UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

June 13, 2017, at 3:00 p.m.

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1. **14-31903-E-13** **MARK GARCIA** **MOTION FOR ADMINISTRATIVE EXPENSES**
RRJ-1 **Peter Macaluso** **5-1-17 [65]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on May 1, 2017. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Administrative Expenses is granted.

State Compensation Insurance Fund ("Movant") requests payment of administrative expenses in the amount of $1,476.94, incurred during the period of June 1, 2015, to June 29, 2015, for providing post-petition worker's compensation insurance to Mark Garcia, dba Mark Garcia Associates ("Debtor").

TRUSTEE'S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a statement of non-opposition on May 10, 2017.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on May 30, 2017. Dckt. 71. Debtor does not oppose collection of the debt directly, but Debtor does oppose inclusion of the debt in the ongoing case and does not agree with the amounts stated as owed.

Debtor's Opposition consists merely of Debtor's attorney arguing that the administrative expense not be allowed. Debtor failed, or was unwilling, to provide any testimony under penalty of perjury in opposition to the Motion. In light of the court having addressed the failure to provide evidence in opposition to a motion with Debtor's counsel on multiple occasions over the past year, the court believes that if any such evidence actually existed, Debtor and Debtor's counsel would have timely filed it in opposition. Merely because counsel represents a debtor does not mean that counsel need not provide evidence to support the arguments he desires to make for his clients.

Debtor states that he will file an Objection to Claim and set it for hearing.

DISCUSSION

A review of the docket shows that Debtor has not filed an Objection to Movant's Claim.

Movant argues that Debtor could not have operated his business without worker's compensation insurance, thus making Movant's administrative expense a substantial contribution to the Estate.

Section 503(b)(1)(A) of the Bankruptcy Code accords administrative expense status to "the actual, necessary costs and expenses of preserving the estate . . . ." Here, Movant has demonstrated that Debtor was required to have worker's compensation insurance for his business, and Movant was required to issue a premium to him when he tendered payment.

Movant having demonstrated that the expenses were necessary, and the Trustee not opposing the Motion, the court finds that Movant providing a worker's compensation insurance policy for Debtor was necessary for Debtor and provided benefit to the Estate.

The Opposition filed by Debtor appears to admit that the obligation is owed, that the post-petition obligation was not paid, and that the post-petition obligation should be enforced against Debtor, stating:

> "Since the amounts owed are post-petition, there is no opposition to the collection of the debt directly."

Opposition, Dckt. 71. It appears that Debtor's "Opposition" appears to be merely a ploy to avoid the payment of this delinquent post-petition obligation by the Trustee. This could be that Debtor is trying to prevent the Trustee from obtaining fees on the $1,476.94 that will have to be funded through the plan. If so, Debtor's counsel has likely spent more than $1,400 of time and effort losing this battle.

Alternatively, Debtor and counsel may have a scheme to tell Creditor that it can "enforce" this obligation necessary for the post-petition operation of Debtor's business outside the bankruptcy. Then, when

Creditor does, Debtor and Debtor's counsel will contend that all of Debtor's assets are protected by the bankruptcy case, and therefore the "dastardly creditor must pay large damages for violating the automatic stay and the Chapter 13 plan." If the court were to conclude that such a scheme had been concocted by Debtor and his counsel, such would be indicative of bad faith in prosecuting this bankruptcy case and Chapter 13 Plan.

The Motion is granted, and the Trustee is authorized to pay Movant its administrative expenses in the amount of $1,476.94.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Administrative Expense filed by Movant having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
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> **IT IS ORDERED** that the Motion is granted, and the Trustee is authorized to pay State Compensation Insurance Fund $1,476.94 as an administrative expense of the Chapter 13 Estate in this case pursuant to 11 U.S.C. § 503(b)(1).

2. **17-21809-E-13** **PAMELA BEARD HUGHES** **MOTION TO CONFIRM PLAN**
MRL-1 **Mikalah Liviakis** **4-21-17 [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.

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 April 22, 2017. By the court's calculation, 52 days' notice was provided. 42 days' notice is required.

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

The Motion to Confirm the Amended Plan is denied.

Pamela Beard Hughes ("Debtor") seeks confirmation of the Amended Plan in the prosecution of this case. Dckt. 21. The Amended Plan proposes to make monthly plan payments of $470.00. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

The payments provided for in the Plan are: (1) payment of $4,000.00 in Debtor's counsel fees; (2) payment of the Chapter 13 Trustee's fees; (3) no Class 1 secured claims; (4) Class 2 claim secured by a vehicle; (5) Class 3 surrender for claim secured by mobile home; and a (6) 0% dividend on general unsecured claims. The $470.00 per month plan payments generate $28,200.00 in plan payments. After subtracting a $1,974 Chapter 13 Trustee fee (estimated at 7%) and $4,000.00 for Debtor's Counsel's fees, that leaves $22,226.00 to distribute through the plan to pay creditor claims.

In the Plan, Debtor estimates having $18,486.00 in general unsecured claims. Plan ¶ 2.15, Dckt. 18. Yet while having $22,226.00 to fund this portion of the Plan, Debtor is willing to commit to pay only 0.00%, which equates to $0.00, to creditors holding general unsecured claims. The court cannot understand any good faith reason for proposing this 0.00% dividend plan in this case.

Debtor's statements under penalty of perjury are inconsistent with the actual finances shown by her plan. Debtor states under penalty of perjury that "5) I estimate approximately $18,486 in general unsecured claims and estimate that I will satisfy approximately 0% of these claims through monthly payments of disposable income for the plan period." Declaration, p. 2:4–5; Dckt. 21.

On Schedule I, Debtor lists having gross income of $4,531.00 as an employee of the State of California. Dckt. 17 at 2. On Schedule J, Debtor states a rental expense of $800.00, which she is not currently paying but anticipates doing so in several months. *Id.* at 3. It appears that Debtor has no current housing expense, with the foreclosure on her residence pending.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on May 3, 2017. Dckt. 23.

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

The Trustee asserts that Debtor is $470.00 delinquent in plan payments, which represents one month of the $470.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Assuming that Debtor addresses the initial issues raised by the Trustee, there is the issue of whether the Plan actually proposes to properly pay her creditors. Debtor must make a good faith proposal for payment of creditor claims, including the unsecured claims. Merely using boilerplate language of "promising to pay 0.00%" to avoid any commitment is not proper. Even building in a modest $5,000.00 "cushion," Debtor shows a clear ability to "promise" a 90% dividend—assuming that her income and expense information is true and accurate, and not merely made up numbers to create the appearance that Debtor can perform a plan.

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

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

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

3. **13-24610-E-13** **DAX/TINA CHAVEZ** **CONTINUED MOTION TO RECONSIDER**
RMP-1 **Peter Macaluso** **4-6-17 [191]**

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.

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 6, 2017. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

The Motion to Reconsider 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 Reconsider is denied.

U.S. Bank National Association, as Indenture Trustee on Behalf of and with Respect to AJAX Mortgage Loan Trust 2016-B Mortgage-Backed Notes, Series 2016-B AJX Mortgage Trust I ("Creditor") moves for the court to consider an order entered on March 27, 2017, sustaining Dax Chavez and Tina Chavez's ("Debtor") Objection to Notice of Mortgage Payment Change. Creditor contends that:

A. The Notice of Mortgage Payment Change was based solely on an increase in property taxes, and the record shows that there was no increase in the monthly installment payment due to forced-place insurance premiums;

B. Debtor caused the issue with cancellation of the Ameriprise insurance policy by refusing to cooperate with Ameriprise or Creditor; and

C. Ameriprise agreed to reinstate the hazard insurance policy only if Debtor agreed to reinstatement because Creditor had no contractual privity to reinstate the policy on its own.

Creditor's Failure to Comply with Local Bankruptcy Rules

Creditor has filed a Motion combined with a points and authorities, a document this court refers to as a "Mothorities." The Local Bankruptcy Rules require that the motion (which must state with particularity the grounds upon which the relief is based, FED. R. BANKR. P. 9013) is separate from the points and authorities (which contains the citations, quotations, and arguments), which are separate from each declaration, which are separate from the exhibits (which may be combined into one exhibit document). LOCAL BANKR. R. 9004-1 and the Revised Guidelines for Preparation of Documents.

While counsel may feel that the rules should not be enforced because this matter is so simple, this court does not leave attorneys to guess when they need to comply with the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and Local Bankruptcy Rules. If this is so simple, then counsel could have easily and simply complied with the uniformly enforced Rules in this court. The Rules for filing pleadings exist for a very simple reason: to make the court's docket and electronic files reasonably accessible to the court, court staff, attorneys, and the public. Hiding declarations, points and authorities, and proofs of service in one pleading only works to obfuscate the record and make the judicial process less transparent. Further, it creates unnecessary work for the court and other parties in deconstructing a Frankensteinian pleading created by counsel stitching together a series of separate pleadings.

By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on April 19, 2017. Dckt. 196. The Trustee is unsure what new factor Creditor asks the court to consider, but the Trustee believes that the factors are that the payment change was based solely on increased property taxes and that any issue as to insurance was caused by Debtor.

The Trustee believes that Creditor is partly correct. While Creditor listed an entry for "Estimated Force-Placed Insurance/Pending Proof of Insurance" of $916.27, the Trustee notes that Creditor reduced both the Projected Escrow Account Balance and the Required Escrow Account Balance by $916.27. Additionally, the Trustee points to page 4 of the Notice where Creditor lists $10,778.31 for "Escrow Advances – Purchased – BSI" and then deposits it back at the end of the statement.

The Trustee notes that Creditor does not explain how a shortage of $591.41 collected over twelve months results in an increase of $336.75, rather than an increase of $49.29.

CREDITOR'S REPLY

Creditor filed a Reply on April 21, 2017. Dckt. 198. Creditor states that its Motion "does not introduce 'new factors,' but rather truly seeks reconsideration of the prior order." *Id.*, at 2.

Creditor disagrees with the Trustee's assertion that Creditor deposited $10,778.31 back into the escrow account. Creditor states that a loan was transferred from BSI Servicing to Gregory Funding on April 22, 2016. *See* Dckt. 194, at 9. Creditor explains that at the time of transfer, Debtor owed a negative balance of $10,778.31, but Creditor chose to write it off on December 20, 2016, because of concerns of conflicting with Federal Rule of Bankruptcy Procedure 3002.1(b) and (i), coupled with the failure of the prior servicer to timely file payment change notices. After the write off, the amount Debtor owed changed from a debit of $10,520.38 in favor of Creditor to a credit of $257.93 in favor of Debtor.

Creditor also disagrees with the Trustee's allegation that Creditor engaged in double entry reducing for each of the projected and required balances by $916.27. Creditor argues that $591.41 was the shortage calculated by an accounting system to calculate an amount for the Real Estate Settlement Procedures Act ("RESPA"). RESPA requires Creditor to maintain a "cushion" as part of the projected monthly escrow account balance, which 12 C.F.R. 1024.17(b) provides is equal to one-twelfth of the total annual escrow payments that the servicer reasonably anticipates paying from the account. Additionally, Creditor may add an amount to maintain a cushion of no greater than one-sixth of the estimated total annual payments from the account. Creditor argues that the RESPA cushion was clearly disclosed. *See* Dckt. 194, at 8.

Creditor argues that the increase in monthly escrow payment arises only from higher property taxes, higher insurance costs, and the RESPA shortage amount to the cushion caused by the other increases. Since the last payment change in June 2013, property taxes increased by $2,649.26, and the hazard insurance policy negotiated by Debtor increased $800.25. Creditor stresses that no part of the payment change was allocated to a higher insurance rate for forced-place insurance, and no portion was allocated to the $10,778.31 write off of Debtor's negative escrow balance previously owed to Creditor.

TRUSTEE'S AMENDED RESPONSE

The Trustee filed an Amended Response on April 24, 2017. Dckt. 200. The Trustee agrees that $10,778.31 is not at issue because he has already noted that the statement shows a net-zero charge to Debtor. The Trustee notes that Creditor does not apply the RESPA provisions to show a mathematical calculation of the cushion. The Trustee calculates that a one-sixth cushion could be higher than Creditor is seeking—$742.18 compared to the $685.40 Creditor seeks.

