UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

Pursuant to District Court General Order 617, no persons are permitted to appear in court unless authorized by order of the court. All appearances of parties and attorneys shall be telephonic through CourtCall, which advises the court that it is waiving the fee for the use of its service by *pro se* (not represented by an attorney) parties through June 1, 2020. **The contact information for CourtCall to arrange for a phone appearance is: (866) 582-6878**.

May 5, 2020 at 3:00 p.m.

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1. **16-20335-E-13** **ROBERT/BELINDA BOUGHTON**
Thomas Amberg

ORDER TO SHOW CAUSE - FAILURE TO TENDER FEE FOR FILING TRANSFER OF CLAIM
4-13-20 [78]

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. If the court's tentative ruling becomes its final ruling, then the court will make the following findings of fact and conclusions of law:

The Order to Show Cause was served by the Clerk of the Court on Debtors, Debtor's Attorney, Creditor Santander Consumer USA, Inc., and Chapter 13 Trustee as stated on the Certificate of Service on April 15, 2020. The court computes that 20 days' notice has been provided.

The court issued an Order to Show Cause based on Creditor's failure to pay the required fees in this case: $25.00 due on March 30, 2020.

The Order to Show Cause is sustained.

The court's docket reflects that the default in payment that is the subjection of the Order to Show Cause has not been cured. The following filing fees are delinquent and unpaid by Creditor

Santander Consumer USA, Inc.: $25.00.

No response has been filed by Creditor. As stated in the Order to Show Cause, Creditor Santander and Counsel are ordered to appear and explain why this court should not impose monetary corrective sanctions and/or have it referred to the District Court for the exercise of district judge's power to impose sanctions.

At the hearing, **xxxxxxxxx**

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Order to Show Cause 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 Order to Show Cause is sustained.
>
> **IT IS FURTHER ORDERED** that **xxxxxxx**

2. **20-20139-E-13** **TINA ANDRADE** **OBJECTION TO CONFIRMATION OF**
DW-1 **Peter Cianchetta** **PLAN BY CONN APPLIANCES, INC.**
2 thru 3 **4-7-20 [50]**

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

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 April 7, 2020. Such is sufficient for consideration of this as an Opposition to the Motion to Confirm filed by Debtor.

The Objection to Confirmation of Plan is properly considered as an opposition to the Debtor's Motion to Confirm Amended Plan (DCN: PLC-2).

Conn Appliances, Inc. d/b/a Conn's HomePlus as servicer-in-fact and attorney-in-fact for Conn Credit I, LP ("Creditor"), holding a secured claim, filed a pleading tilted Objection to Confirmation, reusing a docket control number that it used when filing an Objection to Confirmation for Debtor's original proposed plan in this case. Objection, Dckt. 29.

While the first Objection to Confirmation was proper, Dckt. 29, because it was to the original plan filed in this case that is timely filed within fourteen days of the commencement of this case, see

L.B.R. 3015-1(c)(4), it is not the response to a motion to confirm. L.B.R. 3015-1(c)(3).

The court recasts the "Objection" as an Opposition to the Motion to Confirm and considers it thereunder.

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 Conn Appliances, Inc. d/b/a Conn's HomePlus as servicer-in-fact and attorney-in-fact for Conn Credit I, LP ("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 considered and ruled on as an Opposition to the Motion to Confirm the Amended Chapter 13 Plan filed by Debtor. L.B.R. 3015-1(c)(3).

3. **20-20139-E-13 PLC-2** **TINA ANDRADE** **Peter Cianchetta** **MOTION TO CONFIRM PLAN 3-27-20 [43]**

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, creditors, parties requesting special notice, and Office of the United States Trustee on March 27, 2020. 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 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.

The debtor, Tina Louise Andrade ("Debtor") seeks confirmation of the Chapter 13 Plan. The Plan provides for monthly plan payments of $425.00 for 60 months with a 0.00% dividend for unsecured claims totaling $417,019.04. Amended Plan, Dckt. 46. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on April 14, 2020. Dckt. 55. Trustee opposes confirmation of the Plan on the basis that:

A. Debtor fails to provide for the secured claim of Creditor Conn Appliances who successfully objected to confirmation of the last plan.

OPPOSITION OF CON APPLIANCES INC.

Conn Appliances, Inc. d/b/a Conn's HomePlus as servicer-in-fact and attorney-in-fact for Conn Credit I, LP ("Creditor"), holding a secured claim, opposes confirmation of the Plan on the basis that the Debtor's amended Chapter 13 Plan does not provide for Creditor's secured claim. This Opposition was filed as an "Objection to Confirmation," which is properly considered as an opposition

to this Motion to Confirm.

Creditor asserts a claim of $5,294.69, of which $2,2776.00 is secured by household goods, while $2,518.69 is unsecured. Proof of Claim 9-1. The collateral listed on the receipt attached to the Proof of Claim includes a washer, dryer, desk, and chair. *Id.* Debtor's has listed Creditor's claim as an unsecured disputed claim on Schedule E/F and states that the total amount of the claim is unknown. Dckt. 1. The Plan does not provide for treatment of this claim. [FN. 1.]

FN. 1. The court notes that Creditor's "Opposition" consists of a two page opposition and then ten pages of exhibits attached. The Local Bankruptcy Rules require that the motion, objection, opposition, each declaration, and the exhibits (which may be combined into one indexed document) must be filed as separate pleadings. L.B.R. 9004-2(c). Failure to properly organize pleadings and file them in compliance with the Local Bankruptcy Rules may result in the court not identifying such hidden pleading for consideration.

DISCUSSION

Trustee argues that the Plan may not be proposed in good faith. *See* 11 U.S.C. § 1325(a)(3). Debtor proposes a plan that does not provide for Creditor's secured claim, failing again to address Creditor's prior objection.

Creditor alleges that the Plan does not comply with 11 U.S.C. § 1325(a) because it contains no provision for payment of Creditor's claim, which is secured by Debtor's household goods. *See* 11 U.S.C. § 1325(a).

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

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

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

A. Provide a treatment that the debtor and creditor agree to (11 U.S.C. § 1325(a)(5)(A)),

B. Provide for payment in full of the entire claim if the claim is modified or

will mature by its terms during the term of the Plan (11 U.S.C. § 1325(a)(5)(B)), or

C. Surrender the collateral for the claim to the creditor (11 U.S.C. § 1325(a)(5)(C)).

Those three possibilities are relevant only if the plan provides for the secured claim, though.

When a plan does not provide for a secured claim, the remedy is not denial of confirmation. Instead, the claimholder may seek termination of the automatic stay so that it may repossess or foreclose upon its collateral. The absence of a plan provision is good evidence that the collateral for the claim is not necessary for the debtor's rehabilitation and that the claim will not be paid. This is cause for relief from the automatic stay. *See* 11 U.S.C. § 362(d)(1).

Notwithstanding the absence of a requirement in 11 U.S.C. § 1322(a) that a plan provide for a secured claim, the fact that this Plan does not provide for respondent Creditor's secured claim raises doubts about the Plan's feasibility. *See* 11 U.S.C. § 1325(a)(6). That is reason to sustain the Objection.

Here, Creditor has filed Proof of Claim No. 9-1, setting forth that $2,776.00 (the asserted value of the collateral) of its claim is secured and $2,518.69 is unsecured. The Amended Plan does not provide for the secured claim, again.

The court says "again" because the Debtor's first run at confirming a plan (Dckt. 3) caught an Objection to Confirmation by Creditor on the same grounds. Objection, Civil Minutes, and Order; Dckts. 29, 34, 36.

Though this "Opposition" was filed by Creditor and it was included in the Trustee's opposition to the Motion, Debtor has not filed a Reply acknowledging a clerical mistake, nor has Debtor proposed any possible amendment to resolve this issue, leaving the conflict ready for battle at the hearing (as opposed to filing a Reply that stated an amendment to pay creditor $x for the term of the plan, which would have allowed the court to resolve this by final ruling).

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the debtor, Tina Louise Andrade ("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.

4. **20-21045-E-13 DPC-1** **ANN CONRAD Travis Stroud** **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 4-15-20 [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 April 15, 2020. By the court's calculation, 20 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 is sustained, and the proposed Chapter 13 Plan is not confirmed.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Subsequent to the filing of this Objection, Debtor filed an Amended Plan (but no motion to confirm) on April 21, 2020. Dckts. 22. Filing a new plan is a *de facto* withdrawal of the pending plan.

The Objection first states that the Debtor actually filed two plans in this case on February 26, 2020, both filed as Docket No. 2. Next, the Objection asserts that the Debtor is delinquent in payments - $784.00 for the first plan payment due in March 2020.

Third, the Plans and the Statement of Compensation appear to be inconsistent as to what Debtor's counsel is to be paid for the services in representing the Debtor. Fourth, that the Plan fails to provide for the payment of creditor listed in Class 2, who is also listed in Class 4 for what may be the same debt.

The Amended Chapter 13 Plan filed on April 21, 2020, does not appear to correct these issues and no amended Statement of Compensation has been filed by counsel for Debtor.

Class 2 of the Amended Plan still lists Travis Credit Union as having a secured claim, for which the collateral is not identified, the amount of the claim is not stated, no interest rate is provided, and no computation of a monthly dividend is made. Dckt. 22 at 4. Travis Credit Union is also listed in Class 4, to be paid $654.00 a month. *Id.* In Class 5 Debtor lists $20,276.24 in priority unsecured claims and in Class 7 $19,931.00 in general unsecured claims (which are to receive a 100% dividend).

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 Confirmation 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 is sustained, and the proposed Chapter 13 Plan is not confirmed.

5.	**20-20353-E-13 LBG-1 5 thru 6**	**JAMES/NOREEN ROBERTSON Lucas Garcia**	**MOTION TO VALUE COLLATERAL OF MARRIOT OWNERSHIP RESORTS, INC. 3-31-20 [20]**

Final Ruling: No appearance at the May 5, 2020 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 March 31, 2020. 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 Marriott Ownership Resorts, Inc. ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $ 15,000.00.

