to) all payments and other obligations owed by the Lessee to the Lessor under the Lease"

The Assignment of Lease is Exhibit 3 and demonstrates a transfer of interest from Innovative Capital Corp. to Pawnee Leasing Corporation concerning the Crazy For Yogurt, Inc. lease.

DEBTORS' OPPOSITION

Debtors argue that no cause exists for the relief requested. Debtors argue that the reason Movant has not been paid is because Movant has not filed a proof of claim and Trustee cannot disburse payments to Movant without a proof of claim on file.

Further, Debtor argues that the contract relationship between Debtor and Movant is not a "pure" lease and that Debtors have a beneficial interest in paying the claim in Class 2 of their plan. Debtors propose making an adequate protection payment of \$380.00 per month.

DEBTORS' SUPPLEMENTAL OPPOSITION

Debtors reiterate that no cause exists for the requested relief. Debtors assert that their counsel prepared a stipulation that was circulated to and rejected by Movant. Debtors state that they filed an amended plan providing for payments in full with a payment of no less than \$906.27 per

month to Movant as a class 2(a) claim.

DISCUSSION

11 U.S.C. § 362(a)(6) provides that the filing of a petition under section 301, 302, or 303 of the Code operates as a stay of any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case. A "claim" consists of a right to payment, whether or not it is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured. 11 U.S.C. § 105(5)(A). Here, Movant is seeking to enforce a claim against the Debtors in their role as guarantors under the lease agreement. The claim became fixed in nature when the lessees failed to make the March 1, 2014 pre-petition payment under the lease, triggering the guarantor's responsibility under the Equipment Lease Guaranty, guaranteeing all payments owed by the lessee to the lessor under the lease (Exh. 2, Dkt. 33).

The court maintains the right to grant relief from stay for cause when the debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay since the debtor has not made post-petition payments as guarantors under the lease. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

A copy of the lease is hidden behind a declaration. Local Bankruptcy Rule 90061 and the Revised Guidelines for Preparation of Documents requires that the motion, points and authorities, each declaration, and the exhibit document (all exhibits being included in one document) be filed as separate documents. While Debtors argue that this is not a pure lease, they provide no legal arguments or evidence as to why it is an impure lease. Additionally, Debtors do not provide legal argument or evidence as to why they can assert the rights to the equipment under the lease when the Lessee on the contract is Crazy for Yogurt, Inc. Exhibit 1, Dckt. 33.

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 Relief From the
Automatic Stay filed by the creditor having
been presented to the court, and upon review
of the pleadings, evidence, arguments of
counsel, and good cause appearing,

IT IS ORDERED that the automatic stay
provisions of 11 U.S.C. § 362(a) are vacated
to allow Pawnee Leasing Corporation, its
agents, representatives, and successors, and
trustee under the trust deed, and any other
beneficiary or trustee, and their respective
agents and successors under any trust deed
which is recorded against the property to

secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the personal property commonly known as a Soft Serve Freezer and 87" Dipping Cabinet.

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 4, 2014. 42 days' notice is required. That requirement was met.

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

The court's decision is to deny the Motion to Confirm without prejudice.

PRIOR HEARING

The Motion was initially scheduled to be heard on October 21, 2014. On October 16, 2014, the court approved a Stipulation entered into between the parties to continue the hearing to December 16, 2014.

As part of Debtors' response to the Trustee's and Creditor's objections, they requested a continuance to allow a formal Broker's Price Opinion ("BPO") to be presented to the Trustee for both real properties; to allow the Trustee to account for the nine bank accounts; to allow for analysis of the trust to be provided to the trustee, and to allow for the Debtors to address the best efforts.

CHAPTER 13 TRUSTEE OBJECTION

The Chapter 13 Trustee opposes confirmation of the plan based on the following:

1. Debtors' plan may fail Chapter 7 Liquidation under 11 U.S.C.

§ 1325(a)(4). Debtors' non-exempt equity totals \$2,925 and the Debtors are proposing a 1% dividend to unsecured creditors.