The Trustee states that he does not oppose the Motion.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on April 25, 2017. Dckt. 204. Debtor argues first that the Motion should be denied because it lacks a separate Memorandum of Points and Authorities pursuant to Local Bankruptcy Rule 9004-1(a). Next, Debtor argues that there are no clerical mistakes under Federal Rule of Civil Procedure 60(a) to support the Motion. As for the grounds for relief in Federal Rule of Civil Procedure 60(b), Debtor argues that Creditor has not explicitly asserted a ground listed in Federal Rule of Civil Procedure 60(b)(1)–(5), and as for subsection (6), Debtor argues that it should be used sparingly. *Id.*, at 2 (citing *Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1103 (9th Cir. 2006); *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009)).

Additionally, Debtor states that relief under Federal Rule of Civil Procedure 60(b)(6) requires a showing that the moving party was affected by "external, extraordinary circumstances" and was "faultless in the delay." *Id.*, at 3 (citing *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd.*, 507 U.S. 380, 393 (1993)). Debtor argues that Movant has not demonstrated any external, extraordinary circumstances beyond its control.

Debtor argues that there is no dispute that Creditor has a claim listed in Class 1, that the Trustee made timely payments during the period at issue, that Creditor had a fiduciary duty to make timely payments through the escrow account, that Creditor failed to timely pay the property insurance with Ameriprise, that Ameriprise cancelled the property insurance for non-payment, and that Debtor sustained damage to their property's roof during winter storms and are now unable to make an insurance claim.

Debtor asserts that Creditor's filing of this Motion is merely an attempt to relitigate the matter, and the cases cited by Creditor are inapplicable because they relate to default judgment. While Creditor argues that it has been prejudiced by sustaining the Objection to Notice of Mortgage Payment Change, Debtor argues that Creditor has not stated what kind of prejudice.

Debtor argues that they have incurred additional attorney's fees for defending this erroneous motion, and an award of fees by California Civil Code §§ 1717 and 2941 is appropriate. Debtor requests an award of $1,575.00 in fees for opposing a motion in which no error has been shown to the court.

CREDITOR'S RESPONSE

Creditor filed a Response on May 1, 2017. Dckt. 211. Creditor alleges that there is clear error caused by misinformation placed into the record by Debtor. Second, Creditor states that it did tender payment to Ameriprise, but Ameriprise did not cash the check that Creditor sent, and Creditor acted to reinstate the policy after it was cancelled.

Creditor again asserts that the payment change is based entirely on an increase in property taxes and insurance policies that Debtor negotiated. Creditor argues that Debtor could have made—and continue to make—an insurance claim for roof damage under the forced-place policy. Creditor also notes that the Trustee does not oppose the Motion.

Creditor places blame on Debtor for being delinquent $11,100.00 in plan payments to the Trustee, which has prevented him from making mortgage payments to Creditor. Finally, Creditor claims that Debtor has been unjustly enriched by improperly taking $916.27 in funds that Creditor paid to reinstate the Ameriprise insurance policy.

DEBTOR'S REPLY

Debtor filed a Reply on May 2, 2017. Dckt. 213. Debtor states that if the court finds that plan payments of $1,700.05 are inaccurate, then there is an additional $418.00 from unused Social Security balance that would allow Debtor to make payments of $1,993.16.

APPLICABLE LAW

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

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

FED. R. CIV. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199, 1203 (5th Cir. 1993). The court uses equitable principles when applying Rule 60(b). *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2857 (3d ed. 1998). The so-called catch-all provision, Federal Rule of Civil Procedure 60(b)(6), is "a grand reservoir of equitable power to do justice in a particular case." *Uni-Rty Corp. V. Guangdong Bldg., Inc.*, 571 F. App'x 62, 65 (2d Cir. 2014) (citation omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, relief under Rule 60(b)(6) may be granted in extraordinary circumstances. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 & n.11 (1988).

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

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

DISCUSSION

As an initial policy matter, the finality of judgments is an important legal and social interest. The standard for determining whether a Rule 60(b)(1) motion is filed within a reasonable time is a case-by-case analysis. The analysis considers "the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties." *Gravatt v. Paul Revere Life Ins. Co.*, 101 F. App'x 194, 196 (9th Cir. 2004) (citations omitted); *Sallie Mae Servicing, LP v. Williams (In re Williams)*, 287 B.R. 787, 793 (B.A.P. 9th Cir. 2002) (citation omitted).

Here, Creditor has informed the court that it "does not introduce 'new factors,' but rather truly seeks reconsideration of the prior order." Dckt. 198, at 2. Such a statement by Creditor seems to be an admission by Creditor that it is trying to relitigate the court's final ruling on the Objection to Notice of Mortgage Payment Change.

Creditor asserts that the mortgage payment increased solely because of an increase in property taxes and that the insurance policy was cancelled because Debtor refused to cooperate with Ameriprise.

Because the Creditor's contention of mistake is that the court is mistaken as to what Creditor did and asserted in opposing the Motion, the court begins with Creditor's Opposition itself. Dckt. 161. The Opposition states:

A. "9. On July 29, 2016, GF mailed a check for renewal of the subject policy to Ameriprise as check #55076. KB Decl. ¶ 13." Opposition ¶ 9.

B. "10. On October 24, 2016, GF employee Kim Barney ("KB") received an email from GF Accounts payable that the check was still outstanding for 87 days and never cashed. A true and correct copy of the e-mail from Gregory Funding Accounts payable is attached as Exhibit B to the concurrently filed Exhibits and incorporated herein by reference. KB Decl. ¶ 14." *Id.* ¶ 10.

C. "11. On October 24, 2016, KB made a telephone call and spoke to an Ameriprise representative and was informed that the subject insurance policy was cancelled for non Payment and could possibly be reinstated if the policy premium was paid and the Debtors called to initiate the reinstatement. KB Decl. ¶ 15." *Id.* ¶ 11.

D. "14. On November 16, 2016, Ameriprise cashed GF check #1059. A true and correct copy cancelled check #1059 is attached as Exhibit D to the concurrently filed Exhibits and incorporated herein by reference. KB Decl. ¶ 18." *Id.* ¶ 14.

E. "15. On November 16, 2016, Ameriprise sent a letter to the Debtors which states: 'Because there was an outstanding premium balance for coverage we provided prior to the policy's lapse date, we retained $0.00 of your recent payment and closed your account. The remaining $916.27 has been refunded, and a check for this amount is enclosed. A true and correct copy of the Ameriprise November 16, 2016 letter is

attached as Exhibit E to the concurrently filed Exhibits and incorporated herein by reference. KB Decl. ¶ 19. [no end to quote in the Opposition]" *Id.* ¶ 15.

F. "16. On November 22, 2016, Ameriprise sent another letter to Debtors which states: 'Thank you for your recent payment; however, we are returning this payment because we have already received a premium payment from you and your account is paid in full.' A true and correct copy of the Ameriprise November 22, 2016 letter is attached as Exhibit F to the concurrently filed Exhibits and incorporated herein by reference. KB Decl. ¶ 20" *Id.* ¶ 16.

G. "21. As a result of the cancellation of the Ameriprise policy, on December 21, 2016, GF sent written notice to Debtors regarding GF's intent to purchase force placed hazard insurance for the Property. The notice letter also provided the Debtors with notice of an opportunity to acquire non-force placed hazard insurance. A true and correct copy of the December 21, 2016 letter is attached as Exhibit G to the concurrently filed Exhibits and incorporated herein by reference. KB Decl. ¶ 24." *Id.* ¶ 21.

H. "22. As a result of the cancellation of the Ameriprise policy, on January 25, 2017, GF sent a second and final written notice to Debtors regarding GF's intent to purchase force placed hazard insurance for the Property. The second notice letter also provided the Debtors with notice of an opportunity to acquire non-force placed hazard insurance. A true and correct copy of the January 25, 2017 letter is attached as Exhibit H to the concurrently filed Exhibits and incorporated herein by reference. KB Decl. ¶ 25." *Id.* ¶ 22.

I. "A. The Deed of Trust Requires the Debtors to Maintain Hazard Insurance Coverage.

> Paragraph of the subject Deed of Trust provides in relevant part:
>
> 5. Property Insurance: Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods for which lender requires insurance.
> ……
> If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage at Lender's option and Borrower's expense. See, Proof of Claim, p. 12, ¶ 5."

Id., p. 5:15–25.

J. "As a result of the Debtors' actions, GF had no other option but to force place insurance coverage for the subject property with another insurance carrier." *Id.* p. 6:12–13.

K. "Therefore, to protect U.S. Bank's interest in the Property, GF was required to force place hazard insurance. If Debtors are able to reinstate their Ameriprise policy or obtain other insurance, GF will cancel the force placed hazard insurance coverage." *Id.* p. 6:25–27.

L. "For the foregoing reasons, Debtors' objection to the Notice of Mortgage Payment Change should be denied." *Id.* p. 7:1–2.

Opposition, Dckt. 161.

It must be remembered that the Objection to Notice of Mortgage Payment Change was expressly stated to be based on Creditor having obtained forced place insurance and increasing the mortgage payment to make Debtor pay for the expensive forced place insurance (Debtor having already paid for the insurance, the payment of the premium being the responsibility of Creditor).

The Opposition stated by Creditor is clearly: (1) Creditor received the monies to make the insurance payments from Debtor, (2) Creditor (having somehow failed to pay the insurance premium) has let the insurance company cancel the policy for failure to make the payment, (3) Creditor has obtained forced place insurance, and (4) Debtor is obligated to pay for the forced place insurance. The court understood, and still understands the Opposition filed by Creditor to be that **Debtor's Objection to the Mortgage Payment Change for the cost of Forced Place Insurance should be denied.**

Kim Barney, an employee of Gregory Funding LLC, the agent of Creditor, provides testimony under penalty of perjury in her declaration, which includes:

A. "24. As a result of the cancellation of the Ameriprise policy, **on December 21,2016, GF sent written notice to Debtors regarding GF's intent to purchase force placed hazard insurance for the Property**. The notice letter also provided the Debtors with notice of an opportunity to acquire non-force placed hazard insurance. A true and correct copy of the December 21, 2016 letter is attached as Exhibit G to the concurrently filed Exhibits and incorporated herein by reference." Declaration, ¶ 24 (emphasis added).

B. "25. As a result of the cancellation of the Ameriprise policy, on January 25, 2017, **GF sent a second and final written notice to Debtors regarding GF's intent to purchase force placed hazard insurance for the Property.** The second notice letter also provided the Debtors with notice of an opportunity to acquire non-force placed hazard insurance. A true and correct copy of the January 25, 2017 letter is attached as Exhibit H to the concurrently filed Exhibits and incorporated herein by reference." *Id.* ¶ 25 (emphasis added).

Declaration, Dckt. 162. The testimony provided by Creditor focuses on the forced place insurance, to which Debtor has filed the Objection to Notice of Mortgage Payment Change.

Ms. Barney's declaration confirms that Creditor obtained the forced place insurance, which in the Opposition Creditor argues that Debtor is obligated to pay, therefore the Objection to Notice of Mortgage Payment Change should be denied. This is all consistent with **Creditor Arguing that the Objection to Notice of Mortgage Payment Change**, which is based on the repayment of forced place insurance, **Should Be Denied Because Debtor Is Obligated to Pay for Forced Place Insurance**.

In Opposition to the Objection to Notice of Mortgage Payment Change, which objection was based on there being an increase for forced place insurance, Creditor provided the court with the following documents as Exhibits, Dckt. 164:

A. Exhibit A—Mortgage Notification

This document states that the Ameriprise insurance renewal was effective as of August 8, 2016, and did not expire until August 8, 2017. This notice is dated June 24, 2016.

B. Exhibit E—November 16, 2016 Letter from IDS Property Casualty Insurance Company

This letter is addressed to Debtor, stating that the insurance policy had lapsed due to non-payment (the payment being the responsibility of Creditor for which Debtor had paid all necessary monies to Creditor in advance).

C. Exhibit F—November 22, 2016 Letter from Ameriprise Auto & Home Insurance (signed by the same person who signed the letter from IDS Property Casualty Insurance Company).

In this letter to Debtor, Ameriprise confirms that "we have already received a premium payment from you and **your account is paid in full**." The letter concludes, "Thank you for allowing us to continue serving your insurance needs."