The Motion filed by James Duncan Robertson and Noreen Helen Robertson ("Debtor") to value the secured claim of Marriott Ownership Resorts, Inc. ("Creditor") is accompanied by Debtor's declaration. Declaration, Dckt. 22. Debtor is the owner of an interest in a Marriott Time Share ("Property"). Debtor seeks to value the Property at a replacement value of $15,000.00 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).

In his Response, Trustee requests the court to into consideration that the Creditor values the interest in the amount of $27,360.00, and the amount necessary to cure any default as of the date of the petition is $1,711.61. Dckt. 27.

DISCUSSION

The lien on the Property secures a purchase-money loan incurred on March 29, 2017, which

is more than one year prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $16,669.07. Proof of Claim, No. 4-1. Therefore, Creditor's claim secured by a lien against the Property is under-collateralized. Creditor's secured claim is determined to be in the amount of $15,000.00, 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 James Duncan Robertson and Noreen Helen Robertson ("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 Marriott Ownership Resorts, Inc. ("Creditor") secured by an asset described as an interest in a Marriott Time Share ("Property") is determined to be a secured claim in the amount of $15,000.00, 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 $15,000.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

6.	**20-20353-E-13 DPC-1**	**JAMES/NOREEN ROBERTSON Lucas Garcia**	**CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 3-3-20 [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 March 3, 2020. 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 overruled.

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

A. Plan relies on Motion to Value Secured which has not been filed.

DISCUSSION

Trustee's objections are well-taken.

A review of Debtor's Plan shows that it relies on the court valuing the secured claim of Marriott Vacations Worldwide. Debtor has failed to file a Motion to Value the Secured Claim of Marriott Vacations Worldwide, however. Without the court valuing the claim, the Plan is not feasible. 11 U.S.C. § 1325(a)(6).

At the hearing, Debtor's Counsel informed the court that the Motion to Value the Secured Claim was filed that morning with a hearing set for May 5, 2020 at 3:00 p.m. Debtor's Counsel then requested the hearing on the present Objection be continued to May 5, 2020 at 3:00 p.m.

Motion to Value Collateral

On May 5, 2020, the Motion to Value Collateral was granted, and the secured claim was valued at $15,000.00.

Trustee's Objection being addressed, this Objection is overruled.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the 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 is overruled, and James Duncan Robertson and Noreen Helen Robertson's ("Debtor") Chapter 13 Plan filed on January 22, 2020, is confirmed. Counsel for Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

7. **18-26959-E-13** **CHAI LEE**
Mikalah Liviakis

ORDER TO SHOW CAUSE - FAILURE TO TENDER FEE FOR FILING TRANSFER OF CLAIM
4-13-20 [23]

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, then the court will make the following findings of fact and conclusions of law:

The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, Creditor, and Chapter 13 Trustee as stated on the Certificate of Service on April 15, 2020. The court computes that 20 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: $25.00 due on March 30, 2020.

The Order to Show Cause is sustained.

The court's docket reflects that the default in payment that is the subjection of the Order to Show Cause has not been cured. The following filing fees are delinquent and unpaid by Debtor: $25.00. No response has been filed by Creditor.

No response has been filed by Creditor. As stated in the Order to Show Cause, Creditor Santander and Counsel are ordered to appear and explain why this court should not impose monetary corrective sanctions and/or have it referred to the District Court for the exercise of district judge's power to impose sanctions.

At the hearing, **xxxxxxxxx**

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Order to Show Cause 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 Order to Show Cause is sustained.
>
> **IT IS FURTHER ORDERED** that **xxxxxxx**

8. **20-21974-E-13 PGM-1** **PETE GARCIA** **Peter Macaluso** **MOTION TO EXTEND AUTOMATIC STAY** **4-20-20 [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 Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 20, 2020. By the court's calculation, 15 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.

Pete Aldret Garcia ("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. 19-22037) was dismissed on March 7, 2020, after Debtor became delinquent in plan payments and failed to confirm a Plan. *See* Order, Bankr. E.D. Cal. No. 19-22037, Dckt. 118, March 7, 2020. 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 his tenants were late on payments which made him late on making his plan payment.

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 demonstrated the case was filed in good 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 Pete Aldret Garcia ("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.

9.	**20-21229-E-13 SDH-1**	**KENNETH/JENNIFER HALL Scott Hughes**	**MOTION TO VALUE COLLATERAL OF TRUWEST CREDIT UNION 4-9-20 [19]**

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, Creditor, and Office of the United States Trustee on April 8, 2020. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The Motion to Value Collateral and Secured Claim of Truwest Credit Union ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $11,600.00.

The Motion filed by Kenneth Richard James Hall and Jennifer Kay Hall ("Debtor") to value the secured claim of Truwest Credit Union ("Creditor") is accompanied by Debtor's declaration. Declaration, Dckt. 21. Debtor is the owner of a 2014 Kia Sorrento ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $11,600.00 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).

In his Response, Trustee does not oppose the Motion. Dckt. 23. He further requests the court to take into consideration that Creditor is included in the proposed Plan, and that Creditor filed Proof of Claim. *Id*. The Trustee states that Proof of Claim 2-1 asserts a secured claim in the amount of $12,365.79.

DISCUSSION

The lien on the Vehicle's title secures a purchase-money loan incurred on August 25, 2015, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $12,365.79. Proof of Claim, No. 2-1. Therefore, Creditor's claim secured by a lien on the asset's title is under-collateralized. Creditor's secured claim is determined to be in the amount of $11,600.00, 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 Kenneth Richard James Hall and Jennifer Kay Hall ("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 Truwest Credit Union ("Creditor") secured by an asset described as 2014 Kia Sorrento ("Vehicle") is determined to be a secured claim in the amount of $11,600.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is $11,600.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

10. **18-21488-E-13 CLH-7** **DANIEL/ALLISON BRENNAN** **Charles Hastings** **MOTION TO SELL AND/OR MOTION TO PAY** **4-13-20 [180]**

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, parties requesting special notice, and Office of the United States Trustee on April 13, 2020. By the court's calculation, 22 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days' notice).

The Motion to Sell Property 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 Sell Property is granted.

The Bankruptcy Code permits Daniel Lawrence Brennan and Allison Lyn Brennan, Chapter 13 Debtor, ("Movant") to sell property of the estate under the confirmed plan after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movant proposes to sell the real property commonly known as 11840 Gidaro Drive, Elk Grove, California ("Property").

The proposed purchaser of the Property is Michael and Karen Mester, and a summary of the terms of the sale are (the full terms and conditions are set forth in the Purchase Agreement, Exhibit A, Dckt. 183):

A. Sale Price is $1,099,000.00.

B. Initial Deposit of $15,000.00.

C. Closing Date shall occur 45 days after acceptance of offer.

D. Property sold As-Is.

E. Broker's compensation of 6% of the purchase price of the property.

DISCUSSION

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

Trustee does not oppose the sale. Response, Dckt. 185. Trustee points out that the Plan called for a lump sum payment from this sale of $359,000, with the expected proceeds to be paid into the plan, and $25,019.46 paying for the Chase mortgage arrearage. *Id*. at 2. Under the current terms of the sale, after accounting for broker's fees and Creditor Chase's secured claim in the amount of $725,003.24 (which includes the arrearage), Trustee expects to receive $333,076.22 less escrow fees, costs and charges, provided that Trustee does a check swap with the title company to pay the arrearage. *Id*.

Creditor JP Morgan Chase Bank filed a Response in support of the sale. Response, Dckt. 187. Creditor does not oppose the sale provided that Creditor's claim is paid off in full, including the arrearage before it releases its lien on the property. *Id*. at 2, ¶ 1. Moreover, that Creditor be permitted to submit an updated payoff demand to the applicable escrow or title company facilitating the sale so that Creditor's claim is paid in full at the time the sale of the Property is finalized. *Id*. ¶ 2.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because the sale will pay off Creditor's Chase claim and provide for a 100% percent payment to unsecured claims as called for in the plan.

No closing statement has been provided. However, given that the brokers have been approved their six percent (6%) broker's commission, the court calculates $65,940.00 in broker fees. As part of the sale in the best interest of the Estate, the court permits Movant to pay the broker an amount not more than 6% percent commission.

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 6004(h) stays an order granting a motion to sell for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the **ten** day stay period pursuant to Rules 4001(a)(3), to the extent applicable and 6004(g). The court takes the reference to Rule 6004(g) as a clerical error meaning Rule 6004(h).

Movant has not pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 6004(h), and this part of the requested relief.

Though Debtor could not state grounds for waiving the fourteen day stay of enforcement of an order approving the sale, and did not deem it more significant than a stock language line in the prayer for relief, the court can perceive such grounds. The sale will pay all claims, including unsecured in full. The buyer is ready to go. In this uncertain COVID-19 environment, there is a premium on getting the financial transactions that can be consummated completed. The court will "save" the Debtor from possible repercussions if the fourteen day stay was not waived due to the lack of grounds stated and

during that fourteen days events occurred which resulted in the escrow not closing and a $1.1 Million sale was lost.

The fourteen day stay of enforcement is waived for cause.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Sell Property filed by Daniel Lawrence Brennan and Allison Lyn Brennan, Chapter 13 Debtor, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Daniel Lawrence Brennan and Allison Lyn Brennan, Chapter 13 Debtor, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Michael and Karen Mester or nominee ("Buyer"), the Property commonly known as 11840 Gidaro Drive, Elk Grove, California ("Property"), on the following terms:
>
> A. The Property shall be sold to Buyer for $1,099,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 183, and as further provided in this Order.
>
> B. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred to effectuate the sale.
>
> C. Chapter 13 Debtor is authorized to execute any and all documents reasonably necessary to effectuate the sale.
>
> D. Chapter 13 Debtor is authorized to pay a real estate broker's commission in the aggregate amount of not more than six percent (6%) of the purchase price, with one-half of the commission (3%) paid to Jaci Wallace, of ReMax Gold Sierra Oaks, as the Broker for Seller Chapter 13 Debtor, and one-half of the commission (3%) to Reider Waage, of Rock Realty, as the Broker for Buyer.
>
> E. No proceeds of the sale, including any commissions, fees, or other amounts, shall be paid directly or indirectly to the Chapter 13 Debtor. Within fourteen days of the close of escrow, the Chapter 13 Debtor shall provide the Chapter 13 Trustee with a copy of the Escrow Closing Statement. Any monies not disbursed to creditors holding claims secured by the property being sold or paying the fees and costs as allowed by

this order, shall be disbursed to the Chapter 13 Trustee directly from escrow.