Residential Real Property: Debtors list real property at 1141 El Sur Way, Sacramento, California on Schedule A. Debtors filed Amended Schedule A on September 9, 2014 and increased the value in the property from \$1.00 to \$680,000 (value is actually \$738,000 but Debtors reduced the value by 8%). Debtors claim that the value is the Zillow.com value. Trustee visited the Zillow.com website and found that the property has an estimated value of \$827,535. (Exh. A).

Based on Trustee's Zillow estimate, minus 8% cost fo sale, the net property value is \$761,332.20. After accounting for the mortgage loan, Debtors have \$136,165.27 in equity. Debtors exempted \$100,000 on Schedule C, leaving approximately \$36,165.27 in non exempt equity.

Non-Primary Residence: Debtors list on Schedule A interest in real property located at 10200 Tinker Court, Truckee, California with a value of \$100,000. Debtor's had originally listed the value of the property as \$60,000, but give insufficient information pertaining to the property to support any valuation. Trustee queries whether the value provided is proper.

Bank Accounts: Schedule B includes multiple bank accounts held at Wells Fargo Bank, N.A. All of the accounts are held in Debtors' trust, listed as an asset on Schedule B. Debtors do not disclose the true value of these accounts and did not provide Trustee with bank account statements for the time period prior to filing.

Value of Trust: Debtors list a family trust, The Paul and Lynda Fanfelle Family Trust on Schedule B with a value of \$1.00. Debtors report that the trust holds real property at 1141 El Sur Way, Sacramento California, real property at 10200 Tinker Court, Truckee, California, the contents of both properties, all bank, retirement, pension and 401K accounts; however, the value is only \$1.00. Debtors have provided insufficient information to support the valuation.

2. Trustee argues that the plan does not reflect Debtors' best efforts under 11 U.S.C. § 1325(b). Debtors are over median income and proposing a 60 months plan paying \$1,975 for 12 months, \$2,500 for 12 months, and \$3,840 for 36 months with a 1% dividend to general unsecured claims. In Class 4 of the plan, Debtors indicate that their son is making ongoing auto payments to J.P. Morgan Chase Bank, N.A. of \$339.54 per month. Debtors list their son as a dependent on both Form B22C and Schedule J and report no income from their son on Schedule I. Debtors may not be reporting all income.

CREDITOR'S OBJECTION

Creditor, Mesa Leasing, Inc., objects to Debtors' Motion. Mesa is the owner and lessor of yogurt and food service equipment previously

delivered to and located in Debtors' Sacramento yogurt retail shop. Prior to the filing, Debtors entered into a commercial lease agreement with Creditor and each Debtor signed a personal guaranty for all performances due under the lease.

Creditor argues that the plan is deficient for the following reasons:

1. Debtors have not reported all household income from their son.
2. Debtors are not using their best efforts because they are dealing inequitable among the secured creditors.
3. Repayment to Creditor is provided in Class 2. It is acknowledged that the debt is \$105,343 as set forth in the Proof of Claim. The regular payments under the contract are \$3,148 per month. Debtor propose to only pay \$675.00 per month in the first year; \$1,200 per month for the second year, at the end of 24 months the payment increases to \$2,450 per month for 19 months and then increases to \$2,850 for the remaining 17 months. Creditor argues that the equipment value is depreciating faster than the proposed payments provide and the plan does not come close to adequately protecting the Creditor's interests.

Further, Creditor objects to "inequitable treatment" that the other secured "equipment" creditor, Pawnee Leasing, is set to receive almost one-third more in their monthly payment when the entire debt to Pawnee (at \$35,900) is significantly less than the debt owed to Creditor.

On January 20, 2015, Creditor filed another objection reiterating the reasons stated above, providing further that Debtors continue to be "specious and surreptitious and still have not come clean about their income and assets."

TRUSTEE'S AMENDED OBJECTION

Trustee amends his objection to add the following basis for denying the Motion:

1. Debtors misclassified the lease agreement with Pawnee Leasing Corporation, which is currently listed in Class 2 of the plan. Pawnee Leasing is described as a Class 2 secured creditor holding a purchase money security interest and is receiving payments of \$907 per month, with their claim amount being \$35,698.08 at 4% interest. Debtors' prior plan proposed to pay Pawnee \$380.00 per month.