D. Exhibit G—A December 21, 2016 letter from Creditor (agent) to Debtor.

The letter states that the insurance has lapsed, and if it is not insured "WE PLAN TO BUY INSURANCE FOR THE PROPERTY. You must pay us for any period during which the insurance we buy is in effect but you don not have insurance" (emphasis in original). The letter further states that the agent sending the letter is "a debt collector, and any information you provide to us may be used to collect a debt."

E. Exhibit H—January 25, 2017 Letter from Creditor (agent to Debtor).

In this letter, Creditor states, "**BECAUSE HAZARD INSURANCE IS REQUIRED ON YOUR PROPERTY, WE PLAN TO BUY INSURANCE FOR YOUR PROPERTY**. You must pay us for any period during with the insurance we buy is in effect but you do not have insurance" (emphasis in original). Again, the agent is identified as a debt collector who will use the information to collect at debt.

F. February 24, 2017 Letter from Ameriprise to James Lewin, Esq., attorney for Creditor.

In this letter, Ameriprise states that the insurance policy was terminated because it did not receive by August 8, 2016, the premium payment that Creditor was obligated to pay and for which Debtor has funded in advance.

No mention is made of property taxes, no evidence concerning any property taxes were provided in response to the Objection to Notice of Mortgage Payment Change that was based on the forced place insurance. The Opposition and evidence presented by Creditor is that Creditor had the right to obtain forced place insurance and Debtor had to pay for the forced place insurance.

The Notice of Mortgage Payment Change states that there is an increase from $348.69 per month in the escrow payment to $685.00 per month. This is a 96.6% increase in the escrow payment—$336.56 per month. Exhibit A, Dckt. 141. On the attached Annual Escrow Account Disclosure Statement the increase is identified as a $636.16 escrow payment and a $49.28 shortage/surplus payment. *Id.*, p. 3 of Notice of Mortgage Payment Change.

On this projection for the coming year, for which the payments are computed, there is stated to be $916.27 of forced place insurance included in the amounts due to escrow. In the Notice of Mortgage Payment Change Creditor states:

> "Gregory Funding [Creditor's agent] analyzes your escrow account annually, in accordance with federal regulations, **to ensure we collect sufficient funds to pay escrow items when they are due.** The **escrow account projection below, is an estimate of activity in your escrow account during the coming year** based on payments anticipated to be made from your account."

Exhibit A, Dckt. 141 at 4 (emphasis added). The court reads this language to state that the charges and amounts below are what you are paying Creditor through the escrow payments Creditor is now increasing.

As discussed previously, due to Proposition 13 there is very little change permitted in real property taxes year to year. Clearly there can be no 96.6% increase in property taxes from year to year.

For the escrow payment history, Creditor states that it paid $916.27 to Ameriprise Insurance on July 29, 2016, and then again $916.27 to Ameriprise Insurance on November 3, 2016. It also states that he actual property taxes paid on December 9, 2016, was $3,358.77 (which is exactly one-half of the property tax amount, which in California is commonly paid in two installments—November and April).

The Escrow Account Projection for the coming year expressly states that there is a $917.27 payment for "Estimated Force - Placed Insurance/Pending Proof of Insurance." *Id.* Adding the property taxes and forced place insurance, the escrow amounts total $7,633.78,which when divided by 12 is $636.15 per month. The actual amount Debtor is told to pay is higher by $49.28 to cover a "shortage/surplus." Over a one-year period, this is $591.36.

Motion to Reconsider

In the present Motion to Reconsider, the grounds stated with particularity (FED. R. BANKR. P. 9013) spend the first twenty paragraphs citing grounds relating to the lack of insurance, the asserted failure of payment to Ameriprise, and the notice of forced place insurance. The Motion then melds into the points and authorities, which is supposed to be a separate document from the motion stating the grounds for relief. LOCAL BANKR. R. 9004-1 and the Revised Guidelines for Preparation of Documents.

In the Points and Authorities, Creditor starts with the section titled "MOVANT IS NOT CULPABLE FOR THE FORCE-PLACED INSURANCE." Motion/Points and Authorities, p. 5:21; Dckt. 191. Creditor begins with arguing that the issue is the expense for forced place insurance. Creditor argues that it is Debtor's "fault" that the insurance was cancelled and not reinstated. Creditor continues to argue that Debtor was told that the insurance was cancelled and failed to act. Creditor continues to ignore the last letter from Ameriprise stating that "we have already received a premium payment from you and your account is paid in full" and "Thank you for allowing us to continue serving your insurance needs." Exhibit F—November 22, 2016 Letter from Ameriprise Auto & Home Insurance; Dckt. 141.

Creditor then argues that it has a meritorious defense because property taxes have increased. Creditor now provides the court with copies of property tax records. Creditor argues that $10,778.31 has been written off to the Debtor's advantage on this account. Creditor argues that the "record," not clearly identifying whether Creditor is referencing the record created on the motion or the new record on this Motion to Reconsider "that none of the increased payment is attributable to an increase in insurance premiums stemming from "force-placed" insurance; the only increase to the insurance portion of the escrow account arose from an increase in the premium amount Debtors negotiated for the policies themselves." Points and Authorities in Motion to Reconsider, p. 8:8–11; Dckt. 191. For this proposition the court cites to the Joseph Declaration, ¶ 23.

This is the Katherine Joseph Declaration filed on April 6, 2017, in support of the Motion to Reconsider—not a declaration or evidence filed in opposition to the Objection to Notice of Mortgage Payment Change. Dckt. 193. This declaration provides a detailed discussion of property taxes and that in the past the Creditor and former loan servicer did not provide an escrow analysis and did not make adjustments for any increases in property taxes. This resulted in Creditor and its new loan servicer writing off prior year tax payments that Creditor and the former loan servicer paid.

Ms. Joseph continues testifying, stating under penalty of perjury that the insurance premium has increased by 23%, which is another reason why there has been a change in the mortgage payment. Further, that under the forced place insurance that Creditor has obtained (due to the existing insurance having been terminated on Creditor's watch), the actual premium is $1,200.85.

In the Motion/Points and Authorities, Creditor concludes that the court was in error, based on the opposition presented to the Objection to Notice of Mortgage Payment Change, in sustaining that Objection. However, the alleged error is not based on the opposition presented at that time, but all of the new facts and testimony that Creditor presents now in this Motion to Reconsider. Creditor offers no basis for stating that it has new evidence, new arguments, or anything now that did not exist when it filed the Opposition to Notice of Mortgage Payment Change. Rather, the present Motion/Points and Authorities reads

more like a second bite at the litigation apple, with Creditor realizing that the court did not find its prior opposition to have merit.

Most of Creditor's arguments continue to be "the Debtor's fault" that the insurance was cancelled and not reinstated. Creditor continues to ignore that the last written communication it provided concerning the insurance from the insurance company was a "your premiums are paid, we are happy to be providing you with insurance" letter dated November 22, 2016. Creditor's Exhibit F, Dckt. 164.

In addition to carefully reading the Opposition filed by Creditor to the Objection to Notice of Mortgage Payment Change (Dckt. 161), the court has run a word search of that document for the words: "tax," "taxes," "property tax," and "property taxes." None of those words or word phrases appear. However, the word "insurance" appears twenty-five times.

In the Declaration of Kim Barney filed in opposition to the Objection to Notice of Mortgage Payment Change, the words "tax," "taxes," "property tax," or "property taxes" are not used by the declarant. Dckt. 162. However, the word "insurance" is used nine times. In stating her qualifications to testify, Ms. Barney states that she is an "Insurance Analyst" for Creditor's agent.

A Mistake Has Occurred, But Not by the Court

Reading the Motion to Reconsider, the court believes that a mistake has occurred, but not by the court. It appears that Creditor and its agent have been "asleep at the switch" over the years as property taxes may have increased. It may well be that it is proper for the mortgage payment to increase due to property taxes, but such is not what was argued in opposition to the Objection to Notice of Mortgage Payment Change. Creditor's opposition to support the Notice of Mortgage Payment Change was based on the termination of the insurance and why Debtor was obligated to pay for the insurance that Creditor was "forced" (the purported termination having occurred while Creditor was obligated to pay the insurance premiums with the money paid to it by Debtor). Creditor did not once use the word "tax" or phrase using the word "tax" in its Opposition.

In trying to dig themselves out of this hole, Creditor and its agent have their attorneys advance new arguments painting Debtor as being the bad person. Creditor continues to argue that it was Debtor who "misinformed" the court. However, when given the opportunity to correct the Debtor's error (if one existed), Creditor never once explained how the Notice of Mortgage Payment Change related at all to any property taxes. All Creditor argued is why the Objection by Debtor to the increase in the payment for insurance was proper and it was all the Debtor's fault that forced place insurance was obtained.

Creditor has not shown that the court was in error in sustaining the Objection to Notice of Mortgage Payment Change based upon that Objection and Creditor's Opposition based on the purported termination of insurance and why the Debtor was: (1) responsible for the termination and (2) why Debtor was obligated to pay for the increased insurance payment. What Creditor argues now is entirely different than the opposition it chose to present. Conducting federal court litigation is not merely an exercise in a series of dry run trials and contested matters until each party finds the arguments with which it may win.

If Creditor can properly increase the mortgage due to the property taxes having increased over a number of years, then it may issue a new Notice of Mortgage Payment Change that accurately and correctly states that amount. If, as Creditor asserts, the prior increases in property taxes were ignored by Creditor and allowed to build to such a substantial amount that creditor elected to pay the tax amount rather than try and hit Debtor with a big arrearage to trigger a foreclosure, then Creditor shows that it has addressed that deficiency in its management of the loan.

To the extent Debtor owes Creditor the $916.27 for the double insurance payment refund (when Ameriprise confirmed that the premium was paid twice), Creditor may enforce that obligation, Debtor may voluntarily repay it in an act of good faith, or the parties may agree that it was to be paid out of the insurance proceeds for the damage to the property or offset against the obligation of any person for the lack of insurance to cover the loss.

For Debtor, if there is a claim to be made on the insurance for which Debtor has paid, the claim can be made. Debtor can also make the claim to Creditor and its agent—who were responsible for delivering the premium payment that Debtor had funded through escrow. Just as Creditor has to move forward and act on any adjustment to the mortgage payment going forward, Debtor needs to step up and assert its rights.

Using the new, formerly undisclosed tax information provided by Creditor in support of the Motion to Reconsider (Exhibit A, Dckt. 194), the annual Sacramento County Property Tax amount appears to be $4,401.48 (two installments of $2,200.74 each). Dividing $4,401.48 by twelve yields a monthly escrow payment of $366.79. When added to a $917.00 annual insurance bill, which is $76.42, it may be that the new and correct monthly escrow payment is $449.21. That is well less than the $785.44 stated in the Notice of Mortgage Payment Changed filed as Exhibit B in support of this Motion to Reconsider. Dckt. 194 at 10. In that Exhibit the property tax amount is shown to be $6717.54—52.6% higher than Creditor reports is stated by the County of Sacramento.

Award of Attorneys' Fees

In bringing this Motion to Reconsider, Creditor has forced Debtor to incur an additional $1,575.00 in legal fees to defend the prior order. As the court determined in ruling on the Objection to Notice of Mortgage Payment Change, the prevailing party in this (now ongoing) dispute is entitled to attorneys' fees. Civil Minutes, Dckt. 181. The parties continue to argue under the same contract that has an attorneys' fees provision. In retrospect, Creditor may well realize that rather than trying to continue in its "blame the Debtor" game, moving forward stops the bleeding and actually advances Creditor's interests. Creditor inadequately opposed the Objection to Notice of Mortgage Payment Change, if what it now asserts as to property taxes is correct, and has to deal with that "strategy decision."

The court awards Debtor $1,575.00 in legal fees and costs relating to this Motion to Reconsider.

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

The Motion to Reconsider filed by Creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Reconsider is denied.

IT IS FURTHER ORDERED that Dax Ruandi Chavez and Tina Marie Chavez, jointly, are awarded $1,575.00 in legal fees against U.S. Bank, National Association.

This Order constitutes a judgment (FED. R. CIV. P. 54(a) and FED. R. BANKR. P. 7054, 9014) and may be enforced pursuant to the Federal Rules of Civil Procedure and Federal Rule of Bankruptcy Procedure (including FED. R. CIV. P. 69 and FED. R. BANKR. P. 7069, 9014).