IT IS FURTHER ORDERED that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 6004(h) is waived for cause.

11. 16-21719-E-13 PSB-5 JANEE FARRIS Paul Bains

MOTION FOR COMPENSATION BY THE LAW OFFICE OF BAINS LEGAL, PC FOR PAULDEEP BAINS, DEBTORS ATTORNEY(S)
4-14-20 [100]

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, parties requesting special notice, and Office of the United States Trustee on April 14, 2020. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00).

The Motion for Allowance of Professional Fees 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 for Allowance of Professional Fees is granted.

Pauldeep Bains of Bains Legal, PC, the Attorney ("Applicant") for Janee Marie Farris, the Chapter 13 Debtor ("Client"), makes a Request for the Additional Allowance of Fees and Expenses in this case.

Fees are requested for the period October 31, 2019, through April 14, 2020. Applicant requests fees in the amount of $1,900.00.

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 communicating with Debtor, preparing motion to modify chapter 13 plan, and preparing for and attending the hearing on

Trustee's motion to dismiss the case. 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).

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

Fees

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

Motion to Modify Plan: Applicant spent 5.3 hours in this category. Applicant communicated with Debtor regarding modification of the plan; reviewed financial information; prepared the modified plan, motion and accompanying declaration; and reviewed the opposition.

Motion to Dismiss: Applicant spent 3.1 hours in this category. Applicant communicated with Debtor regarding Trustee's Motion to Dismiss; reviewed Debtor's financial situation; drafted the reply to Trustee' motion to dismiss; and attended the hearing.

Motion for Compensation: Applicant spent 1.8 hours in this category. Applicant prepared the motion for compensation, exhibits, and declaration.

Case Administration: Applicant spent 0.4 hours in this category. Applicant communicated the

bank and filed a change of address. Applicant is not charging for this category.

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**
Pauldeep Bains	10.1	$300.00	$3,030.00
Total Fees for Period of Application			$3,030.00

Costs and Expenses

Applicant does not seeks the allowance and recovery of costs and expenses as part of this application.

FEES AND COSTS & EXPENSES ALLOWED

Fees

The unique facts surrounding the case, including preparing the motion to modify chapter 13 plan and preparing the reply and attending the hearing on Trustee's motion to dismiss the case, raise substantial and unanticipated work for the benefit of the Estate, Debtor, and parties in interest. The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. The request for additional fees in the amount of $1,900.00 is approved pursuant to 11 U.S.C. § 330 and authorized to be paid by David Cusick ("the Chapter 13 Trustee") from the available funds of the Plan in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

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

Fees $1,900.00

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Pauldeep Bains of Bains Legal, PC ("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 Pauldeep Bains of Bains Legal, PC is allowed the following fees and expenses as a professional of the Estate:

Pauldeep Bains of Bains Legal, PC, Professional Employed by Janee Marie Farris ("Debtor")

Fees in the amount of $1,900.00,

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

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

12. 17-25309-E-13 ANTHONY/LAURA GONZALEZ MOTION TO DISMISS CASE
4-11-20 [88]

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.

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 April 25, 2020. By the court's calculation, 10 days' notice was provided. The court set the hearing for May 5, 2020. Dckt. 94.

The Motion to Dismiss the Chapter 13 Case 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 Dismiss the Chapter 13 Case is xxxxx.

This Motion to Dismiss the Chapter 13 bankruptcy case of Anthony and Laura Gonzalez ("Debtor") has been filed by Laura Gonzalez ("Movant"). Pursuant to the Status Report filed on April 23, 2020 (Dckt. 95), Movant asserts that the case should be dismissed based on the following grounds:

A. Movant wants to sell her home and resolve her debts outside of court. She already has a pending offer.

B. Debtor intends to pay off the mortgage upon sale, likely pay off one of the vehicles, and surrender the second one.

C. With the recent loss of the co-debtor Anthony Gonzalez, she wishes to simplify her life as much as possible.

As to the administration of her deceased husband's bankruptcy case, Movant believes she can resolve the remaining debts more efficiently outside of bankruptcy. Status Report, at 1.

TRUSTEE'S RESPONSE

Trustee filed a Response on April 27, 2020. Dckt. 97. Trustee discusses that converting the case to a Chapter 7 may be in the best interest of the creditors due to non-exempt equity in the home. *Id*. at p. 1. Further, creditors with unsecured claims have not received any dividend to date and the confirmed plan proposes no less than 6% to be paid to the filed unsecured claims, at this time totaling $34,334.93. *Id*. at p. 2.

APPLICABLE LAW

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson)*, 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

> [O]n request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

11 U.S.C. § 1307(b).

Further, the Bankruptcy Code Provides:

> [O]n request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause . . . .

11 U.S.C. § 1307(c). The court engages in a "totality of circumstances" test, weighing facts on a case-by-case basis and determining whether cause exists, and if so, whether conversion or dismissal is proper. *Drummond v. Welsh (In re Welsh)*, 711 F.3d 1120, 1123 (9th Cir. 2013) (citing *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219 (9th Cir. 1999)). Bad faith is one of the enumerated "for cause" grounds under 11 U.S.C. § 1307. *Nady v. DeFrantz (In re DeFrantz)*, 454 B.R. 108, 112 n.4 (B.A.P. 9th Cir. 2011) (citing *In re Leavitt*, 171 F.3d at 1224).

DISCUSSION

Debtor has explained the significant events that have led her to request dismissal of the case. Trustee asserts that creditors would benefit by converting this chapter 13 into a Chapter 7 case. Debtor is represented by counsel.

The Trustee is correct that there is a provision for a very small dividend for creditors with unsecured claims. However, as a practical matter, such may not translate to a payment if the property of the estate is administered through a Chapter 7 liquidation.

The Trustee also points out that Debtor has "invested" $70,000 into this case. Further, that there "appears" to be a $330,000 sale of the property pending, $50,000 more than the debtor listed on the Schedules (that were filed three years ago). The Trustee has made payments of $41,507.39 current payments and $2,121.44 on the mortgage.

The Trustee notes that while the Debtor has scheduled $75,173.88 in general unsecured claims, only $34,334.93 in claims have been filed. It appears that if Debtor accelerated the completion of this plan with the sale of the property, she might well get more than a 50% "discount" on these debts (even if paying 100 cents on the dollar for the filed claims), rather than having them all be alive with the dismissal of the case.

At the hearing, Counsel **xxxxxxx**

~~Cause exists to dismiss this case pursuant to 11 U.S.C. § 1307(c). 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 Laura Gonzalez ("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 Dismiss is granted and the case is dismissed.~~

13. **19-21310-E-13 RJ-6** | **WANDA COLLIER-ABBOTT** **Richard Jare** | **CONTINUED MOTION TO VALUE COLLATERAL OF RRA CP OPPORTUNITY TRUST 2** **1-24-20 [152]**

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, and Office of the United States Trustee on January 24, 2020. By the court's calculation, 32 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 RRA CP Opportunity Trust 2 ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $157,410.62.

REVIEW OF MOTION

The Motion to Value filed by Wanda Collier-Abbott ("Debtor") to value the secured claim of RRA CP Opportunity Trust 2 ("Creditor") is accompanied by Debtor's declaration. Declaration, Dckt. 154. Debtor is the owner of the subject real property commonly known as 3101 Spinning Rod Way, Sacramento, California ("Property"). Debtor seeks to value the Property at a fair market value of $470,000.00 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).

Creditor's claim is secured by the second deed of trust against the Property. The claim secured pursuant to the first deed of trust is identified as that of Bank of New York Mellon, as Trustee. Bank of New York Mellon, Trustee, filed Proof of Claim No. 6-1, in which the amount of the secured claim is stated to be $312,589.38.

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

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

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

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

At dispute in this Contested Matter is whether Creditor's claim, secured only by Debtor's residence may be valued in this case pursuant to 11 U.S.C. § 506(a), the allowed secured claim determined, and that allowed secured claim amount provided for in the plan, with Creditor having an unsecured claim for the balance. As addressed below, Creditor's claim may properly be valued pursuant to 11 U.S.C. § 506(a) to determined what is the allowed secured claim.

TRUSTEE'S OPPOSITION

Trustee filed an Opposition on February 10, 2020. Dckt. 168. Trustee opposes on the basis that:

1. Motion fails to state with particularity grounds for relief and failed to address issues raised by the court in the denial of the previous motion to value.

2. Declaration appears to be the same one used in the previous motion except for changes in the caption and additional changes as to needed repairs which create discrepancies and lack detail.

CREDITOR'S OPPOSITION

Creditor filed an Opposition on February 10, 2020. Dckt. 171. Creditor objects to the valuation on the basis that:

1. Creditor's loan is not a "short-term loan."

2. The fair market value of the Property was approximately $550,000.00 on or near the date of the filing and therefore no portion of Creditor's lien can be bifurcated and/or avoided.

Additionally, Creditor requests that the Motion be denied, or, that in the alternative, Creditor be allowed to obtain an interior appraisal. *Id*. at 2.

DISCUSSION

DETERMINATION OF 11 U.S.C. § 1322(c)(2)
EXCLUSION OF CLAIM FROM 11 U.S.C. § 1322(b)(2)

In a matter of first impression in the Ninth Circuit, Debtor asserts that even though Creditor's claim is secured only by Debtor's primary residence for which there is undisputedly at least some value and 11 U.S.C. § 1322(b)(2) states that such a claim cannot be modified, Debtor asserts that the provisions of 11 U.S.C. § 133(c) modify that restriction because Creditor's claim comes due, under the original terms of the obligation, before the plan term concludes.