Trustee argues that if the contract is not secured but, rather, a lease, it appears the claim would be more appropriately provided for in section 3.02 of the plan as an unexpired lease with regular payments paid by the Debtor and the plan curing any arrears.

DEBTOR'S SUPPLEMENTAL RESPONSE

On January 21, 2015, Debtors filed a supplemental reply to Chapter 13 Trustee's objection to confirmation of the plan. Debtors respond as follows in efforts to resolve many issues identified in the last hearing:

1. Debtors have presented Trustee with BPOs on both real properties without issue.
2. Debtors have further amended the nine (9) bank accounts in response to Trustee's objection for not limiting the exemption amount to 75%.
3. Debtors stand on the exemption for both spouses as to the tools of the trade for spouses. Debtors' "declaration in support of exemption" asserts that this is a community property business, and while the husband may have a full time job, he does assist in the repairs, emergencies, deliveries between store, responses to county agencies, and financial planning as to this community asset. This issue should not defeat confirmation.
4. The Trust has been provided and the analysis has been completed by the Trustee without issue.
5. Debtors' plan proposes payments of \$1,975 for twelve (12) months, \$2,500 for twelve (12) months, and \$3,840 for thirty-six (36) months. Debtors' plan is short \$9,214. Debtors can pay the shortage in the thirty-six (36) month step increase by furthering increasing those payments by \$255, from \$3,840 to \$4,100 per month in the Order Confirming Plan.

TRUSTEE'S SUPPLEMENTAL RESPONSE

On January 27, 2015, Trustee filed a supplemental response to Debtors' supplemental response. The Chapter 13 Trustee asserts as follows:

1. Trustee states that Debtors' assertion, stating that they presented Trustee with BPOs for both properties and that the Trustee has performed an analysis without issue, is inaccurate. Trustee is uncertain where Debtors obtained this information, considering Trustee only received the BPO on the residential real property after their January 21, 2015 filing. Trustee does not have issue with the BPOs directly, but takes issue with the fact of Debtor speaking on behalf of Trustee where the Trustee had not yet received the documents.
2. Trustee has reviewed the amended Schedules B and C filed on December 15, 2014, (Dkt. 86), listing the nine (9) bank accounts held in Trust. Trustee has filed an Objection to Exemptions, and this objection is scheduled for hearing on February 24, 2014, (Dkt. 89).
3. Trustee has reviewed Trustee has reviewed the amended Schedules B and C filed on December 15, 2014, (Dkt. 86), listing tools of trade vehicle exemptions. Trustee has filed an Objection to Exemptions, and this objection is scheduled for hearing on February 24, 2014, (Dkt. 89).

DISCUSSION

Debtors have attempted to resolve numerous issues identified by Chapter 13 Trustee, including: to allow for a formal Broker's Price Opinion ("BPO") to be presented to the Trustee for both real properties; to allow the Trustee to account for the nine bank accounts; to allow for analysis of the trust to be provided to the trustee; and to allow for the Debtors to address the best efforts. However, Chapter 13 Trustee has identified that contrary to Debtors' representations otherwise, Trustee had not, at the time of Debtors' filing, reviewed and analyzed the BPOs without issue, and second, that an amended Schedules B and C filed on December 15, 2014 have not resolved Trustee's concerns with the Plan. Finally, Debtors have not addressed the lease issues present in the objections or Creditor's objections. Therefore the Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a) and is not confirmed.

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

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

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

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

3. [14-31016](#)-C-13 GARRY/CYNTHIA SIMPSON
SJS-1 Scott Sagaria

MOTION TO VALUE COLLATERAL OF
CITIBANK, N.A.
12-19-14 [[27](#)]

Final Ruling: No appearance at the February 3, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on December 19, 2014. Twenty-eight days' notice is required. This requirement has been met.

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

The Motion to Value secured claim of Citibank, N.A., "Creditor," is granted.