4. 13-24610-E-13 PGM-7 | **DAX/TINA CHAVEZ** **Peter Macaluso** | **CONTINUED MOTION TO MODIFY PLAN** **3-27-17 [183]**

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, Chapter 13 Trustee, creditors, and Office of the United States Trustee on March 27, 2017. By the court's calculation, 43 days' notice was provided. 35 days' notice is required.

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 granted.

Dax Chavez and Tina Chavez ("Debtor") seek confirmation of the Modified Plan because business slowed down for several months, and they did not have backup funds. Dckt. 186. The Modified Plan proposes that $11,000.00 in missed payments be reamortized through the Modified Plan by increasing the plan payment to $3,700.00 beginning in April 2017 for the remaining thirteen months of the plan term, and that unsecured claims receive a dividend of 5%. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

CREDITOR'S OPPOSITION

U.S. Bank National Association, as Indenture Trustee on Behalf of and with Respect to AJAX Mortgage Loan Trust 2016-B, Mortgage-Backed Notes, Series 2016-B AJX Mortgage Trust I, Creditor with a secured claim, filed an Opposition on April 24, 2017. Dckt. 202. Creditor argues that the Plan has not been proposed in good faith pursuant to 11 U.S.C. § 1325(a)(3) because it once again asks for forgiveness of missed payments and because it improperly modifies a claim secured only by an interest in Debtor's principal residence, and the Plan is not feasible pursuant to 11 U.S.C. § 1325(a)(6) because Debtor's projected business income is too speculative.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on April 25, 2017. Dckt. 208. The Trustee notes that Debtor is current under the Plan and that the Plan is feasible with the current ongoing monthly mortgage amount of $1,700.05, but that amount depends on the court's ruling with a related Motion to Reconsider Order Sustaining Objection to Notice of Mortgage Payment Change. The Trustee thinks that Debtor appears able to increase the plan payment to pay a modestly-increased mortgage payment.

DEBTOR'S REPLY

Debtor filed a Reply on May 2, 2017. Dckt. 213. Debtor argues that the Plan would be feasible at $1,700.05 or at $1,993.16 depending on what the monthly mortgage payment is determined to be.

Second, Debtor argues that "forgiven" applies only to amounts due within the previous plan that are in default, with such defaulted payments to be paid before the completion of the end of the modified plan.

MAY 9, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on June 13, 2017, to be heard in conjunction with a motion to reconsider. Dckt. 217.

DISCUSSION

No further pleadings have been filed since the May 9, 2017 hearing.

The court has denied Creditor's Motion to Reconsider, and the mortgage payment has not changed past the $1,700.05 that the Trustee notes Debtor is current on paying. 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 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 27, 2017, is confirmed. Debtor's Counsel 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.

5. **16-28316-E-13** **SHARRY STEVENS-GOREE** **MOTION TO CONFIRM PLAN**
FF-4 **Gary Fraley** **5-1-17 [49]**

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 May 1, 2017. By the court's calculation, 43 days' notice was provided. 42 days' notice is required.

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

The Motion to Confirm the Amended Plan is denied.

Sharry Stevens-Goree ("Debtor") seeks confirmation of the Amended Plan because Debtor asserts that the protection payment demanded by creditor Citizen's Equity First Credit Union violates RESPA in that the escrow amounts that are demanded by the creditor exceed the amounts necessary to pay the taxes on the property the creditor is secured for by more than three times. Dckt. 49.

The Amended Plan includes an adequate protection payment of $1,551.48, which is less than the $2,095.78 protection payment demanded by Citizen's Equity First Credit Union. The Amended Plan specifies that Debtor will pay an average of $4,595.76 for two months, $0.00 for one month, and $3,655.00 for fifty-seven months, for a total of sixty months with 3% paid to the Debtor's general unsecured claims. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on June 13, 2017. Dckt. 57.

The Trustee asserts that the Plan relies on a pending adversary proceeding against Citizen's Equity First Credit Union. The Trustee further asserts that the Plan relies on the court valuing the secured claim of Santander Consumer USA. The Trustee argues that Debtor has failed to file a Motion to Value the Secured Claim of Santander Consumer USA, however. Without the court valuing the claim, the Trustee argues the Plan is not feasible. 11 U.S.C. § 1325(a)(6).

The Trustee asserts that the Plan relies on the court avoiding a judicial lien as to "Citibank." The Trustee argues that Debtor has failed to file that motion.

The Trustee asserts that the Plan makes a student loan provision for payment to the U.S. Department of Education but that claims for student loans have also been filed by Navient Solutions. The Trustee asserts that it is not clear whether the claims of Navient Solutions are affected by the additional student loan plan provision. The Trustee argues that if the additional plan provision does not affect the claims of Navient Solutions, then the Plan appears to unfairly discriminate against those unsecured claims. *See* 11 U.S.C. § 1322(b)(1).

Debtor's Amended Schedule J, filed on May 1, 2017, lists $3,599.53 in monthly net income, while the Plan provides for a $3,680.00 monthly payment. The Trustee argues that Debtor's budget does not support the Plan, making the Plan infeasible. *See* 11 U.S.C. § 1325(a)(6).

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

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

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

6. **13-30919-E-13** **BUN AUYEUNG AND SOO TSE** **MOTION TO CONFIRM PLAN**
PGM-9 **Peter Macalsuo** **4-21-17 [314]**

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, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 21, 2017. By the court's calculation, 53 days' notice was provided. 42 days' notice is required.

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

The Motion to Confirm the Amended Plan is granted.

Bun Auyeung and Soo Han Tse ("Debtor") seek confirmation of the Amended Plan because Debtor asserts that they have paid all installment fees, charges, or amounts required by the Court. Dckt. 314. The Amended Plan changes treatment to the secured claims of Barton Christensen and Paula Christensen ("Creditor") from Class 2 to Class 4 pursuant to the terms of the Motion to Compromise. Dckt. 309. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

Debtor asserts that on March 24, 2017, a Settlement Agreement was reached regarding the Judicial Lien of Creditor, and a Motion to Compromise was set for hearing for June 6, 2017.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on May 25, 2017. Dckt. 325. The Trustee argues that the Plan's feasibility cannot be determined until after the pending Motion to Compromise, set for hearing on June 6, 2017. That Motion was granted at the June 6, 2017 hearing.

The Trustee further argues that the plan may not have been proposed in good faith. By the Trustee's calculations, Debtor's Plan calls for total payments of $17,200.00, leaving a refund of approximately $10,744.00 to Debtor. The Trustee opposes the possibility of refunding money paid to the Plan to Debtor where there is a secured claimant who has not and is not being paid by the Plan. The Trustee would not oppose the Plan if the order confirming it provided that any funds remaining after payment of attorney's fees be paid to the secured claim of Creditor.

DEBTOR'S REPLY

Debtor filed a Reply on May 5, 2017. Dckt. 333. Debtor argues that the lump sum payment of $13,000.00 provided by Florence Auyeung, Debtor's daughter, was a gift in support of the Plan. Debtor argues that the Trustee has, in the past, not considered this payment proper, and that these funds should be refunded so that Debtor may return them.

Debtor also argues that all claims are satisfied under the proposed the Plan, specifically the claim of Creditor, because Debtor settled the claim with them. Debtor believes that any overpayment should be refunded to Debtor.

DISCUSSION

The court approved the compromise with Creditor at the June 6, 2017 hearing. The court's summary of some of the terms that are relevant to this ruling includes:

A. The principal amount of Creditor's judgment lien encumbering Debtor's real property and its improvements is $140,000.00.

B. Interest shall accrue at 10% annually after April 1, 2017, until the judgment lien is paid fully or satisfied by a compromise.

C. The judgment lien shall remain enforceable against Debtor's property until it is paid in full, including all interest, or until compromised or reconveyed or released, even though Debtor is not personally liable for paying the judgment lien and interest.

D. Nothing in the settlement agreement prevents Debtor from satisfying the judgment lien by paying the then-principal balance plus interest outstanding.

Settlement Agreement; Exhibit A, Dckt. 311.

The amount owed on the judgment lien has not gone away by the compromise between Debtor and Creditor. However, under the Settlement Creditor has agreed to forebear from enforcing any rights and there being an obligation for Debtor to make any payments.

Debtor claims that "any over-payments should be refunded as required by law." Dckt. 333.

Confirmation of Plan

This is the Debtor's second bankruptcy case, with Debtor's use of the bankruptcy process dating back to the July 21, 2009 filing of bankruptcy case 09-35065. That case was converted to one under Chapter 7 on February 25, 2013, and Debtor was granted her discharge in that case. The current case was filed on August 19, 2013. Debtor has not confirmed a Chapter 13 Plan in this case, with there having been an appeal of the court's July 28, 2014 order denying confirmation and July 28, 2014 order denying motion to avoid the lien of Christensen. Those rulings were affirmed on appeal by the Bankruptcy Appellate Panel, with further appeals pending before the Ninth Circuit Court of Appeals when in 2017 Debtor and Christensen reached a comprehensive settlement that not only resolved their disputes but made confirmation of a plan possible.

Though highly unusual that a bankruptcy case could be pending for four years without a confirmed plan, Debtor having obtained her discharge in the first case, there are relatively few creditors, with only Christensen being the Debtor's financial nemesis. No other creditors pushed for dismissal and in light of the facts, the Chapter 13 Trustee let the case percolate, not taking the side of one party or the other as they pursued the appeals. Though letting the case percolate, the Chapter 13 Trustee has incurred all of the costs and expenses of having to administer this case for four years.

Other than Christensen, the only proofs of claim filed were:

A. Ocwen Loan Servicing, LLC.....$237,632.27.....Secured
B. County of Sacramento Utilities..... $798.97.....Secured
C. County of Sacramento Prop. Taxes..... $1,683.60.....Secured (Amended)
D. County of Sacramento..... $2,214.17.....Secured and Unsecured

Christensen's proof of claim was filed as a $140,000 secured claim.

The proposed Amended Chapter 13 Plan provides for a $13,000.00 lump sum payment (which has previously been funded as a gift by Debtor's daughter) and $100.00 per month by Debtor (which is made by a gift subsidy paid monthly by Debtor's daughter). The Term of the Plan is forty-two months.

There are no Class 1 claims to be paid.

For Class 2, Sacramento County real property taxes are to be paid in one monthly dividend of $1,683.60, plus 18% interest.

For the Class 3 Claim, Debtor surrenders the collateral identified as 5851 34th Avenue, to allow creditors OneWest Bank, Ocwen, and Sacramento County to exercise their lien rights.

For Class 4, it is provided that the payment of the Christensen claim (which is the subject of the stipulation approved by the court) will be paid outside of the Chapter 13 Plan.

There are no Class 5 (priority) or Class 6 (special treatment) unsecured claims. For Class 7 general unsecured claims, there will be a 100% dividend. Amended Plan, Dckt. 317.

The prior plan that was denied confirmation proposed a 0.00% dividend on a projected $157,547.31 in unsecured claims. Dckt. 148. The unsecured claims were the amount projected to be owed after an 11 U.S.C. § 506(a) valuation. The prior plan was funded with the $13,000.00 gift from Debtor's daughter and a $100.00 per month plan payment.

The Trustee reports that Debtor has funded the Plan with $17,200.00, of which the Trustee is currently holding $16,427.70. Opposition, Dckt. 325. This money paid into the Plan that the Trustee is having to administer is sufficient to pay the claims in this case, the Chapter 13 Trustee's fees, and the approved fees of counsel for Debtor. To the extent that any surplus remains after the Trustee has paid all of the administrative expenses, Chapter 13 Trustee fees, and claims, such surplus will be distributed to the Debtor as provided by the Bankruptcy Code.

While this is an outlier Chapter 13 case, and application of the Bankruptcy Code, under the strange and unique facts of this case and the peccadilloes of the parties, it has brought decades of litigation in both the federal and state courts to an end (hopefully).

The Amended Plan complies with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Amended Chapter 13 Plan filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Debtor's Amended Chapter 13 Plan filed on April 21, 2017, is confirmed. Debtor's Counsel 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. **16-21719-E-13** **JANEE FARRIS**
PSB-3 **Pauldeep Bains**

MOTION FOR COMPENSATION FOR PAULDEEP BAINS, DEBTOR'S ATTORNEY
5-15-17 [64]

Final Ruling: No appearance at the June 13, 2017 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, creditors, parties requesting special notice, and Office of the United States Trustee on May 15, 2017. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

Pauldeep Bains of Bains Legal, PC, the Attorney for Janee 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 July 1, 2016, through May 12, 2017. The order of the court approving substitution of Applicant was entered on March 8, 2017. Dckt. 33. Applicant requests fees in the amount of $3,300.00.