Review of Claim

Proof of Claim No. 4-1 was filed on May 6, 2019, for Creditor. The attachments to Proof of Claim No. 4-1 include a Note which is titled "NOTE With Balloon Payment." Proof of Claim 4-1, p. 14. Paragraph 3 of the Note states that all amounts then owing on April 1, 2020, will be due in full. The bankruptcy case was filed on March 1, 2019, the NOTE With Balloon Payment states that the obligation is due in full on April 1, 2020, with April 1, 2020 being before the term of the plan in this case is to conclude.

Review of Statutory Provisions

In considering this issue, the court begins with the well established doctrine for statutory construction. The Supreme Court has been very clear in reading and applying the "plain language" stated by Congress in statutes. *Hartford Underwriters Insurance Company v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000); *United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989)*. The basic direction is that Congress says in a statute what it means and means in a statute what it says. *Connecticut Nat. Bank v. Germain, 503 U.S. 249, 254, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992);* (quoting *Caminetti v. United States, 242 U.S. 470, 485, 61 L. Ed. 442, 37 S. Ct. 192 (1917))*; *United Savings Association of Texas v. Timbers of Inwood Forest Associates, LTD.*, 484 U.S. 365, 371 (1988). This court will not presuppose that the Supreme Court or Congress, in adopting the Federal Rules of Bankruptcy Procedure, did so expecting that the inferior court would not first look to the plain meaning of the Rule.

Beginning with the prohibition on modifying some secured claims in Chapter 13 plan, the Bankruptcy Code provides in 11 U.S.C. § 1322(b)(2) (emphasis added):

> (b) Subject to subsections (a) and (c) of this section, the plan may—
> . . .
> (2) **modify the rights of holders of secured claims**, **other than** a claim **secured only** by a security interest in real property that is the **debtor's principal residence**, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

As the Ninth Circuit Court of Appeals addressed in *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); if there is no value in the collateral for the holder of the secured claim, then it may be valued at $0, there being no "secured claim" to be protected by the above. However, if there is

any value, then the entire secured claim is protected from valuation under 11 U.S.C. § 506(a).

Debtor asserts that the above restriction on modifying claims secured by the debtor's residence is itself limited by 11 U.S.C. § 1322(c)(2), which provides (emphasis added):

> (c) Notwithstanding subsection (b)(2) and applicable nonbankruptcy law—
>
> > (1) . . . ; and
> >
> > (2) in a case in which the **last payment** on the **original payment schedule for a claim** secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due, the **plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title**.

Going to 11 U.S.C. § 1325(a)(5) it states (emphasis added, with strikeout text for the provisions clearly not applicable to the issue before the court):

> (5) with respect to each allowed secured claim provided for by the plan—
>
> ~~(A) the holder of such claim has accepted the plan;~~
>
> (B)
>
> > (i) the plan provides that—
> >
> > > (I) the holder of such claim retain the lien securing such claim until the earlier of—
> > >
> > > > (aa) the payment of the underlying debt determined under nonbankruptcy law; or
> > > >
> > > > (bb) discharge under section 1328; and
> > >
> > > (II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;
> >
> > (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; **and**
> >
> > (iii) if—
> >
> > > (I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and

(II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan; or

~~(C) the debtor surrenders the property securing such claim to such holder; . . .~~

Looking at the "plan language" of 11 U.S.C. § 1325(a)(5), it appears to say that if there is a secured claim, for which the only collateral is the debtor's primary residence for which the final payment under the original payment terms is due before the end of the plan, then the Plan may:

(1) The creditor will retain its lien until the earlier of the payment of obligation as determined under nonbankruptcy law or entry of the debtor's Chapter 13 discharge;

(2) the value, as of the effective date of the plan, of the payments on the secured claim must be the amount of the allowed secured claim; and

(3) There must be equal periodic payments to the creditor holding the secured claim.

Debtor's Authorities

Debtor's points and authorities provides minimal analysis of this issue and the cited cases. The court begins with the Circuit Court of Appeals decisions cited by Debtor.

The first is *American General Finance, Inc. v. Paschen (In re Pachen)*, 296 F.3d 1203 (11th Cir. 2002). In that case, the Eleventh Circuit concluded that the 11 U.S.C. § 1322(c)(2) exception works through 11 U.S.C. § 1325(b)(5) to allow not only payment terms to be modified, but also to allow for an 11 U.S.C. § 506(a) valuation.

In 2019, the Fourth Circuit Court of Appeals revisited a prior decision that went contrary to the ruling in *Paschen*, but reversed that prior decision. In *Hurlburt v. Black*, 925 F.3d 154 (4th Cir. 2019), the Fourth Circuit Court of Appeals concluded that the 11 U.S.C. § 1322(c)(2) exception providing for the 11 U.S.C. § 1325(a)(5) treatment for claims that come due in full during the period of the plan to be modified, including 11 U.S.C. § 506(a) valuation.

Creditor's Authorities

Creditor directs the court to the Supreme Court decision, *Nobelman v. American Savings Bank (In re Nobelman)*, 508 U.S. 324 (1993), for the proposition that the provisions of 11 U.S.C. § 1332(b)(2), when read in conjunction with 11 U.S.C. § 506, precludes the bifurcation of any and all claims secured by the debtor's primary residence if there is equity to protect such lien. Interestingly, the Nobelman decision from 1993 is older than the "aged case law from other circuits" that Creditor dismissive chooses not to address.

Discussion of Applicable Law

Beginning with the decision in *Nobelman*, the Supreme Court determined that the provisions

of 11 U.S.C. § 1322(b)(2) focuses on the "rights" of the creditor being protected from modification. *Nobelman v. American Savings Bank (In re Nobelman)*, 508 U.S. at 329, 331. These protected rights included the right for the entire obligation to be treated as a secured claim and not be bifurcated pursuant to 11 U.S.C. § 506(a). While not allowing for bifurcation, the Supreme Court noted that some rights could be modified as permitted under the Bankruptcy Code, such as 11 U.S.C. § 1322(b)(5), permitting the curing of defaults through the Chapter 13 plan. *Id.* at 330. Thus, the protection granted pursuant to 11 U.S.C. § 1322(b)(5) was not sacrosanct and insulated from all other provisions of the Bankruptcy Code that Congress made applicable to a claim secured only by the debtor's residence.

In 1994 Congress amended this code section and added 11 U.S.C. § 1322(c) (and re-lettering former paragraph (c) as (d)) to add the exception to 11 U.S.C. § 1322(b)(2). When the Supreme Court issued its ruling in Nobelman, there was, and there could not be, a consideration of the yet to be enacted exception to 11 U.S.C. § 1322(b)(2) residence secured claims.

8 Collier on Bankruptcy, ¶ 1322.17 (Sixteenth Edition) (emphasis added), discusses the effect of this statutory exception to the residence secured claim limitations in 11 U.S.C. § 1322(b)(2).

> ¶ 1322.17 Exceptions to the Rule Against Modification of Home Mortgages; § 1322(c)(2)
>
> **Section 1322(c)(2) carves out an exception to the rule in section 1322(b)(2)**, which prohibits the modification of the rights of holders of claims secured solely by a security interest in real estate that is the debtor's principal residence. It provides that **if the last payment on the original payment schedule for such a mortgage is due before the final payment** under the plan is due the debtor may pay **the claim as modified pursuant to section 1325(a)(5)**.
>
> The legislative history of the provision states that it **was intended to overrule the decision** of the Court of Appeals for the Third Circuit in ***First National Fidelity Corp. v. Perry***, which held that a debtor could not utilize section 1325(a)(5) to provide for a home mortgage protected from modification by section 1322(b)(2). Section 1322(c)(2) thus expressly provides that certain mortgages may be modified and provided for under section 1325(a)(5). Specifically, this may occur if the last payment on the original payment schedule for the mortgage is due before the final payment under the plan is due.
>
> As the Court of Appeals for the Eleventh Circuit held in *American General Finance, Inc. v. Paschen (In re Paschen)*, the **plain language** of this provision **permits the modification of a claim on such a home mortgage through the bifurcation of that claim into secured and unsecured components**, with the unsecured component crammed down pursuant to section 1325(a)(5).
>
> Because the plan may not extend beyond five years, **this section will encompass** short-term mortgages, fully matured mortgages, **long-term mortgages** on which the debtor has nearly completed payments, **and mortgages with balloon payments**. Congress obviously believed that debtors with such mortgages needed additional protection. Short-term and **balloon payment mortgages often have high rates or terms that are particularly unfavorable**, which **Congress has**

deemed deserving of close scrutiny. And debtors nearing the end of a long-term mortgage often have large amounts of equity that could be lost in a foreclosure. Reverse mortgages that have matured due to the death of the original mortgagor can also be modified under section 1322(c)(2). The fact that other nonmodifiable mortgages may be junior to a mortgage described by section 1322(c)(2) does not affect the debtor's ability to modify that mortgage.

The exception from the modification prohibition also **overrules** for such mortgages the Supreme Court's decision in ***Nobelman v. American Savings Bank***. That decision was **based solely on section 1322(b)(2), to which section 1322(c) is an** [subsequently enacted] **exception**. Again, it is not surprising that Congress would create an exception for the types of mortgages described above, which are often undersecured.