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 510 Hamon Court, Wheatland, California. The Debtor seeks to value the property at a fair market value of \$176,792 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See Fed. R. Evid. 701; see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The first deed of trust secures a loan with a balance of approximately \$210,000. Citibank, N.A.'s second deed of trust secures a loan with a balance of approximately \$25,507.19. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The creditor's secured claim is determined to be in the amount of \$0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See 11 U.S.C. § 506(a); Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

Findings of Fact and Conclusions of Law are

stated in the Civil Minutes for the hearing.

The Motion for Valuation of Collateral filed by Debtor(s) 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 Citibank, N.A. secured by a second deed of trust recorded against the real property commonly known as 510 Hamon Court, Wheatland, California, is determined to be a secured claim in the amount of \$0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is \$176,792 and is encumbered by senior liens securing claims which exceed the value of the Property.

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 22, 2014. Thirty-five days' notice is required. That requirement was met.

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

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

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. In this instance, opposition to the proposed modifications was filed by Chapter 13 Trustee, David Cusick.

The Chapter 13 Trustee objects to confirmation of Debtors' Modified Plan for the following reasons:

1. Debtor's plan does not appear on the Court Docket. The official record of the court does not reflect that Debtor's First Amended Chapter 13 Plan has been filed. The plan was filed as part of the Motion to Confirm Chapter 13 Plan (Dkt. 89), not filed separately with the Court. Thus the Court and any party of interest may be unable to find the Plan without searching for it. The plan should be filed separately with the Court.
2. Debtor's Proof of Service states service was provided to "parties listed herein below," however no parties were listed.

3. Priority Claim no. 2 filed by the Franchise Tax Board claiming \$397.44 as priority was not provided for.
4. The proposed plan does not state a payment for months 1 through 6 of the plan.

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

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

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

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

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

5. [14-30332](#)-C-13 JEFFREY AKZAM
DPC-1 Pro Se

CONTINUED OBJECTION TO
CONFIRMATION OF PLAN BY DAVID
P. CUSICK
12-9-14 [[23](#)]

Also #6

Continued to February 24, 2015 at 2:00 pm.

6. [14-30332](#)-C-13 JEFFREY AKZAM
PD-1 Pro Se

CONTINUED OBJECTION TO
CONFIRMATION OF PLAN BY U.S.
BANK NATIONAL ASSOCIATION
12-11-14 [[31](#)]

Continued to February 24, 2015 at 2:00 pm.

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 19, 2014. Thirty-five days' notice is required. That requirement was met.

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

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

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. In this instance, opposition to the proposed modifications was filed by Chapter 13 Trustee, David Cusick.

The Chapter 13 Trustee objects to confirmation of Debtors' Modified Plan for the following reasons:

1. Debtor has used the forms for Schedules I and J that were effective December 1, 2007. Instead the latest forms were effective December 1, 2013.
2. Amended Schedule I (Dkt. 49) appears to mirror the exact income Debtor was receiving at the petition was filed on November 14, 2011.

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

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

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

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

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

Motion to Modify Plan no opposition, (f)(1) notice

Final Ruling: No appearance at the February 3, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 2, 2014. 35 days' notice is required. That requirement was met.

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

The Motion to Confirm the Modified Plan is granted.

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

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

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

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

IT IS ORDERED that the Motion is
granted, Debtors' Chapter 13 Plan filed on
September 12, 2013 is confirmed, and counsel for
the Debtors shall prepare an appropriate order

confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on December 16, 2014. Fourteen days' notice is required. This requirement has been met.

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

PRIOR HEARINGS

The initial hearing on the Objection was on January 13, 2015. At the hearing, the Debtor indicated that she was in the process of obtaining an attorney at Hughes Law Firm. The Court continued the hearing to permit her to obtain counsel to February 3, 2015.

TRUSTEE'S OBJECTION

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

1. Debtor did not report four (4) prior bankruptcy cases on her petition. The case numbers for these prior cases are: 13-

27271 filed on November 29, 2013; 12-34671 filed on August 10, 2012; 09-47849 filed on December 21, 2009; and 06-24743 filed on November 13, 2006.