TRUSTEE'S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a Non-Opposition on May 23, 2017. Dckt. 69.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

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

APPLICABLE LAW

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 demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. An attorney must exercise good billing judgment with regard to the services provided because the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

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

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including substantial and unanticipated post-confirmation work related to case administration, drafting two Motions to Modify, and preparing the instant Motion for Compensation. The court finds the services were beneficial to the Client and bankruptcy estate and were reasonable.

"No-Look" Fees

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

> (a) Compensation. Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c). The failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall signify that the attorney has opted out of Subpart (c). When there is an objection or when an attorney opts out, compensation shall be determined in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017, and any other applicable authority."
> . . .
> (c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.
>
> (1) The maximum fee that may be charged is $4,000.00 in nonbusiness cases, and $6,000.00 in business cases.
>
> (2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.
>
> (3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor's attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6).

The Order Confirming the Chapter 13 Plan expressly provides that Applicant is allowed $4,000.00 in attorneys' fees, the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Dckt. 5. Applicant prepared the order confirming the Plan.

Lodestar Analysis

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

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

FEES REQUESTED

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

Case Administration: Applicant spent 4.5 hours in this category. Applicant engaged in email and phone communications related to the substitution of the attorney and the filing of said document, uploading documents to the client file, and providing the client with orders of the court.

Motion to Modify PSB-1: Applicant spent 6.8 hours in this category. Applicant communicated with the Debtor concerning Debtor's current income and the modification process. Applicant drafted a modified plan and updated budget, and Applicant filed said Motion.

Motion to Modify PSB-2: Applicant spent 7.3 hours in this category. Applicant communicated with the Debtor concerning Debtor's current income, the modification process, and surrendering the current lease. Applicant drafted a modified plan and updated budget, and Applicant filed said Motion. Applicant drafted a reply to the Chapter 13 Trustee's objection.

Motion for Compensation PSB-3: Applicant spent 3 hours in this category. Applicant prepared the instant Motion for Additional Attorney Fees.

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, attorney	11.0	$300.00	$3,300.00
	10.6	$0.00	$0.00
Total Fees for Period of Application			$3,300.00

FEES ALLOWED

The unique facts surrounding the case, including Debtor's loss of employment and the incarceration of Debtor's ex-husband who was making monthly car payments prior to his arrest, 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 $3,300.00 is approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the 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 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees $3,300.00

pursuant to this Application as 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 for Chapter 13 Debtor having been

presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that 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 Chapter 13 Debtor

Fees in the amount of $3,300.00

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 13 Debtor.

IT IS FURTHER ORDERED that the 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.

8. **17-22220-E-13** **KHAULA NIXON** **OBJECTION TO DISCHARGE BY**
DPC-1 **Mohammad Mokarram** **DAVID P. CUSICK**
4-21-17 [13]

Final Ruling: No appearance at the June 13, 2017 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, and Office of the United States Trustee on April 21, 2017. By the court's calculation, 53 days' notice was provided. 28 days' notice is required.

The Objection to Discharge has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). 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 Objection to Discharge is sustained.

David Cusick, the Chapter 13 Trustee ("Objector"), filed the instant Objection to Debtor's Discharge on April 21, 2017. Dckt. 13.

Objector argues that Khaula Nixon ("Debtor") is not entitled to a discharge in the instant bankruptcy case because Debtor previously received a discharge in a Chapter 7 case.

Debtor filed a Chapter 7 bankruptcy case on December 2, 2013. Case No. 13-35277. Debtor received a discharge on April 7, 2014. Case No. 13-35277, Dckt. 16.

The instant case was filed under Chapter 13 on April 3, 2017.

11 U.S.C. § 1328(f) provides that a court shall not grant a discharge if a debtor has received a discharge "in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter." 11 U.S.C. § 1328(f)(1).

Here, Debtor received a discharge under 11 U.S.C. § 727 on April 7, 2014, which is less than four years preceding the date of the filing of the instant case. Case No. 13-35277, Dckt. 16. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), Debtor is not eligible for a discharge in the instant case.

Therefore, the Objection is sustained . Upon successful completion of the instant case (Case No. 17-22220), the case shall be closed without the entry of a discharge, and Debtor shall receive no discharge in the instant case.

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 Discharge filed by David Cusick, the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to Discharge is sustained, and upon successful completion of the instant case, Case No. 17-22220, the case shall be closed without the entry of a discharge.

9. 17-22224-E-13 DPC-1 | **LARRY/ELIZABETH RIZZIO** **Pro Se** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 5-17-17 [17]**

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 (*pro se*) on May 17, 2017. By the court's calculation, 27 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 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection. At the hearing ----------.

The Objection to Confirmation of Plan is sustained.

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

A. Debtor failed to appear at the First Meeting of Creditors on May 11, 2017.

B. The Plan will not complete within sixty months.

C. Debtor has failed to pay one or more installments of the court's filing fees.

DISCUSSION

The Trustee's objections are well-taken. Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. To attempt to confirm a plan while failing to appear and be questioned by the Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to the Trustee, the Plan will complete in ninety-one months due to a discrepancy in Debtor's Plan that lists a Class 5 priority debt to Internal Revenue Service for $1,798.00, whereas the Service has filed a Proof of Claim for $12,984.63 in priority unsecured debt and $14,467.50 in general unsecured debt. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d). That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

As of the date of this hearing, June 13, 2017, Debtor has paid all installments of the Debtor's filing fees that are currently due, which resolves that portion of the Trustee's Objection.

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

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

10. 17-21525-E-13 CHERI GOETZ
EWV-116 Eric Vandermey

CONTINUED MOTION TO VALUE COLLATERAL OF TRINITY FINANCIAL SERVICES, LLC
3-26-17 [14]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, and Office of the United States Trustee on March 26, 2017. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

The Motion to Value Secured Claim has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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 Secured Claim of Trinity Financial Services, LLC ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $0.00.

The Motion to Value filed by Cheri Goetz ("Debtor") to value the secured claim of Trinity Financial Services, LLC ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 374 Aaron Circle, Vacaville, California ("Property"). Debtor seeks to value the Property at a fair market value of $317,000.00 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).

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).

NO PROOF OF CLAIM FILED

No Proof of Claim has been filed by a creditor that appears to be for the claim to be valued.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on April 11, 2017. Dckt. 20. The Trustee states that Creditor has not filed a claim, and the Trustee has no basis to oppose the motion.

CREDITOR'S OPPOSITION

Creditor filed an Opposition on April 11, 2017. Dckt 23. Creditor asserts that the initial assessment value of the Property is $340,000.00. Creditor requests additional time to retain an appraiser expert to inspect and report the property value. Creditor believes that it is not wholly unsecured and is entitled to full rights as a lienholder on the Property.

Creditor requests an initial determination at the first hearing on this matter as to the date of valuation, as there is an alleged split of authority in the Ninth Circuit regarding whether the date of confirmation or the date of filing is the proper date for value in a Chapter 13 motion to value. Creditor's position is that the date of confirmation is the date of valuation, and would brief the issue upon request.

However, Creditor has not provided any admissible evidence of value in favor of any of the positions it requests in opposition.

APRIL 25, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on June 13, 2017, to allow Creditor to obtain an appraisal and share a copy of the appraisal with Debtor if Creditor disputes the asserted value of the Property. Dckt. 28. Opposition pleadings were set for May 30, 2017, and replies, if any, were due on June 7, 2017.

DISCUSSION

No additional pleadings have been filed with this matter, and Creditor has not filed a proof of claim. The court's docket shows that a hearing has been noticed for Creditor's Objection to Confirmation of the Plan, but no actual Objection or supporting evidence has been filed to support the noticed hearing. Dckt. 43.

The Capital One 360 First deed of trust secures a claim with a balance of approximately $328,000.00, based on Debtor's statement under penalty of perjury on Schedule D. Creditor's Second deed of trust secures a claim with a balance of approximately $71,339.00. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized if Debtor's testimony of value is uncontested, and no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value Secured Claim filed by Cheri Goetz ("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 Trinity Financial Services, LLC, secured by a second in priority deed of trust recorded against the real property commonly known as 374 Aaron Circle, Vacaville, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $317,000.00 and is encumbered by a senior lien securing a claim in the amount of $328,000.00, which exceeds the value of the Property that is subject to Creditor's lien.

11. 15-22239-E-13 ROBERT/SANDRA RYAN MOTION TO MODIFY PLAN
MJD-1 Scott Sagaria 5-9-17 [36]

Final Ruling: No appearance at the June 13, 2017 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 May 9, 2017. By the court's calculation, 35 days' notice was provided. 35 days' notice is required.

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. Debtor has filed evidence in support of confirmation. The Chapter 13 Trustee filed a Response indicating non-opposition on May 24, 2017. Dckt. 44. The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

RULING

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 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 May 9, 2017, is confirmed. Debtor's Counsel 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.

12. 17-21345-E-13 DPC-1 | **WILLIAM MCDANIELS JR. Richard Jare** | **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 4-19-17 [29]**

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 and Debtor's Attorney on April 19, 2017. 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 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further.

The matter was set for final hearing on June 13, 2017.

The hearing on the Objection to Confirmation of Plan is sustained, and the Plan is not confirmed.

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

A. Tax returns have not been filed;

B. Tax returns have not been provided;

C. The Plan may not be proposed in good faith;

D. William McDaniels, Sr. ("Debtor") may not be able to make plan payments; and

E. Debtor has not provided all disposable income.

MAY 9, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on June 13, 2017, and ordered Debtor file supplemental pleadings by May 26, 2017. Dckt. 36. A reply from the Trustee, if any, was due by June 2, 2017.

DEBTOR'S OPPOSITION

Debtor filed a late Opposition on May 29, 2017, because Debtor spent the weekend moving into an apartment. Dckt. 40. The court grants leave to file an untimely pleadings, and any response thereto. Debtor expects the IRS to amend its claim to state that it no longer asserts that the 2015 tax return has not been filed.

Debtor argues that the non-filing spouse's Schedule I income has been presented and that when a car loan is paid off, she will want to purchase a new vehicle.

Regarding the wrong case number on some documents, Debtor's Attorney reports that he uses Corel WordPerfect, and he argues that it is defective in not always copying and pasting accurately.

Debtor argues that more evidence is needed to prove good faith; specifically, Debtor needs overtime pay stubs for mid-June 2017 and mid-July 2017. Nevertheless, Debtor argues that confirming the Plan now is fair with a payment increase from $800.00 to $1,250.00 next month.

Debtor argues that his 2015 tax return was filed on April 16, 2016, and that his tax preparer assured him on May 8, 2017, that it was filed.

Debtor states that he did not have any bank accounts when the case was filed.

Debtor also states that his overtime assignments will be cut to $800.00 per month in the future.

TRUSTEE'S REPLY

The Trustee filed a Reply on June 5, 2017. Dckt. 47. The Trustee states that he received a copy of Debtor's 2015 federal and state tax returns on April 5, 2017, but he notes that the IRS has not amended its claim to reflect that the 2015 return was filed. The Trustee is not sure whether Debtor's statement—allegedly relayed from his tax preparer—that filing issue was cleared up with the IRS on May 8, 2017, is sufficient.

The Trustee agrees that projecting Debtor's overtime may not be reasonably possible until after the June and July 2017 paystubs. The Trustee believes that Debtor can afford the increased $1,250.00 plan payment and recommends that the court confirm the Plan with the increased payment.

As side notes, the Trustee disagrees that Schedule I is normally prepared without reviewing paystubs of a non-filing spouse and disagrees that a car is normally exhausted by the time a loan against it is paid. The Trustee accepts Debtor's explanation of how the wrong case number was used, but the Trustee disagrees that Corel WordPerfect being defective is common knowledge, and he states that such a possible defect does not excuse Debtor and Debtor's Attorney from reviewing documents.

DISCUSSION

Debtor has provided copies of tax returns to the Trustee and has provided income information for Debtor's non-filing spouse. Nevertheless, the Trustee's remaining objections are well-taken.