The most recent Circuit Court authority is the *Hurlburt v. Black*, 925 F. 3d 154 (4th Cir. 2019). In analyzing these interlocking Code sections, the *Hurlburt* court states:

> Emphasizing that other aspects of Section 1322(c)(2)—not highlighted in ***Witt***—indicate that **Congress intended for the exception to permit modification of "claims," not just "payment[s]," other courts universally have criticized *Witt*'s finding of ambiguity** and attendant reliance on the statute's legislative history. *See*, *e.g., In re Paschen*, 296 F.3d at 1209; *In re Eubanks*, 219 B.R. at 471-73; *In re Tekavec*, 476 B.R. 555, 556, n. 2 (Bankr. E.D. Wis. 2012); *Geller v. Grijalva (In re Grijalva)*, No. 4:11-bk-25386-EWH, 2012 Bankr. LEXIS 1355, 2012 WL 1110291, at *3-4 (Bankr. D. Ariz. Apr. 2, 2012); *In re Reeves*, 221 B.R. 756, 760 (Bankr. C.D. Ill. 1998); *In re Mattson*, 210 B.R. 157, 158-59 (Bankr. D. Minn. 1997). **Commentators have reached the same conclusion**—the plain language of Section 1322(c)(2) authorizes Chapter 13 plans to modify claims, not just payment schedules. ***See*** **Nat'l Bankr. Rev. Comm'n, Report of the National Bankruptcy Review Commission 237 (1997) ("[S]ection 1322(c)(2) authorizes a stripdown of an undersecured residential mortgage if final payment would become due during the course of the Chapter 13 plan."**); 8 Collier on Bankr. (MB) ¶ 1322.17 (2018) (opining that "the plain language of [§ 1322(c)(2)] permits the modification of a claim on [a qualifying] home mortgage through the bifurcation of that claim into secured and unsecured components, with the unsecured component crammed down pursuant to section 1325(a)(5)," and characterizing *Witt* as a "strained reading of the language" that runs "contrary to accepted canons of statutory construction, as well as the great weight of authority, and inconsistent with other language in the subsection that specifically referred to section 1325(a)(5)").

Hurlburt v. Black, 925 F. 3d 154, 161 (4th Cir. 2019).

This court's reading of the plan language of these interlocking statutory provisions renders the same result. The exception created in 11 U.S.C. § 1322(c)(2) takes the present claim out of the protections of 11 U.S.C. § 1322(b)(2).

Beginning with the language of 11 U.S.C. § 1322(c)(2), it provides:

1. Notwithstanding the provisions of 11 U.S.C. § 1322(b)(2)

2. For a secured claim

    a. which is secured only by the debtor's residence

    b. for which the last payment based on the original payment terms comes due before the date when the final payment on the plan is due;

3. The plan may provide for the payment of that secured claim as provided in 11 U.S.C. § 1325(a)(5).

The plain language states that the limitations under 11 U.S.C. § 1322(c)(2) does not "protect" the claim coming due before the end of the plan from treatment under 11 U.S.C. § 1325(a)(5).

Going to 11 U.S.C. § 1325(a)(5), it provides that for this claim secured only by the debtor's residence for which the last payment, as computed under the original payment terms, comes due, the plan treatment may be:

1. For the holder of an allowed secured claim;

2. The holder of the claim shall retain the lien

    a. until the claim is paid in full as determined under nonbankruptcy law, **or**

    b. the debtor is granted a discharge pursuant to 11 U.S.C. § 1328;

3. The value of the payments disbursed to the creditor holding the allowed secured claim is **not less than the allowed amount** of such secured claim; and

4. If the payments are periodic, that shall be in equal monthly amounts.

To determine the allowed secured claim, Congress provides in 11 U.S.C. § 506(a) that a creditor who has a lien to secure its claim can have both an allowed secured claim and an allowed unsecured claim arising out of one obligation. The allowed secured claims is:

> (1) An allowed **claim of a creditor secured by a lien on property** in which the estate has an interest, . . ., **is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property**, . . ., and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set off is less than the amount of such allowed claim.

Debtor is correct that Congress has created an exception from the limitations of 11 U.S.C. § 1322(b)(2) for Creditors balloon payment note that has come due under the original terms of the note on April 1, 2020 - which is before the last payment will be made on a plan in this case (assuming one is

confirmed). Creditor's claim may be valued as provided in 11 U.S.C. § 506(a) to determined the allowed secured claim and the secured claim amount be paid as provided in 11 U.S.C. § 1325(a)(5).

Debtor has filed as "Reply" pleadings, additional evidence of value and a Broker's Prior Opinion. Dckts. 181, 182, 177.

In the Opposition, Creditor reasonably requests the opportunity to conduct discovery and have an interior appraisal conducted. Debtor attempting to slip in the Broker's Price Opinion as a "Reply" document clearly requires such discovery request be granted.

At the February 25, 2020, the court continued the hearing to allow for discovery and the filing of supplemental pleadings.

Supplemental Pleadings

Creditor filed the Declaration of Appraiser Lynn W. Johnson, accompanied by the Appraisal Report, in support of Creditor's Opposition on April 6, 2020. Dckt. 198. Lynn W. Johnson is a licensed real estate appraiser in the state of California who has been working as a licensed real estate appraiser since 2005. *Id.* After personally inspecting the property, both the interior and exterior, and comparing the Property with other properties in the area, it is her opinion that the Property, as of the date of filing of the instant case (March 1, 2019), had a current market value of $513,000.00.

Debtor replied with what Debtor refers to as a "more refined Broker Price opinion" and the Declaration of Osceola Winnumucca Stephenson in support of the Reply. Dckt. 209, 210. Osceola Winnumucca is a real estate person licensed in California. Declaration, Dckt. 209. After a physical examination of the Property on February 8, 2020, Declarant values the property, as of March 1, 2019, at $470,000.00. Declarant arrived at this value due to several features of the residence:

a. No high ceilings
b. No steeply pitched roof
c. $96,050.00 worth of necessary repairs due to lack of maintenance since its construction
d. House was built with defective windows that have caused dry rot
e. 29 windows need replacement due to water damage
f. Major systems not in proper working order
g. Heating and air system did not function properly
h. Main floor ceiling water intrusion to be replaced due to dry rot damage

Declarant points out that Creditor's Appraisal Report did not address the repairs the Property needs.

Review of Expert Testimony

Evidence Presented by Movant Debtor

The court begins with the evidence of value presented by Debtor. Osceola Stephenson's declaration was filed on April 21, 2020. Dckt. 209. In it, Stephenson testifies that he is licensed as a real estate agent by the State of California and works with Red Dog Real Estate. He has prepared his

Broker's Price Opinion ("BPO") for the value of the Property as of March 1, 2019 (the date this bankruptcy case was filed). The BPO is filed as an exhibit with his Declaration. BPO, Dckt. 210.

The BPO states that in its As-Is condition, the Property has a Probable Sales Price Value of $465,000 with a 90-day marketing period and $475,000 with a 180-day marketing period. BPO, Value Estimation section; *Id.*

In the BPO Stephenson identifies ($96,050) in repairs needed for the Property which are taken into account in Stephenson developing his value opinion. He states the Property is in fair condition, with immediate repairs to be taken by the buyer to include replacement of windows and that "major systems" not being in "proper working order."

Stephenson identifies three listing comparables that he uses and three closed sales comparables (all with sales dates of January 2019), for which the properties are within 0.3 miles of the Property. *Id.*, p. 2.

In his Declaration, Stephenson explains his condition and style considerations. Dckt. 209. He also discusses water damage caused by leakage at the windows and the need for the replacement of 29 windows. He also testifies that the heating and air conditioning system did not "function properly" (but did not explain what did not work) and that it needs to be replaced. He also provides testimony as to the repairs for the damage caused by the water intrusion.

Stephenson also discusses that the valuation provided in the appraisal testimony, which while consistent with that of Stephenson in considering comparable properties, it did not take into account the damages and necessary repairs that a buyer would consider.

Evidence Presented by Creditor

Creditor has provided the Declaration and Appraisal Report of Lynn Johnson. Dckt. 198 (Appraisal Report Exhibit attached to the Declaration). The Declaration and Appraisal Report review Johnson's experience and knowledge to provide expert witness testimony. Johnson testifies that the Property was inspected, interior and exterior, as part of Johnson's acts in coming to an opinion of $513,000.00 for the value of the Property.

In the Appraisal Report, Johnson identifies three comparable property sales, with the comparables 0.9 miles to 1.62 miles from the Property. Appraisal Report page 2 of 6; Dckt. 198. The three comparables are for sales in April 2018, December 2018, and January 2019.

For the valuation, in the Supplemental Addendum (Dckt. 198 at 12), Johnson states

> The subject is of good quality construction that conforms to the local neighborhoods in quality and design. . . The subject features moderate upgrades and has some unique design features to include coffered ceilings in the dining room, but does not appear to have any recent updating. The kitchen has upgraded cabinetry, granite counters and back splash, standard grade appliances, and tile flooring. . . **Overall the dwelling appears in average to fair condition** and **water staining was noted on the ceiling areas in the family room / kitchen areas due to**

> **apparent leaking**. It is **recommended that a professional be consulted to mitigate further damage**. . . There is also a large hole in the corner of the ceiling hallway near the half bathroom (see photo addendum). It is unclear why this exists as no water damage was noted in the immediate area.
> . . .
> All utilities were on at the time of inspection and mechanical systems appear to be functioning in a normal manner. . .

Johnson includes pictures of the Property. Dckt. 198 at 19-22. The picture of the rear of the home shows garbage, appliances, and other "junk" strewn around the patio. *Id.* at 19. A side view picture appears to a structure with junk piled up inside, including rolled up carpeting. *Id.* at 20.

The picture titled "Water Damage in Ceiling" (*Id.*) shows a large, jagged hole in the ceiling, with something hanging out of the hole (which the court could not identify even when the picture was enlarged). Water stains on the ceiling to the right of the hole are visible.

There are two other water damage pictures from the family room, showing water stains near a ceiling fan. *Id.*

A picture of the garage shows it filled (but for a narrow walk way) with open boxes of "stuff." *Id.* at 21. It appears that Debtor has piled up "stuff" on "stuff," creating a disorganized pile of "stuff."

In another ceiling picture, there is a hole in the ceiling and wall where two walls meet. *Id.* It appears, that in addition to the hole, the crown molding on a wall is missing.

The last picture is one showing water damage and staining at a window. *Id.* at 22. Through the window, one can see into the backyard, filled with piles of "stuff," similar to what is piled up next to the back of the house on the patio.

