UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

Notice

The court has reorganized the cases, placing all of the Final Rulings in the second part of these Posted Rulings, with the Final Rulings beginning with Item 22.

The court has also reorganized the items for which the tentative rulings are issued, Items 1–21, attempting to first address the items in which short argument is anticipated.

June 26, 2018, at 3:00 p.m.

1.	**18-22301-E-13** **DPC-1**	**KATISHA BROWN** **Candace Brooks**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **5-25-18 [19]**

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

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the 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 25, 2018. By the court's calculation, 32 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Debtor, Creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not

required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection. At the hearing ----------.

The Objection to Confirmation of Plan is sustained.

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

A. Katisha Brown ("Debtor") is delinquent on plan payments, and

B. Debtor failed to appear at the First Meeting of Creditors held on May 24, 2018.

The Chapter 13 Trustee's objections are well-taken. The Chapter 13 Trustee asserts that Debtor is $368.00 delinquent in plan payments, which represents one month of the $368.00 plan payment. According to the Chapter 13 Trustee, the Plan in § 2.01 calls for payments to be received by the Chapter 13 Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

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

The Plan does not comply with 11 U.S.C. § 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 David Cusick ("the Chapter 13 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

2. **18-20405-E-13** **JUNELLE PALEC** **MOTION TO CONFIRM PLAN**
FF-2 **Gary Fraley** **5-9-18 [32]**

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 May 9, 2018. By the court's calculation, 48 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is denied.

Junelle Palec ("Debtor") seeks confirmation of the Amended Plan to provide for all creditors. Dckt. 35. The Amended Plan proposes plan payments of $2,000.00 for three months, then $3,705.00 for three months, and then $4,065.00 for the remaining fifty-four months, with a 100% dividend to unsecured claims. Dckt. 34. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on June 4, 2018. Dckt. 44. The Chapter 13 Trustee asserts that Debtor is $3,705.00 delinquent in plan payments. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor added a claim to Class 1 without providing for late fees due on post-petition payments. Additionally, because Debtor is delinquent, the Chapter 13 Trustee does not have sufficient funds to make the mortgage payment. The Plan is not confirmable.

The Chapter 13 Trustee raises a potential noticing issue in that the Motion and Notice of Hearing reference a plan filed on May 4, but the plan up for consideration was filed on May 9.

Finally, the Chapter 13 Trustee argues that Debtor has not proposed step plan payments in the correct section of the Plan. Section 2.01 calls for a specific dollar amount, but any alternate payment proposal should be introduced in Section 7.02. Debtor cannot comply with the Plan as proposed—technically. 11 U.S.C. § 1326(a)(6).

RULING

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 Junelle Palec ("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. **18-22713-E-13** **DAMION HRIBIK** **MOTION TO VALUE COLLATERAL OF**
FF-3 **Gary Fraley** **SCHOOLS FINANCIAL CREDIT UNION**
5-25-18 [31]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditor, the party requesting special notice, and Office of the United States Trustee on May 25, 2018. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

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

The Motion to Value Collateral and Secured Claim of Schools Financial Credit Union ("Creditor") is xxxxxxxxxxxxxxxxx.

The Motion filed by Damion Hribik ("Debtor") to value the secured claim of Schools Financial Credit Union ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2008 Ford F-150, VIN ending in 6083 ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $2,500.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

CHAPTER 13 TRUSTEE'S NON-OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed a Non-Opposition to the Motion on June 7, 2018. Dckt. 39. The Chapter 13 Trustee states that Debtor's Declaration indicates Vehicle is in poor condition with approximately 159,000 miles and provides a list of needed repairs, while Debtor's Schedule A/B describes Vehicle as in poor condition with approximately 109,293 miles due to several accidents. The Chapter 13 Trustee also states that Debtor's proposed Plan includes "Schools Financial Credit Union/2008 Ford F150" as a Class 2B claim to be reduced based on value of collateral with 0.00% interest rate and a monthly dividend of $48.00.