According to a claim filed by the Internal Revenue Service, the federal income tax return for the 2015 tax year has not been filed still. Filing of the return is required. 11 U.S.C. § 1308. Debtor has presented copies of the tax return to the Trustee, but no admissible evidence has been presented to the court that the tax returns were actually filed.

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

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

The Plan proposes to pay a zero percent dividend to unsecured claims, which total $132,000.00, though Debtor's projected disposable income under 11 U.S.C. § 1325(b)(2) totals $14,927.88. Thus, the court may not approve the Plan.

The court also finds the "excuses" and "explanations" offered by Debtor to not reflect a debtor prosecuting the bankruptcy case and plan in good faith. Merely because a debtor may prefer driving a new car, instead of one several years old after the car loan is paid off, such is not a good reason for not paying her creditors. In effect, Debtor states that his non-debtor wants to use the bankruptcy process to maintain her "Cadillac lifestyle" buying new cars (stated in the plural, indicating that one wife wants to use money to purchase multiple cars rather than Debtor making any provision for a dividend to creditors holding general unsecured claims) while making creditors enjoy the "Yugo experience" (for those readers who are old enough to appreciate the "Yugo" reference). The Debtor's Reply states that his wife's car is a 2014 Ford Fusion. This appears to be the "old car" that wife will feel a need to replace sometime during the next several years—as soon as it is paid off to avoid Debtor making anything more than a 0.00% dividend over five years to creditors holding general unsecured claims.

Going further, counsel explaining that his "word processing program ate the case number" is not credible. It is not common knowledge that the Corel program does not copy and paste text accurately. Rather than owning up to a human error, Debtor has had her counsel "blame the computer." If such was a "common problem" and "well known," especially to Debtor's counsel, then Debtor's counsel can answer why he continues to use a program that he admits is defective. This does not sound in good faith, but an excuse as part of a scheme for counsel and Debtor to bring this case in bad faith.

Debtor's prior Chapter 13 case, in which he was represented by the same counsel as in this case, was filed on February 18, 2014. 14-21464. That case was dismissed on January 24, 2017. 14-21464; Order, Dckt. 81.

Additionally, contending that Schedule I is completed without the attorney having income documentation does not comport with the conduct of counsel who is making sure that accurate information is provided in Schedules being filed under penalty of perjury by his client. The "whatever the client said is what goes into the schedules" strategy is not consistent with the good faith filing and prosecution of a bankruptcy case.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the 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 to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

13. **17-22646-E-13** **JAYWAUN CLARK** **OBJECTION TO DISCHARGE BY DAVID P. CUSICK**
DPC-1 **Kristy Hernandez** **5-16-17 [21]**

Final Ruling: No appearance at the June 13, 2017 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, and Office of the United States Trustee on May 16, 2017. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Objection to Discharge has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). 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 Objection to Discharge is sustained.

David Cusick, the Chapter 13 Trustee ("Objector"), filed the instant Objection to Debtor's Discharge on May 16, 2017. Dckt. 21.

Objector argues that Jaywaun Clark ("Debtor") is not entitled to a discharge in the instant bankruptcy case because Debtor previously received a discharge in a Chapter 7 case.

Debtor filed a Chapter 7 bankruptcy case on March 31, 2014. Case No. 14-23300. Debtor received a discharge on July 8, 2014. Case No. 14-23300, Dckt. 16.

The instant case was filed under Chapter 13 on April 20, 2017.

11 U.S.C. § 1328(f) provides that a court shall not grant a discharge if a debtor has received a discharge "in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter." 11 U.S.C. § 1328(f)(1).

Here, Debtor received a discharge under 11 U.S.C. § 727 on July 8, 2014, which is less than four years preceding the date of the filing of the instant case. Case No. 14-23300 Dckt. 16. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), Debtor is not eligible for a discharge in the instant case.

Therefore, the Objection is sustained. Upon successful completion of the instant case (Case No. 17-22646), the case shall be closed without the entry of a discharge, and Debtor shall receive no discharge in the instant case.

RULING

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 Discharge filed by David Cusick, the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to Discharge is sustained, and upon successful completion of the instant case, Case No. 17-22646, the case shall be closed without the entry of a discharge.

14. **17-22150-E-13** **JAMES SMITH** **MOTION FOR WAIVER OF DISCHARGE**
DPC-1 **Matthew DeCaminada** **4-21-17 [16]**

Final Ruling: No appearance at the June 13, 2017 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, and Office of the United States Trustee on April 21, 2017. By the court's calculation, 53 days' notice was provided. 28 days' notice is required.

The Objection to Discharge has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). 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 Objection to Discharge is sustained.

David Cusick, the Chapter 13 Trustee ("Objector"), filed the instant Objection to Debtor's Discharge on April 21, 2017. Dckt. 16.

Objector argues that James Smith ("Debtor") is not entitled to a discharge in the instant bankruptcy case because Debtor previously received a discharge in a Chapter 7 case.

Debtor filed a Chapter 7 bankruptcy case on July 24, 2014. Case No. 14-27560. Debtor received a discharge on November 17, 2014. Case No. 14-27560, Dckt. 24.

The instant case was filed under Chapter 13 on March 31, 2017.

11 U.S.C. § 1328(f) provides that a court shall not grant a discharge if a debtor has received a discharge "in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter." 11 U.S.C. § 1328(f)(1).

Here, Debtor received a discharge under 11 U.S.C. § 727 on November 17, 2014, which is less than four years preceding the date of the filing of the instant case. Case No. 14-27560, Dckt. 24. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), Debtor is not eligible for a discharge in the instant case.

The Objection is sustained. Upon successful completion of the instant case (Case No. 17-22150), the case shall be closed without the entry of a discharge, and Debtor shall receive no discharge in the instant case.

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 Discharge filed by David Cusick, the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to Discharge is sustained, and upon successful completion of the instant case, Case No. 17-22150, the case shall be closed without the entry of a discharge.

15. 17-22150-E-13 DPC-2 | **JAMES SMITH** **Matthew DeCaminada** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **5-17-17 [22]**

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

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 May 17, 2017. By the court's calculation, 27 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 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection. At the hearing ----------.

The Objection to Confirmation of Plan is sustained.

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

A. James Smith ("Debtor") failed to appear and be examined at the first meeting of Creditors held on May 11, 2017.

B. Debtor failed to provide the Trustee with a tax transcript or a copy of the Federal Income Tax Return with attachments for the most recent pre-petition tax year for which a return was required, or a written statement that no such documentation exists.

C. Debtor failed to provide the Trustee with sixty days of employer payment advices received prior to the filing of petition.

D. Debtor may be unfairly discriminating against unsecured creditors.

The Trustee's objections are well-taken. Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. To attempt to confirm a plan while failing to appear and be questioned by the Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

Debtor has not provided the Trustee with employer payment advices for the sixty-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv). Also, the Trustee argues that Debtor did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. *See* 11 U.S.C. § 521(e)(2)(A); 11 U.S.C. § 1325(a)(9); FED. R. BANKR. P. 4002(b)(3). Debtor has failed to provide all necessary pay stubs and has failed to provide the tax transcript. Those are independent grounds to deny confirmation. 11 U.S.C. § 1325(a)(1).

Debtor also opposes confirmation due to possible unfair discrimination to unsecured creditors under 11 U.S.C. § 1322(b)(1). Debtor proposes to pay 0% to unsecured claims; however, Debtor proposes to pay the Class 2 secured debt in full for a vehicle that appears to be eligible for valuation under 11 U.S.C. § 506(a). Debtor subsequently filed a motion to value the secured claim on May 30, 2017, set for hearing on June 27, 2017. Dckt. 30.

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

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

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

16. **17-23464-E-13** **JOSEPHINE MELONE** **MOTION TO EXTEND AUTOMATIC STAY**
MET-1 **Mary Ellen Terranella** **5-27-17 [8]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on May 27, 2017. By the court's calculation, 17 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 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 on an interim basis, with the final hearing scheduled for 3:00 p.m. on July 11, 2017.

Josephine Melone ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond thirty days in this case. This is Debtor's second bankruptcy petition pending in the past year. Debtor's prior bankruptcy case (No. 14-29966) was dismissed on April 12, 2017, after Debtor failed to make plan payments. *See* Order, Bankr. E.D. Cal. No. 14-29966, Dckt. 37, April 12, 2017. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor thirty days after filing of the petition.

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed because Debtor fell behind in plan payments after having to make unexpected repairs to rental property when one set of renters moved out and before new renters moved in. While the property was vacant, Debtor lost rental income as well. Now, the repairs have been made, and new tenants are in the property.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on June 1, 2017. Dckt. 15. The Trustee states that he has no basis to oppose the Motion.

DISCUSSION

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

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

A. Why was the previous plan filed?

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

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

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

After the filing of this Motion, several creditors have required requests for special notice. They were not included on the service list for the present motion.

In reviewing the pleadings, Debtor states that she has $3,200.00 in rental income. It may be that this rental income, if from the real property Debtor owns, may be cash collateral of some creditor.

The Motion is granted, and the automatic stay is extended on an interim basis through and including noon on July 15, 2017, for all purposes and parties, unless terminated by operation of law or further order of this court. The final hearing on this Motion will be conducted at 3:00 p.m. on July 11, 2017. Opposition, if any, shall be filed and served on or before June 24, 2017, and Replies filed and served on or before July 1, 2017.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Extend the Automatic Stay filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and the automatic stay is extended pursuant to 11 U.S.C. § 362(c)(3)(B) on an interim basis through and including noon on July 15, 2017, for all purposes and parties, unless terminated by operation of law or further order of this court.
>
> **IT IS FURTHER ORDERED** that the final hearing on this Motion will be conducted at **3:00 p.m. on July 11, 2017.** Opposition, if any, shall be filed and served on or before June 24, 2017, and Replies filed and served on or before July 1, 2017.
>
> **IT IS FURTHER ORDERED** that notice of the final hearing and pleadings requesting the extension of the automatic stay shall be served on the persons requesting special notice on or before June 15, 2017.

17. 17-22866-E-13 DPC-1 | **ABEL RUSFELDT**
Dale Orthner | **MOTION FOR DENIAL OF DISCHARGE OF DEBTOR UNDER 11 U.S.C. SECTION 727(A)**
5-15-17 [16]

Final Ruling: No appearance at the June 13, 2017 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, and Office of the United States Trustee on May 15, 2017. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Objection to Discharge has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). 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 Objection to Discharge is sustained.

David Cusick, the Chapter 13 Trustee ("Objector"), filed the instant Objection to Debtor's Discharge on May 15, 2017. Dckt. 16.

Objector argues that Abel Rusfeldt ("Debtor") is not entitled to a discharge in the instant bankruptcy case because Debtor previously received a discharge in a Chapter 7 case.

Debtor filed a Chapter 7 bankruptcy case on June 27, 2013. Case No. 13-28581. Debtor received a discharge on October 15, 2013. Case No. 13-28581, Dckt. 15.

The instant case was filed under Chapter 13 on April 28, 2017.

11 U.S.C. § 1328(f) provides that a court shall not grant a discharge if a debtor has received a discharge "in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter." 11 U.S.C. § 1328(f)(1).

Here, Debtor received a discharge under 11 U.S.C. § 727 on October 15, 2013, which is less than four years preceding the date of the filing of the instant case. Case No.13-28581, Dckt. 15. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), Debtor is not eligible for a discharge in the instant case.

The Objection is sustained . Upon successful completion of the instant case (Case No.17-22866), the case shall be closed without the entry of a discharge, and Debtor shall receive no discharge in the instant case.

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 Discharge filed by David Cusick, the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to Discharge is sustained, and upon successful completion of the instant case, Case No. 17-22866, the case shall be closed without the entry of a discharge.

18. 17-20174-E-13 DAVID BERMAN MOTION TO CONFIRM PLAN
MOH-2 Michael Hays 5-2-17 [79]

Final Ruling: No appearance at the June 13, 2017 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 May 2, 2017. By the court's calculation, 42 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Amended Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Amended Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Debtor has provided evidence in support of confirmation. The Chapter 13 Trustee filed a statement of non-opposition on May 26, 2017. Dckt. 87. The Amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Amended Chapter 13 Plan filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Debtor's Amended Chapter 13 Plan filed on May 1, 2017, is confirmed. Debtor's Counsel 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.