Determination of Value

The evidence presented by both experts presents the court with documentation of there being significant damage to the Property. As shown by the photos and the Stephenson Declaration, there are multiple holes in the ceiling, water damage in the ceiling and windows, and the need for significant repairs. Additionally, the photographs further show a lack of maintenance in and around the Property, including the trash and "stuff" piled in around the house on the patio, in the backyard, and in the garage.

Creditor's appraiser opinion of value is $513,000. While acknowledging that there is significant damage to the structure, she makes no clear adjustments for it. Rather, her Appraisal Report states that investigation is required.

The three comparables used by Johnson, Creditor's expert, in the Appraisal Report had sales prices of $510,000, $520,000, and $525,000. In getting to the $513,000 value for the Property, she makes no adjustment for condition, stating in the Appraisal Report that the Property and the three comparable are all of Good Construction and in Average Condition. Appraisal Report, p. 2 of 6; Dckt. 198. There is nothing provided by Johnson to indicate that the three comparables were "Average

Condition" properties with water stained ceilings, a gaping hole in the ceiling and another hole in the wall, water damage around the windows, and no treatment or repairs for the obvious and significant visible and the hidden damage to the structure.

Stephenson, the Debtor's expert, states that his starting value is in line with Johnson, but then he makes a downward adjustment for ($95,000) of repairs. Actually, it appears that Johnson may have started with a higher value or has not made a full adjustment of ($95,000) in coming to his opinion of $470,000 (based on a one hundred and twenty day marketing period, which is not commercially unreasonable).

While opining for the BPO that the repair costs are ($95,000), there is no other testimony from a contractor or other construction expert. The court recognizes that though real estate professionals do have knowledge of real property values and have addressed adjusting sales prices due to repairs, they are not contractors or construction experts.

From the evidence presented, the court determines that the value of the property securing Creditor's claim is $470,000. That is within $40,000 - $50,000 of Johnson's comparables, without any adjustment for damages.

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 Wanda Collier-Abbott ("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 RRA CP Opportunity Trust 2 ("Creditor") secured by second in priority deed of trust recorded against the real property commonly known as 3101 Spinning Rod Way, Sacramento, California, is determined to be a secured claim in the amount of $157,410.62, 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 $470,000.00 and is encumbered by a senior lien securing a claim in the amount of $312,589.38, which does not exceed the value of the Property that is subject to Creditor's lien.

14. 19-21310-E-13 WANDA COLLIER-ABBOTT
Richard Jare

CONTINUED MOTION TO CONFIRM PLAN
3-4-20 [192]

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, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 4, 2020. By the court's calculation, 55 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.

REVIEW OF MOTION

The debtor, Wanda Collier-Abbott ("Debtor") seeks confirmation of the Modified Plan after failing to get a plan confirmed and has amended her budget to establish disposable income consistent with the plan. Declaration, Dckt. 194. The Modified Plan provides payments of $2,850.00 for 36 months, and a 0% percent dividend to unsecured claims totaling $5,000.00. Modified Plan, Dckt. 191. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

CREDITOR'S OPPOSITION

Real Time Resolutions, Inc. ("Creditor") holding a secured claim filed an Opposition on April 6, 2020. Dckt. 199. Creditor opposes confirmation of the Plan on the basis that:

A. Debtor fails to provide adequate protection payments to Creditor.

B. Plan is too speculative.

C. Plan is not feasible.

D. Debtor is incapable of reorganization.

CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on April 14, 2020. Dckt. 203. Trustee opposes confirmation of the Plan on the basis that:

A. Debtor is delinquent in plan payments.

B. It is unclear if Debtor can make Plan payments.

C. Plan is too speculative as to the sale or refinance of the property.

D. Attorney's fees should not be paid through the Plan.

CREDITOR'S OPPOSITION

The Bank of New York Mellon ("Creditor") holding a secured claim filed an Opposition on April 14, 2020. Dckt. 206. Creditor opposes confirmation of the Plan on the basis that:

A. Plan fails to cure Creditor's pre-petition arrears.

B. Plan is not feasible.

DISCUSSION

Review of Debtor's Proposed Plan

Debtor's Proposed Third Modified Plan provides that plan dividend for the Class 2 claim of RPA CP Opportunity Trust shall be $350 a month for the first thirty-five months of this Plan, and then in the thirty-six month of this Plan Debtor shall make a final payment of approximately $158,143.00. Third Modified Plan, Additional Provisions, ¶ 7.01. Dckt. 191. Thus, it appears that the Third Modified Plan provides for there to be three years from confirmation before more than a nominal payment of $350 a month is made by Debtor.

In Section 7.02 of the Third Modified Plan, Debtor states that the payment in the thirty-sixth month shall be from a sale or refinance by the thirty-sixth month of **this Plan**.

In Section 7.03 it states that Debtor has made payments of $24,700 for the first 11 months altogether (but does not specify eleven months from when) and will thereafter (it not being clear when is "thereafter") "resume" making payments of $2,850.00 a month.

In Section 7.04 it states that Debtor will pay arrears of $37,554.51 in a lump sum on "month 36 of the case." It is not clear how requiring this lump sum payment in "month 36 of the case" works with Debtor not selling or refinancing property until "month 36 "of this plan."

Review of Opposition and Ruling

Trustee's and Creditors's objections are well-taken. There are several issues with Debtor's Third Modified Plan that cause this court great concern.

Delinquency

The Chapter 13 Trustee asserts that Debtor is $350.00 delinquent in plan payments, which represents a fraction of one month of the $2,850.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Attorney's Fees

Under Local Bankruptcy Rule 2016(a), compensation paid to attorneys for the representation of chapter 13 debtors is determined according to 2016-1(c), which provides for fixed fees approved in connection with plan confirmation. However, if a party in interest objects, such as the trustee, compensation is determined in accordance with 11 U.S.C. §§ 329 and 330.

Trustee objects to attorney's fees being paid through the Plan. Thus, counsel's fees will be reviewed under the standard loadstar analysis.

Failure to Cure Arrearage of Creditor Bank of New York Mellon

The objecting creditor holds a deed of trust secured by Debtor's residence. Creditor has filed a timely proof of claim in which it asserts $37,354.41 in pre-petition arrearage. The Plan does not propose to cure those arrearage. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments because it does not provide for the surrender of the collateral for this claim. *See* 11 U.S.C. §§ 1322(b)(2) & (5), 1325(a)(5)(B). The Plan cannot be confirmed because it fails to provide for the full payment of arrearage.

Feasibility

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). The court will review the concerns regarding whether Debtor will be able to make plan payments.

Debtor lacks sufficient income to Support Proposed Plan Payments. According to Debtor's Schedule J, Debtor has monthly disposable income of $2,100.00. Yet, her proposed plan payment is $2,850.00.

Debtor's Plan proposes payments of $2,044.12 to Creditor New York Mellon, yet the actual monthly mortgage payment beginning May 2020 is $2,325.07.

The Plan is too speculative. Whether Debtor can make the Plan depends on the sale of real estate property or refinancing by "no later than month 36" of the Plan. Yet, Debtor fails to explain why the delay of three years to sell the property which unduly prejudices creditors. This is not the first time the court and parties involved have raised this particular concern. The Civil Minutes for January 28, 2020, the hearing on the Second Modified Plan, note the following:

> Trustee contends that the Plan is not feasible because the Plan proposes the refinance or sale of the Property. Further arguing that this sale or refinance appears speculative or as a delay, as the Plan fails to provide an actual time frame in which any of

> these actions will take place or why it should take 36 months to sell or refinance.

Civil Minutes at 7. Dckt. 166.

Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

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 the debtor, Wanda Collier-Abbott ("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 Modified Plan is denied.

15. **19-27862-E-13 DPC-1** **SHAVINA/DONALD THOMAS** **Richard Jare** **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **3-17-20 [61]**

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, on March 17, 2020. By the court's calculation, 21 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 overruled.

REVIEW OF MOTION

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

A. Shavina Denise Thomas and Donald Wayne Thomas ("Debtor") are delinquent in plan payments.

B. Plan's Additional Provisions alter priority claims treatment without agreement or consent from creditors.

C. Failure to identify 2019 tax refunds on Schedule B.

D. Schedule I may not accurately reflect Debtor's actual income.

DISCUSSION

Trustee's objections are well-taken.

Delinquency

Debtor is $600.00 delinquent in plan payments, which represents multiple months of the $300.00 plan payment. Before the hearing, another plan payment will be due. According to Trustee, the

Plan in § 2.01 calls for payments to be received by 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's Counsel addresses this delinquency in his Declaration filed in support of the Motion. Dckt. 67. Counsel testifies under penalty of perjury that he has personal knowledge that Debtor made a payment of $600.00 on March 12, 2020. *Id.* at 1. Counsel testifies that he obtained printouts of the TFS Trustee Payment System website which he filed as Exhibit (Dckt. 68). *Id.* at 3. He further testifies that proof of payment was shown to the Trustee at the March 12 Meeting of Creditors. *Id.* at 5.

Priority Claims Not Paid in Full

A debtor's Plan must provide for all priority debt, unless the creditor agrees to other treatment. 11 U.S.C. § 1322(a)(2). According to Debtor's Additional Provisions under Section 7.03: "The Plan shall complete regardless of whether or not these § 507(a)(1)(B) obligations are paid in full. As Debtor's plan is a PRO TANTO with respect to class 5 claim, the plan shall complete at the stated term, whether or not this Priority obligation is paid in full." This provision amends §3.12.

Debtor argues that under §1322(a)(4), *pro tanto* treatment of the AFDC claim is allowed without the consent of the creditor. That section provides for claim entitled to priority under section 507(a)(1)(B). Further arguing that this is a distinct term of that of subsection (a)(2) which defines that consent is required if this was a priority IRS debt. Debtor adds that this class of creditor normally boycotts most chapter 13 proceedings.

In looking at Debtor's response, it states that this is a "preliminary response" in light of this being an Objection to Confirmation filed using the Local Bankruptcy Rule 9014-1(f)(2) procedure which allows opposition to be stated orally at the hearing and the court setting a briefing schedule as warranted.