2. Debtor did not complete the Means Test form. By failing to complete the form, Trustee is unable to determine what the Debtor's average income is and whether she is over median income or not. Debtor reports on Schedule I her employment at Oakland Military Institute, but fails to report how long she has been employed there. On her Statement of Financial Affairs, Debtor reports having earnings for 2011, 2012, and 2013, which would cause one to believe that Debtor had employment for the 6 months prior to filing.
3. Debtor's Plan does not provide how Debtor will be able to make all payments under the Plan. 11 U.S.C. § 1325(a)(6). In Class 1 of the Plan, Debtor lists payments to Consumer Portfolio Services in the amount of \$349. However, Debtor proposes a plan payment of only \$300 per month.
4. Debtor has not designated a treatment for claims of a particular class. 11 U.S.C. § 1322(a)(3). The Plan does not provide a dividend to unsecured creditors, and does not state 0%, but has left the dividend blank. Failure to provide a treatment may result in a failure to discharge unsecured debts under 11 U.S.C. § 1328(a).
5. Debtor has doubly treated a claim for Consumer Portfolio Services in both Class 1 and Class 4. At the 341 hearing, Debtor indicated that the creditor holds a secured interest in a vehicle which she intends to retain and pay through the Plan. Consumer Portfolio Services filed a claim showing that Debtor purchased the vehicle on October 26, 2013 under a 60 month contract. Based on this information, it appears the claim should be provided for in Class 2, as the term will expire within the life of the Plan.
6. Debtor has erroneously classified a claim. Debtor lists A-L Financial in Class 4 of the Plan. However, at the 341 hearing, Debtor indicated that she intends to surrender the vehicle.
7. Debtor has provided special treatment for certain unsecured creditors over other unsecured creditors without explanation. Debtor lists Ace Cash Advance and Dollar Loan Center in Class 6 of the Plan. Trustee object to the special unsecured treatment of these claims.
8. Debtor's Plan does not provide how Debtor will be able to make all payments under the Plan. 11 U.S.C. § 1325(a)(6). Debtor's projected monthly disposable income listed on Schedule J is \$273.15 and Debtor proposes a plan payment of \$300.

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

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

holding that:

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

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

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

10. [12-40294](#)-C-13 HENRY APODACA
PGM-5 Peter Macaluso

MOTION FOR COMPENSATION FOR
PETER G. MACALUSO, DEBTOR'S
ATTORNEY
1-2-15 [[82](#)]

Final Ruling: No appearance at the February 3, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on January 2, 2015. Twenty-eight days' notice is required. That requirement was met.

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

The Motion for Allowance of Professional Fees is granted.

FEES REQUESTED

Peter Macaluso, the Attorney ("Applicant") for Henry Apodaca, the Chapter 13 Debtor ("Client"), requests the court permit additional fees pursuant to Local Bankruptcy Rule 2016-1(c)(3).

Local Bankr. Rule 2016-1(c)(3) provides:

(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 1 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).

Local Bankr. R. 2016-1(c)(3)

Applicant provides the following explanation of services that were substantial and unanticipated post-confirmation work:

- a. Preparation of a modified plan that was necessary to maintaining the case after a Motion to Dismiss, filed by the Chapter 13 Trustee.
- b. Preparation of a Motion to Approve Loan Modification requiring court approval.

The court finds these post-confirmation services to be sufficiently substantial and unanticipated.

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).

Benefit to the Estate

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

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

Id. at 959.

CHAPTER 13 TRUSTEE

On January 9, 2015, the Chapter 13 Trustee submitted a statement indicating that he has no opposition to the court granting the relief requested by Peter Macaluso.

DISPOSITION

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

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

Fees	\$1,290
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pursuant to this Application in this case.

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

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

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

IT IS ORDERED that Peter Macaluso is allowed the following fees and expenses as a professional of the Estate:

Peter Macaluso, Professional Employed by Chapter 13 Debtors Fees in the amount of \$1,290,

IT IS FURTHER ORDERED that the Chapter 13 Trustee is authorized to pay the fees allowed by this Order from the available funds of the plan in a manner consistent with the order of distribution in a Chapter 13 case.