19. 13-35878-E-13 MICHAEL JOHN/TARA HOOPER
Peter Macaluso

MOTION FOR PAYMENT OF UNCLAIMED FUNDS IN THE AMOUNT OF $3672.63
3-21-17 [87]

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, Creditor, and Office of the United States Trustee on May 12, 2017. By the court's calculation, 32 days' notice was provided.

The Application for Payment of Unclaimed Funds was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and 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 Application for Payment of Unclaimed Funds is denied.

Michael Hooper and Tara Hooper, the Chapter 13 Debtors, completed making payments on their thirty-six month Chapter 13 Plan in this case in December 2016. The Chapter 13 Trustee filed is final report on March 24, 2017, and no objection to the report has been filed by any party in interest. Dckt. 88. The time for objecting to the final report expired, and the Order Approving the Final Report was filed on May 2, 2017. Dckt. 94. In the final report, the Trustee states that the only disbursement made on general unsecured claims was in the amount of $3,672.63 to "City of Jackson First-Time Home." Dckt. 88, at 2–3.

On January 3, 2017, the Trustee filed a notice of Unclaimed Funds, stating that the $3,672.63 check sent to the City of Jackson First-Time Homebuyer Program ("Creditor") had not been cashed. Dckt. 80. The Claims Registry for this case discloses that Creditor's program is the only creditor with a proof of claim filed as an unsecured claim in this case. Claim No. 2. That claim lists Creditor as being located at 2215 21st Street, Sacramento, California.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on May 19, 2017. Dckt. 99. The Trustee asserts that under the confirmed plan the funds are due to Creditor's claim. The Trustee began sending payments to Creditor on September 30, 2015, but on October 27, 2015, the check was returned to the Post Office marked "Not at this address" and "Please return to sender." On December 21, 2016, the Trustee turned funds in the amount of $3,928.27 over to the Clerk of Court to satisfy the claim.

The Trustee states that the funds do no belong to Debtor.

The Trustee informs the court that Debtor's Attorney, Peter Macaluso, informed a debtor in another recent case to file the same kind of application, and he argues that Mr. Macaluso may be complicit in trying to take Creditor's money.

CITY OF JACKSON'S OPPOSITION

City of Jackson ("City") filed an Opposition on May 26, 2017. Dckt. 104. The City reports that it has filed an amended proof of claim to identify the correct payee with an address. Amended Proof of Claim No. 2 is for the amount of $186,645.63. Based upon that claim, the City asserts that it is entitled to the unclaimed funds.

TRUSTEE'S RESPONSE

The Trustee filed a Response on May 30, 2017. Dckt. 107. The Trustee supports the City's Opposition and requests that the court order the funds paid to City of Jackson, 33 Broadway, Jackson, California 95642.

DISCUSSION

Unclaimed property in bankruptcy proceedings are governed by 11 U.S.C. § 347, which provides that in a Chapter 7, 12, or 13 case, unclaimed funds shall be paid into the court and disposed of under Chapter 129 of Title 28 of the United States Code. 28 U.S.C. § 2042 provides:

> No money deposited under section 2041 of this title shall be withdrawn except by order of the court.
>
> In every case in which the right to withdraw money deposited in court under section 2041 has been adjudicated or is not in dispute and such money has remained so deposited for at least five years unclaimed by the person entitled thereto, such court

> shall cause such money to be deposited in the Treasury in the name and to the credit of the United States. Any claimant entitled to any such money may, on petition to the court and upon notice to the United States attorney and full proof of the right thereto, obtain an order directing payment to him.

As stated in 28 U.S.C. § 2042, the money is to be claimed "by the person entitled thereto."

In this case, the "person entitled thereto" was identified as the City of Jackson First-Time Homebuyer Program. A review of the California Secretary's of State official website does not disclose the existence of a corporation, limited liability company, or limited partnership with that or a similar name existing as an entity separate from the City of Jackson.

The City has responded to this Application, however, and has provided the court with updated information for payment, as well as informing the court that the City an emended claim for Claim No. 2 that resolves the Trustee's inability to direct payment to Creditor. The City reports that payment should be directed to City of Jackson, 33 Broadway, Jackson, California 95642.

Information having been provided to the court of the correct payee, Debtor's Application is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Application for Payment of Unclaimed Funds filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Application is denied.
>
> **IT IS FURTHER ORDERED** that the unclaimed funds of $3,672.63 shall be paid to City of Jackson, 33 Broadway, Jackson, California 95642.

20. **14-30278-E-13 WW-9** | **GARY SHREVES AND KAREN BAYSINGER- SHREVES** **Mark Wolff** | **MOTION TO MODIFY PLAN 5-8-17 [188]**

Final Ruling: No appearance at the June 13, 2017, 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, creditors, parties requesting special notice, and Office of the United States Trustee on May 8, 2017. By the court's calculation, 36 days' notice was provided. 35 days' notice is required.

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. Debtor has filed evidence in support of confirmation. The Chapter 13 Trustee filed a Response indicating non-opposition on May 24, 2017. Dckt. 198. 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 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 May 8, 2017, is confirmed. Debtor's Counsel 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.

21. 17-20681-E-13 MRL-1 | **KEVIN/ELEANOR MOONEY** **Mikalah Liviakis** | **CONTINUED MOTION TO CONFIRM PLAN** **3-22-17 [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.

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 22, 2017. By the court's calculation, 48 days' notice was provided. 42 days' notice is required.

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

The Motion to Confirm the Chapter 13 Plan is denied.

Kevin Mooney and Eleanor Mooney ("Debtor") seek confirmation of the Amended Plan. The Amended Plan proposes plan payments of $450.00 per month, a lump sum of approximately $435,000.00 during or before month twelve, and a 100% dividend to unsecured claims. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on April 24, 2017. Dckt. 39. First, the Trustee notes that there appears to be sufficient equity in the property such that a sale within the first twelve

months would pay all claims in full. The Plan proposes payments for sixty months, but the Trustee argues that the excess equity from the sale of property should be used to pay all claims sooner.

Second, the Trustee disagrees with the amount that would be due in the twelfth month from the sale of property. Debtor estimated it between $430,000.00 and $475,000.00, but the Trustee calculates that the amount due on March 25, 2018, would be no less than $519,000.00.

Finally, the Trustee does not oppose the provision to pay Nationstar Mortgage LLC with a lump sum by the twelfth month, provided that a title company is ready for a "check swap" to allow escrow to close sale of the property.

The Trustee requests that the Motion be considered and that plan term and payment amounts be clarified in the order confirming, if necessary.

MAY 9, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on June 13, 2017. Dckt. 44. The court ordered Debtor to file a supplemental pleading stating proposed amendments to the Plan by May 17, 2017. Opposition was due by May 31, 2017, and any replies were due by June 6, 2017.

DEBTOR'S SUPPLEMENTAL PLEADING

Debtor filed a Supplemental Pleading on May 17, 2017. Dckt. 50. Debtor proposes to market and sell real property located at 3349 Adam Court, Rescue, California. In support of that amendment, Debtor has filed a motion to employ a broker and is seeking to list the property at $764,900.00.

Debtor reports that the hired broker shall e-mail updates to the Trustee every ninety days on the following days: July 31, October 31, January 31, and April 30. Those updates will continue until the property is sold, and they will include information about marketing efforts, received offers, any counteroffers, and whether the broker believes that he is support by Debtor in fulfilling fiduciary duties owed to the Estate.

CREDITOR'S "OPPOSITION"

HSBC Bank USA, National Association as Trustee for Deutsche Alt-A Securities, Inc. Mortgage Loan Trust, Series 2007-1, Mortgage Pass-Through Certificates ("Creditor") filed an Objection to Supplemental Pleading, which the court treats as an Opposition, on May 30, 2017. Dckt. 56.

Creditor states that it holds a lien against the property proposed to be sold. Creditor opposes Debtor's amendment because the length of time Debtor proposes to sell the property has increased from "on or before month 12 of the plan" to providing reports to the Trustee every ninety days.

Creditor opposes any sale that takes longer than six months and argues that the plan should consider what happens if the Property is not sold and should include a deadline for selling the property. If

the property cannot be sold timely, then Creditor insists that the plan should provide for the property to be surrendered to Creditor along with granting Creditor relief from the automatic stay.

Also, Creditor argues that the fixed payment amount listed in the Plan is short of satisfying Creditor's claim fully. If no regular, monthly post-petition payments are made to Creditor while the property is marketed, then Creditor's claim will only grow. Creditor argues that the Plan should provide for Creditor to be paid fully from the proceeds of any sale of the property, especially because Creditor will not be paid while the property is marketed. Creditor cites to *In re Proudfoot* for the supporting proposition that a plan proposing to withhold current mortgage payments while a sale of property is pending violates 11 U.S.C. § 1322(b)(2). 144 B.R. 876, 877–78 (B.A.P. 9th Cir. 1992).

Creditor objects to the ninety-day reports as well. Creditor argues that those reports should be monthly and states that if there are no offers within a reasonable time, then the court should issue an Order to Show Cause Why the Case Should Not Be Dismissed.

TRUSTEE'S RESPONSE

The Trustee filed a Response on June 5, 2017. Dckt. 58. The Trustee states that the Supplemental Pleadings partially clarifies his concerns. The Trustee is satisfied with the proposed listing and sale of real property, as well as the proposed status reports. The Trustee reports that his other concerns have not been addressed, however.

The Trustee cannot determine if Debtor intends to pay all filed and allowed claims with the proceeds from the sale of property. If so, then the Trustee does not oppose confirmation, but if not, then the Trustee does oppose confirmation.

The Trustee states that if Debtor does not intend to pay the Plan fully with the sale proceeds, then Debtor must reinvest the non-exempt equity within six months in a new homestead for the non-exempt proceeds to remain non-exempt.

Review of Plan Terms

As drafted, the Plan provides for $450.00 per month in plan payments. From that, $244.95 will be paid for the claim secured by Debtor's vehicle, priority unsecured claims, Trustee fees, and Debtor's counsel. Nothing is paid for "using" Creditor's collateral during the marketing and sale period, even after considering Debtor's proposed amendments.

Looking at Schedules I and J, Debtor reports having limited income, when after expenses, there is only the $450.00 as net monthly income. The income and expenses have not been placed in dispute.

Debtor has addressed the court's concerns about being serious about selling property by filing a motion to employ a broker and by proposing in the Supplemental Pleading that the listing price is $764,900.00 and that the broker will provide status updates to the Trustee every ninety days. The *ex parte* motion to employ that broker was granted on May 20, 2017. Dckt. 55.

Creditor opposes confirmation of the Plan on the ground that the latest proposal for the sale of property may take even longer than one year, without there being any sale deadline and no procedure for surrendering the property to Creditor in the event that a sale does not occur within a reasonable time. During that potential delay, Creditor would not be receiving any ongoing payment.

Creditor is justified in opposing a plan that appears to have no deadline for a debtor to sell property while not making any payments to that creditor. Debtor's plan is merely a thinly veiled example of "I'll live in the house for free and speculate if the value can rise enough for me to sell it and make a few bucks." If after a year of free housing Debtor's speculation turns out to be improvident, then it is Creditor who takes an even bigger loss.

Debtor contends that the property securing Creditor's claim has a value of $750,000.00, with only $420,861.00 owed. Though more than a purported equity of $300,000.00, Debtor proposes that Debtor live in the house for free for a year. It is not credible that such huge equity could exist, that Debtor has no other claims, that Debtor would not have already sold the house (without the cost and expense of bankruptcy), and that a person trying to sell it is a debtor who is unable to make any payments.

On Schedule I, Debtor states having income of only $2,150.00 per month from operating a business of twenty years. Schedule I, Dckt. 1 at 35. On the Business and Income Sheet, Debtor states having gross monthly business income of $4,000. *Id.* at 36. On the Statement of Financial Affairs, Debtor states under penalty of perjury to having business income of only $20,000.00 in 2015 ($1,666 per month), $36,000 ($3,000 per month) in 2016, and $5,260 for one month in 2017.

On its Proof of Claim No. 4, Creditor states that there is a $62,899.20 arrearage on this obligation, for which Debtor wants to defer any payment for another twelve months. On the attachment to the Proof of Claim, Creditor states that the last payment received was in July 2015. Proof of Claim No. 4, p. 5–7.