Debtor's Opposition provides a **multi**-colored font response and citation to the Cornell University website.

The Trustee's Objection is based in part on the Plan not providing to pay claims in full. Just as many parties and their attorneys believe that one need only utter the magical incantation of "11 U.S.C. § 105(a) and the judge can make up the law," Debtor throws the words "PRO TANTO" (all capital letters in original) at the court. Debtor does not provide the court with a definition of this term or why it is relevant to the discussion. [FN. 1.]

FN. 1. The court notes that Debtor's counsel advises the court that the law library is closed and his law firm does not subscribe to any online legal research services. It is strange that in the 21st Century a attorney would not have either a LEXIS or Westlaw subscription as part of the standard legal office setup.

Using the Ballentine's Law Dictionary, obtained through LEXIS, the following definition of pro tanto is provided:

pro tanto

For so much; for as far as it goes; to such an extent.

So, in using this term, the court understands the Debtor's position is that "the priority claims get what they get, and they can't throw a fit."

The Trustee's monochromatic Objection points the court to 11 U.S.C. § 1322(a)(2), asserting that priority claims must be paid in full through the plans, unless the creditor agrees otherwise. The section of the Bankruptcy Code cited by the Trustee states:

> § 1322. Contents of plan
>
> (a) The plan—
>
> > (1) shall provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan;
> >
> > (2) shall provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim;

11 U.S.C. § 1322(a), the four requirements of which are stated in the conjunction "and," rather than a disjunctive "or" allowing the plan to provide one or the other.

In reviewing the claims register in this case, no priority claim has been filed - either by the creditor or the Debtor. In the Plan, Debtor lists a priority claim of $100.00. Plan, ¶ 3.12; Dckt. 12. This amount has been stated subject to the certifications as provided in Federal Rule of Bankruptcy Procedure 9011.

The Trustee's objection does not direct the court to a specific priority claim, but to the PRO TANTO language Debtor has added to the additional provisions for what is a "nickel and dime" claim stated in the Plan.

Going to Debtor's Schedule E/F, a creditor identified as DCSS, CA with a priority claim of $100.00 is listed. Dckt. 22 at 13. This is stated to be a community debt for Domestic Support Obligations. Debtor adds the following typed at the bottom of the page:

> His Child Welfare Reimbursement Arrears, guesstimate

Id. Debtor's Schedules are filed under penalty of perjury and are statements of factual information - not guesses. If Debtor is obligated to pay California Child Support Services for unpaid child support obligations which Debtor did not pay and the State made public support payments, he should have attached demand and payment letters, statements, and his records of payment - not guesses.

Assuming that there is a priority obligation, the obligation identified is one that can be paid in full in the first month.

If not and the actual amount is greater than the $100 stated by Debtor under penalty of perjury on the Schedules, the Debtor directs the court to paragraph (4) of 11 U.S.C. § 1322(a) which states:

> (a) The plan—
> . . .
> (4) notwithstanding any other provision of this section, may provide for less than full payment of all amounts owed for a claim entitled to priority under section 507(a)(1)(B) only if the plan provides that all of the debtor's projected disposable income for a 5-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

Thus, 11 U.S.C. § 1322(a)(4) which states that priority claims must be paid in full, for one type of priority claim less than the full amount is required to be paid if the debtor provides for paying all of the debtor's disposable income into the plan for five years. That one type of priority claim is:

> (a) The following expenses and claims have priority in the following order:
>
> (1) First:
>
> (A) Allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition in a case under this title, are owed to or recoverable by a spouse, former spouse, or child of the debtor, or such child's parent, legal guardian, or responsible relative, without regard to whether the claim is filed by such person or is filed by a governmental unit on behalf of such person, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition shall be applied and distributed in accordance with applicable nonbankruptcy law.
>
> (B) Subject to claims under subparagraph (A), **allowed unsecured claims for domestic support obligations** that, as of the date of the filing of the petition, **are assigned** by a spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative **to a governmental unit** (unless such obligation is assigned voluntarily by the spouse, former spouse, child, parent, legal guardian, or responsible relative of the child for the purpose of collecting the debt) **or are owed directly to or recoverable by a governmental unit under applicable nonbankruptcy law**, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition be applied and distributed in accordance with applicable nonbankruptcy law.

11 U.S.C. § 507(a)(1)(A), (B).

Thus, there is not a requirement, as a matter of federal law, that if the domestic support obligation was not voluntarily assigned to or owed by operation of nonbankruptcy law to a governmental unit, then the plan does not require them to be paid in full.

The 11 U.S.C. § 507(a)(1)(B) is a priority claim, just second in priority to the first priority domestic support claims. The discussion on this provision in Collier on Bankruptcy is broad, stating:

> [5] Special Provision for Domestic Support Obligations Owed to Governmental Units; § 1322(a)(4)
>
> Section 1322(a)(4) recognizes the fact that some debtors have very large support obligations owed to governmental units, and that requiring those obligations to be paid in full in a chapter 13 plan would make chapter 13 impossible for such debtors. This in turn could leave those debtors saddled with debt, and perhaps subject to foreclosure or repossessions, all of which would greatly undercut their ability to support their dependents, defeating the purpose of other provisions that were intended to increase support payments.
>
> To alleviate this problem, section 1322(a)(4) excuses the debtor from making full payment of domestic support obligations entitled to priority under section 507(a)(1)(B) if the plan provides that all of the debtor's disposable income for five years, the maximum plan period, is devoted to plan payments. This provision enables a chapter 13 debtor to cure a mortgage default, save a family vehicle, or otherwise use chapter 13 even if the debtor cannot pay the domestic support obligations owed to a governmental unit in full. Of course, those obligations remain nondischargeable, so the debtor would continue to be obligated to pay them after the case is concluded.

8 Collier on Bankruptcy, Sixteenth Edition, ¶ 1322.03.

Thus, 11 U.S.C. § 1322(a)(4) allows a plan to provide for those assigned domestic support obligations to be paid partially, with the Debtor having to pay after the case since they are nondischargeable. But the plan must make provision for them.

Additionally, the provisions of 11 U.S.C. § 1322(a)(4) are applicable as a matter of law, not a "Plan Created Modification." Here, the additional provisions do not provide for payment of $X a month for the 11 U.S.C. § 507(a)(1)(B) priority claims, but that the plan does not state how they will be necessarily treated. Then the Debtor adds that even if not paid in full, "the plan shall complete at the stated term." Whether the Plan is completed or not is as provided in the Bankruptcy Code, not as created by Debtor in the Plan. Then, the Plan purports to determine a creditor's claim based upon the creditor using the word "assigned," "welfare," or "AFDC."

Review of Schedules, Plan, and Prior Cases

Between the two debtors, this is their third case since September 2018. The debtors each filed a prior separate case, and now this joint case.

On Schedule I in the current case, Debtor states having gross income of $3,338 a month. Dckt 22 at 26-27. Debtor speculates having an additional $700 in future roommate income and using a tax refund of $350 a month to cover expenses. On Schedule A/B Debtor anticipates $1,900 in 2019 tax refunds. *Id.* at 6. This would provide five months of such coverage.

Once the tax refund comes in, that would give Debtor $3,688 a month. However, on Schedule J Debtor lists having expenses of ($4,088). It is not explained how Debtor, even with the tax refund, is able to make up the difference.

A Chapter 13 Plan is necessary for Debtor due to the loans secured by the Debtor's vehicles, which amounts are well in excess of said vehicles. The court has issued two orders valuing the two secured claims. Orders, Dckts. 58, 59.

Review of Supplemental Pleadings

Debtor filed several supplemental documents as requested by the court. The first one filed on April 14, 2020, is titled "Debtor's 2nd Exhibit in Support of Opposition to Objection to Confirmation." Dckt. 72. There is one statement in this first page: "Proof of payment in the amount of $300.00 on April 13th, 2020[.]" *Id.* The second page seems to be a "print screen shot" of the TFS website purporting to show a processing transaction dated April 13, 2020 in the amount of $300.00 for Debtor Shavina Thomas. *Id.*

Three documents were filed on April 21, 2020: Supplemental Opposition, the Declaration of Richard Jare, and a Proposed Order filed as an Exhibit. The first one is the Supplemental Opposition to Objection to Confirmation. Dckt. 74. This one page Opposition states the following:

> 1. Supplemental Schedules I and J were filed today.

The Supplemental Schedule I lists Debtor having monthly income of $4,359, which includes a $500 a month contribution from Debtor's mother who is a new roommate. Dckt. 73 at 1-2.

On Schedule J Debtor lists a family unit of three persons (the two debtors and a minor child), which does not include Mom as the new roommate. *Id.* at 3-4. Assuming that Mom is not also included in the expenses, those listed on Supplemental Schedule J do not appear to be unreasonable.

> 2. Supplemental evidence of addition trustee payment has been filed subsequent to the last hearing.
>
> 3. The Exhibit with the proposed form for the Order confirming plan clarifies in plan English the some of the NonStandard Provisions.

Id.

The Declaration of Richard Jare declares having personal knowledge of the following (Dckt. 75):

> 1. That notwithstanding his status as Debtor's counsel, he is permitted to authenticate exhibits since the facts they purport to establish are not expected to be in material dispute.

On this point, counsel's testimony, which is in the nature of legal argument properly found in a points and authorities, does not cite to any Federal Rule of Evidence stating that merely having a law license allows an attorney to "authenticate" evidence because the attorney asserts (in good faith) that he or she does not believe that they will be in material dispute. Whether holding a law license or not, a witness must properly authenticate the exhibits.

Here, counsel appears to so testify in paragraphs 2 and 3of this declaration to authenticate the

exhibits. Of course, in doing so, he would be subjecting himself to examination about such testimony if someone questioned such.

2. The exhibit filed on April 14, 2020 evidencing payment by TFS "was filed subsequent to the prior declaration authenticating such evidence, so this new declaration is being provided."

3. The website screen shots as to case status "are ordinary course of business records available to attorneys for Debtors in Chapter 13 cases."