This court has allowed a Chapter 13 debtor to provide for the prompt, orderly, and commercially reasonable sale of property as part of a Chapter 13 plan. When selling a residence, a debtor generally makes the current payment, including taxes and insurance, as adequate protection payments. While the court may allow a year for marketing and sale, the year figure is used to ensure that the debtor can hit the marketing season and is not forced to "dump" the property during the off-season (such as the holidays, when property is covered in snow, and the like). If Debtor was promptly and in good faith prosecuting a plan to sell the property, when Debtor filed the case in February 2017, Debtor would have hired a broker and prepared the property to catch the spring and summer 2017 selling period. With the current market, Debtor would likely have had the property sold, Creditor paid, and the time and expense of the bankruptcy case and plan confirmation avoided.

But Debtor has not sought to have a broker appointed until May 18, 2017, 105 days after the bankruptcy case was filed. That is almost one-third of the year marketing and sale period Debtor now wants to impose for having a "free residence" period.

Looking at Schedule J, Debtor makes no provision for paying the property taxes or insurance while Debtor would continue to live in the property for free for another year. Dckt. 1 at 37. Not only living

in the residence for free, but occupying it without paying taxes or insurance does not demonstrate good faith by Debtor.

The proposed Chapter 13 Plan does not comply with 11 U.S.C. § 1325 and 1322. The Motion is denied, and the Plan is not confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Amended Chapter 13 Plan filed by 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 is denied.

22. **17-20681-E-13** **KEVIN/ELEANOR MOONEY** **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY HSBC BANK USA, N.A.**
PPR-1 **Mikalah Liviakis** **4-13-17 [34]**

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 Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on April 13, 2017. By the court's calculation, 26 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 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing ----------.

The Objection to Confirmation of Plan is sustained.

HSBC Bank USA, National Association as Trustee for Deutsche Alt-A Securities, Inc. Mortgage Loan Trust, Series 2007-1, Mortgage Pass-Through Certificates, Creditor with a secured claim, opposes confirmation of the Plan on the basis that the Plan is not feasible because it proposes a cure by sale that is too speculative and because it fails to provide for the full value of Creditor's claim. FN.1.

FN.1. The moving party is reminded that the Local Rules require the use of a new Docket Control Number with each motion. LOCAL BANKR. R. 9014-1(c). Here, the moving party reused a Docket Control Number. That is not correct. The Court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(l).

Creditor cites to *In re Gavia* for the proposition that paying all creditors with any equity from the liquidation of a debtor's residence is not a confirmable plan term because "there is no certainty that any piece of real property can be sold in the foreseeable future with any degree of certainty in a specified period of time for a sum great enough to cover notes and deeds of trust upon the property, taxes, insurance and costs." *In re Gavia*, 24 B.R. 216, 218 (Bankr. E.D. Cal. 1982), *aff'd*, 24 B.R. 573 (B.A.P. 9th Cir. 1982). The court said additionally that "curing of a default might be allowed if done within a reasonable time and **while making ongoing payments**." *Id.*

Additionally, Creditor, serviced by Nationstar Mortgag LLC, has filed a proof of claim in this case in which it asserts a secured claim of $455,675.82. Proof of Claim 4. The Plan does not list Creditor, but does list "Nationstar Mortgage LI" holding a claim against Debtor's residence in the amount of $420,900.00. The amount paid on the claim is estimated to be $435,000.00 from the speculative sale of property. Debtor has not proposed a feasible plan that satisfies 11 U.S.C. § 1325(a)(6) because it does not provide the full value of Creditor's secured claim.

This court does not concur with *In re Gavia* and Creditor that a Chapter 13 Plan cannot include reasonable terms for the liquidation of assets for the payment of creditors and a debtor preserving equity in assets. Chapter 13 is not a death sentence forfeiture of equity for consumer debtors who are asset "rich" but "cash flow poor."

That being said, such does not allow a debtor to merely say that creditors will be paid, whenever I decide to sell the property during the next year—no adequate protection payments required from my projected disposable income. Especially for residential real estate, it is not difficult to set forth a good faith, commercially reasonable procedure for the marketing and sale of that property in less than one year, and more likely six months.

MAY 9, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on June 13, 2017. Dckt. 46. The court ordered Debtor to file a Supplemental Pleading by May 17, 2017. Opposition was due by May 31, 2017, and replies were due by June 6, 2017.

DISCUSSION

No further pleadings have been filed for this specific matter since the May 9, 2017, but the court notes that Debtor, Creditor, and David Cusick (the Chapter 13 Trustee) have all filed supplemental pleadings for the related Trustee's Objection to Confirmation.

Review of Plan Terms

As drafted, the Plan provides for $450.00 per month in plan payments. From that, $244.95 will be paid for the claim secured by Debtor's vehicle, priority unsecured claims, Trustee fees, and Debtor's counsel. Nothing is paid for "using" Creditor's collateral during the marketing and sale period, even after considering Debtor's proposed amendments.

Looking at Schedules I and J, Debtor reports having limited income, when after expenses, there is only the $450.00 as net monthly income. The income and expenses have not been placed in dispute.

Debtor has addressed the court's concerns about being serious about selling property by filing a motion to employ a broker and by proposing in the Supplemental Pleading that the listing price is $764,900.00 and that the broker will provide status updates to the Trustee every ninety days. The *ex parte* motion to employ that broker was granted on May 20, 2017. Dckt. 55.

Creditor opposes confirmation of the Plan on the ground that the latest proposal for the sale of property may take even longer than one year, without there being any sale deadline and no procedure for surrendering the property to Creditor in the event that a sale does not occur within a reasonable time. During that potential delay, Creditor would not be receiving any ongoing payment.

Creditor is justified in opposing a plan that appears to have no deadline for a debtor to sell property while not making any payments to that creditor. Debtor's plan is merely a thinly veiled example of "I'll live in the house for free and speculate if the value can rise enough for me to sell it and make a few bucks." If after a year of free housing Debtor's speculation turns out to be improvident, then it is the Creditor who takes an even bigger loss.

Debtor contends that the property securing Creditor's claim has a value of $750,000.00, with only $420,861.00 owed. Though more than a purported equity of $300,000.00, Debtor proposes that Debtor live in the house for free for a year. It is not credible that such huge equity could exist, that Debtor has no other claims, that Debtor would not have already sold the house without the cost and expense of bankruptcy, and that trying to sell it is a debtor who is unable to make any payments.

On Schedule I, Debtor states having income of only $2,150.00 per month from operating a business of twenty years. Schedule I, Dckt. 1 at 35. On the Business and Income Sheet, Debtor states having gross monthly business income of $4,000. *Id.* at 36. On the Statement of Financial Affairs, Debtor states under penalty of perjury of having business income of only $20,000.00 in 2015 ($1,666 per month), $36,000 ($3,000 per month) in 2016, and $5,260 for one month in 2017.

On its Proof of Claim No. 4, Creditor states that there is a $62,899.20 arrearage on this obligation, for which Debtor wants to defer any payment for another twelve months. On the attachment to the Proof of Claim, Creditor states that the last payment received was in July 2015. Proof of Claim No. 4, p. 5–7.

This court has allowed a Chapter 13 debtor to provide for the prompt, orderly, and commercially reasonable sale of property as part of a Chapter 13 Plan. When selling a residence, a debtor generally makes the current payment, including taxes and insurance, as adequate protection payments. While the court may allow a year for marketing and sale, the year figure is used to ensure that the debtor can hit the marketing season and is not forced to "dump" the property during the off-season (such as the holidays, when property is covered in snow, and the like). If Debtor was promptly and in good faith prosecuting a plan to sell the property when Debtor filed the case in February 2017, Debtor would have hired a broker and prepared the property to catch the spring and summer 2017 selling period. With the current market, Debtor would likely

have had the property sold, Creditor paid, and the time and expense of the bankruptcy case and plan confirmation avoided.

But Debtor has not sought to have a broker appointed until May 18, 2017, 105 days after the bankruptcy case was filed. That is almost one-third of the year marketing and sale period Debtor now wants to impose for having a "free residence" period.

Looking at Schedule J, Debtor makes no provision for paying the property taxes or insurance while Debtor would continue to live in the property for free for another year. Dckt. 1 at 37. Not only living in the residence for free, but occupying it without paying taxes or insurance does not demonstrate good faith by Debtor.

The proposed Chapter 13 Plan does not comply with 11 U.S.C. § 1325 and 1322. The Objection is sustained, and the Plan is not confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by a Creditor with 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 Plan is sustained, and the Plan is not confirmed.

23. **17-21490-E-13** **TOU VANG AND KA MOUA** **MOTION TO CONFIRM PLAN**
MRL-1 **Mikalah Liviakis** **4-19-17 [22]**

Final Ruling: No appearance at the June 13, 2017 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 April 19, 2017. By the court's calculation, 55 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Amended Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Amended Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Debtor has provided evidence in support of confirmation. The Chapter 13 Trustee filed a statement of non-opposition on May 22, 2017. Dckt. 31. The Amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Amended Chapter 13 Plan filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Debtor's Amended Chapter 13 Plan filed on April 19, 2017, is confirmed. Debtor's Counsel 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.

24. 09-47393-E-13 DBJ-7 — RANDAL/CORESSA DENNHARDT — Douglas Jacobs — MOTION TO AVOID LIEN OF COMMERCIAL TRADE, INC. — 5-3-17 [112]

Final Ruling: No appearance at the June 13, 2017 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 May 3, 2017. By the court's calculation, 41 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 Commercial Trade, Inc. ("Creditor") against property of Randal Dennhardt and Coressa Dennhardt ("Debtor") commonly known as 9408 Lott Road, Durham, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $6,626.32. An abstract of judgment was recorded with Butte County on February 13, 2009, that encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $350,000.00 as of the date of the petition. The unavoidable consensual liens that total $310,000.00 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 704.730(a)(2) in the amount of $40,000.00 on Schedule C.

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 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 Commercial Trade, Inc., California Superior Court for Fresno County Case No. 08CECL06288, recorded on February 13, 2009, Document No. 2009-0005289, with the Butte County Recorder, against the real property commonly known as 9408 Lott Road, Durham, 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.

25. 15-28400-E-13 HEATHER URBAN MOTION TO MODIFY PLAN
LBG-2 Lucas Garcia 4-13-17 [45]

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 April 13, 2017. By the court's calculation, 54 days' notice was provided. 35 days' notice is required.

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 set for an evidentiary hearing on xxxx, 2017.

Heather Urban ("Debtor") seeks confirmation of the Modified Plan because Debtor took time off work to care for her daughter and lost income as a result. Dckt. 48. The Modified Plan proposes to increase the plan payment by $350.00 to $5,150.00 per month starting in the sixteenth month on February 25, 2017. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on May 23, 2017. Dckt. 52. The Trustee argues that Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6).

Debtor has failed to adequately explain a large increase in income for the six-month period of September 2016 through February 2017 reflected in Debtor's profit and loss statement. Dckt. 47. This document shows a gross income of $141,171.51 for that six-month period, whereas the Debtor's gross income for 2014 was $153,820.00 and for 2013 was $157,630.00.

Also, the Trustee states that Debtor's declaration does not include a tax expense in the budget. Dckt. 48. Additionally, changes in monthly expenses are not explained. There may be inconsistent classifications of expenses, for example some months show utilities for $0.00. Lastly, a line for daughter's expense of $11,785.53 appears inappropriate because the daughter was not listed as a dependent on Schedule J. Dckt. 1.

DEBTOR'S REPLY

Debtor filed a Reply on May 30, 2017. Dckt. 55. Debtor argues that the increase on the Statement of Financial Affairs was found previously by the court to be an error: Net income had been used, instead of gross income. Second, Debtor responds that her typical tax burden is reflected on Amended Schedule J.

Third, Debtor states that her bills are precise. She states that there were months when she paid one or more bills late and had to pay more the following month. Lastly, Debtor states the additional expense of $11,785.53 was for assistance she gave to her daughter following a premature birth.

JUNE 6, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on June 13, 2017, for the parties to select a date for an evidentiary hearing. Dckt. 57.

DISCUSSION

At the hearing, the parties stated that xxxx, 2017, is the date they have chosen to conduct an evidentiary hearing.

The Motion to Confirm the Modified Plan is set for an evidentiary hearing on xxxx, 2017.

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 Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Confirm the Modified Plan is set for an evidentiary hearing on xxxx, 2017.