4. Counsel obtained the printouts filed as exhibits through websites maintained by Trustee.

5. His experience is that the website seldom contain data errors and Debtor's payment status is likely to be accurate.

Id.

Last but not least is the Proposed Order Confirming Plan. Dckt. 77. The order filed as an exhibit for purposes of providing clarification as to NonStandard Provisions reads as follows:

A. IT IS ORDERED that the plan filed as docket item 12 on January 3, 2020 is confirmed.

B. IT IS FURTHER ORDERED that:

1. The debtor shall immediately notify, in writing, the Clerk of the United States Bankruptcy Court and the trustee of any change in the debtor's address;

2. The debtor shall immediately notify the trustee in writing of any termination, reduction of, or other change in the employment of the debtor; and

3. The debtor shall appear in court whenever notified to do so by the court.

C. IT IS FURTHER ORDERED that the attorney's fees for the approved, $499.00 of which was paid prior to the filing of the petition. The balance of $2,200.00, provided that the attorney and debtor have complied with Local Bankruptcy Rule 2016-1(c), shall be paid by the trustee from plan payments at the rate specified in the plan.

D. IT IS FURTHER ORDERED that, pursuant to 11 U.S.C. § 1323, the plan is amended as follows, for Nonstandard provisions §7.03 replace that section with the following language : Section 7.03. Which amends §3.12 , This plan specifies that any claims (namely DCSS) which are identifiable as to be entitled to priority under 11 U.S.C. §507(a)(1)(A)

shall be paid in full under class 5 of the plan. This plan specifies that any claims (namely DCSS) which are identifiable as to be entitled to priority under 11 U.S.C. §507(a)(1)(B), so identified or identified as either "assigned or welfare or AFDC" shall be paid prior to the payment of Class 7 general unsecured claims but need not be paid in full.

Feasibility

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). According to Trustee, Debtor admitted at the Meeting of Creditors that they have not yet filed the return for 2019 but that they expect a refund. Such refund is not identified on Schedule B. Moreover, at the Meeting Debtor admitted that roommate income listed on Schedule I is being replaced by a new job. Debtor has failed to file Schedules correcting any of this information. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

In their Response, Debtor asserts that Schedule B and C already exempt the 2019 tax refunds. A review of Debtor's Schedule C, filed on January 17, 2020, shows that Debtor has exempted Federal 2019 pro rata for 1040 in the amount of $1,600.88 and State 2019 pro rata form 1040 in the amount of $300.88 under C.C.P. § 703.1240(b)(5). Dckt. 22. No Objection to Claimed Exemptions has been filed by Trustee as of April 4, 2020.

With respect to the 2019 tax refund, the Trustee can monitor the situation and Debtor will notify the Trustee of all payments. In the current COVID-19 emergency environment, the filing and processing of tax returns has been delayed.

At the hearing, **xxxxxx**

The proposed Chapter 13 Plan, as amended, does comply with the requirements of 11 U.S.C. § 1325 and § 1322, 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 Objection to Confirmation filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is overruled and the proposed Chapter 13 Plan, as amended to provide that the treatment for the DCSS priority claim is that it will receive payment on its claim before there are any disbursements to creditors holding general unsecured claims, though such may not pay the DCSS claim in full, is confirmed. Counsel for the Debtor shall prepare an appropriate order, stating the above amendments, 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.

FINAL RULINGS

16.	**20-21562-E-13** **RWH-2**	**SALLY MUNGWA** **Ronald Holland**	**MOTION TO VALUE COLLATERAL OF SANTANDER CONSUMER USA** **4-3-20 [18]**

Final Ruling: No appearance at the May 5, 2020 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 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on April 3, 2020. By the court's calculation, 34 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 Santander Consumer USA ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $5,608.00.

The Motion filed by Sally Laura Mungwa ("Debtor") to value the secured claim of Santander Consumer USA ("Creditor") is accompanied by Debtor's declaration. Declaration, Dckt. 20. Debtor is the owner of a 2009 Dodge Challenger ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $5,608.00 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).

In his Response, Trustee requests the court to take into consideration that the Debtor provides for the creditor on Schedule D and in class 2B of the proposed plan, and that at time the motion was filed, Creditor had not filed a proof of claim.

Creditor filed a proof of claim on April 21, 2020. Proof of Claim 5. Creditor values the Vehicle in the amount of $8,200.00, with $7,572.00, as the amount necessary to cure any default as of the date of the petition. *Id*.

DISCUSSION

The lien on the Vehicle's title secures a purchase-money loan incurred on February 13, 2017, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $9,969.92. Proof of Claim, No. 5-1. 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 $5,608.00, 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 Sally Laura Mungwa ("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 Santander Consumer USA ("Creditor") secured by an asset described as 2009 Dodge Challenger ("Vehicle") is determined to be a secured claim in the amount of $5,608.00, 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 $5,608.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

17. **19-25174-E-13 BLG-2** **CHRISTOPHER/NIKESHIA KIESSLING** **Chad Johnson** **MOTION TO MODIFY PLAN** **3-30-20 [39]**

Final Ruling: No appearance at the May 5, 2020 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 March 30, 2020. By the court's calculation, 36 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. The debtor, Christopher Jerome Kiessling and Nikeshia Marie Kiessling ("Debtor"), have filed evidence in support of confirmation. No opposition to the Motion has been filed by the Chapter 13 Trustee, David Cusick ("Trustee"), or by 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 Modified Chapter 13 Plan filed by the debtor, Christopher Jerome Kiessling and Nikeshia Marie Kiessling ("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 March 30, 2020, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee, David Cusick ("Trustee"), for approval as to form, and if so approved, the Trustee will submit the proposed order to the court.

18. 13-26192-E-13 MS-1 | **RICHARD/RHONDA SAMPOGNARO** **Mark Shmorgon** | **MOTION TO AVOID LIEN OF CAPITAL ONE BANK (USA), N.A.** **4-7-20 [110]**

Final Ruling: No appearance at the May 5, 2020 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, Chapter 13 Trustee, Creditor, and Office of the United States Trustee on April 7, 2020. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Capital One Bank (USA), N.A. ("Creditor") against property of the debtor, Richard Joseph Sampognaro and Rhonda Annette Sampognaro ("Debtor") commonly known as 5343 Maui Way Fair Oaks, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $6,994.79. Exhibit D, Dckt. 113. An abstract of judgment was recorded with Sacramento County on April 17, 2012, that encumbers the Property. *Id.*

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of $258,100.00 as of the petition date. Dckt. 23. The unavoidable consensual liens that total $312,745.00

as of the commencement of this case are stated on Debtor's Schedule D. Dckt. 23. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(5) in the amount of $1.00 on Schedule C. Dckt. 23.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of the judicial lien impairs Debtor's exemption of the real property, and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT-DRAFTED ORDER

An order (not a minute order) substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Richard Joseph Sampognaro and Rhonda Annette Sampognaro ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Capital One Bank (USA), N.A., California Superior Court for Sacramento County Case No. 34-2011-00112701, recorded on April 17, 2012, Book 20120417 and Page 1848, with the Sacramento County Recorder, against the real property commonly known as 5343 Maui Way Fair Oaks, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

19. **13-26192-E-13 MS-2** | **RICHARD/RHONDA SAMPOGNARO** **Mark Shmorgon** | **MOTION TO AVOID LIEN OF CAPITAL ONE BANK (USA), N.A.** **4-7-20 [115]**

Final Ruling: No appearance at the May 5, 2020 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, Chapter 13 Trustee, Creditor, and Office of the United States Trustee on April 7, 2020. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Capital One Bank (USA), N.A. ("Creditor") against property of the debtor, Richard Joseph Sampognaro and Rhonda Annette Sampognaro ("Debtor") commonly known as 6500 Auburn Blvd. #4 Citrus Heights, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $6,994.79. Exhibit D, Dckt. 113. An abstract of judgment was recorded with Sacramento County on April 17, 2012, that encumbers the Property. *Id.*

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of $40,000.00 as of the petition date. Dckt. 23. The unavoidable consensual liens that total $25,942.34 as of the commencement of this case are stated on Debtor's Schedule D. Dckt. 23. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(5) in the amount of $14,058.00 on Schedule C. Dckt. 23.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of the judicial lien impairs Debtor's exemption of the real property, and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT-DRAFTED ORDER

An order (not a minute order) substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Richard Joseph Sampognaro and Rhonda Annette Sampognaro ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Capital One Bank (USA), N.A., California Superior Court for Sacramento County Case No. 34-2011-00112701, recorded on April 17, 2012, Book 20120417 and Page 1848, with the Sacramento County Recorder, against the real property commonly known as 6500 Auburn Blvd. #4 Citrus Heights, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

20. **20-20879-E-13 PGM-1** **BRUCE WELLER** **Peter Macaluso** **MOTION TO VALUE COLLATERAL OF BAY CITIES CREDIT UNION 3-26-20 [17]**

Final Ruling: No appearance at the May 5, 2020 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, parties requesting special notice, and Office of the United States Trustee on March 26, 2020. By the court's calculation, 40 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 Bay Cities Credit Union ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $7,000.00.

The Motion filed by Bruce Allan Weller ("Debtor") to value the secured claim of Bay Cities Credit Union ("Creditor") is accompanied by Debtor's declaration. Declaration, Dckt. 19. Debtor is the owner of a 2013 Chrysler Town & Country ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $7,000.00 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 does not oppose the Motion. Dckt. 24. Trustee points out that Debtor provides for Creditor in the proposed Plan and Creditor has not yet filed a proof of claim. *Id*.

DISCUSSION

The lien on the Vehicle's title secures a purchase-money loan incurred on February 2014, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a

balance of approximately $9,245.00. Motion, p. 2, ¶ 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 $7,000.00, 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 Bruce Allan Weller ("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 Bay Cities Credit Union ("Creditor") secured by an asset described as 2013 Chrysler Town & Country ("Vehicle") is determined to be a secured claim in the amount of $7,000.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is $7,000.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.