DISCUSSION

Creditor filed a proof of claim on May 29, 2018. Proof of Claim No. 3-1. Creditor claims that the value of Vehicle is $14,502.00 and that the amount of claim that is secured is $3,805.03. Creditor has not opposed the Motion and has not provided any evidence in support of its assertion of value.

At the same time, Debtor has not presented any admissible evidence as to the Vehicle's value. Debtor's Declaration is not sworn under penalty of perjury in violation of Federal Rule of Evidence 603, meaning that nothing alleged in the declaration is admissible.

Debtor's declaration is very detailed, providing an explanation of the factors use to decrease the value as stated in Kelley Blue Book, but Debtor—who clearly is relying on Kelley Blue Book as the starting point for his value—fails to provide a copy of the trade journal upon which he relies.

While stating in the Proof of Claim the Vehicle is worth $14,502.00, Creditor does not attach a copy of a Kelley Blue Book, NADA, or other valuation report for that statement. Though such is not required for a proof of claim, the failure to do so prevents this court from taking such statement as "gospel" for purposes of value.

If the court begins with the $14,502.00 value stated in Proof of Claim No. 3 and then considers the following damages, repairs, and necessary maintenance:

A. Electrical issues present left rear taillight not functioning, as well as most lights on left side;

B. Brake fluid reservoir damage needs replacement;

C. Multiple spark plugs out and need to be replaced. Labor cost high due to issue with plugs possibly breaking during removal;

D. Truck has been involved in multiple motor vehicle collisions;

E. Truck is violently shaking and rattling during driving requiring truck to be shut off to stop;

F. All tires require replacement, currently have spare on front right;

G. Replacement of all brakes and rotors needed;

H. Caliper needs replacing due to damage;

I. Windshield has massive crack; entire windshield needs to be replaced;

J. Damage to interior leather seats;

K. Multiple exterior paint damage and dents;

L. Passenger window not functioning/lowering;

M. Oil and filter needs to be changed;

N. All fluids need to be changed—have not been changed since the purchase of the truck, with the exception of oil;

O. Possible need for belt replacement;

P. Currently has check engine light on; and

Q. Possible need for replacement of transmission—truck is revving without engaging intermittently;

the court determines that a value of $2,500 for an eleven-model-year-old truck with 159,000 miles on it, and needing the above repairs and maintenance, is not unreasonable.

However, as of the time this matter was reviewed on June 25, 2018, to prepare the tentative ruling to be posted, the above testimony had not been provided under penalty of perjury.

At the hearing, xxxxxxxxxxxxxxxxxxxxxxxxxxxx.

The Motion is xxxxxxxxxxxxxxx.

~~The lien on the Vehicle's title secures a purchase-money loan incurred on October 14, 2010, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $3,805.03. Therefore, Creditor's claim secured by a lien on the asset's title is under-collateralized. Creditor's secured claim is determined to be in the amount of $2,500.00, the value of the collateral. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.~~

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value Collateral and Secured Claim filed by Damion Hribik ("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 **xxxxxxxxxx** / ~~granted, and the claim of Schools Financial Credit Union ("Creditor") secured by an asset described as 2008 Ford F-150 ("Vehicle") is determined to be a~~

~~secured claim in the amount of $2,500.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is $2,500.00 and is encumbered by a lien securing a claim that exceeds the value of the asset~~.

4. 18-22116-E-13 DPC-1 | **HORACE HODGES** **Scott Shumaker** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **5-23-18 [20]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on May 23, 2018. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

A. Horace Hodges ("Debtor") failed to provide information regarding the business expenses and business budget related to a non-filing spouse's income listed on Schedule I, Line 8a; and

B. Debtor failed to provide Business Documents for the non-filing spouse's business. Debtor failed to respond to request for business documents and questionnaire mailed to Debtor on April 16, 2018. Dckt. 22.

The Chapter 13 Trustee's objections are well-taken. Debtor has failed to timely provide the Chapter 13 Trustee with business documents including:

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

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

The Chapter 13 Trustee argues that Debtor has failed to file a statement of gross business income and expenses attached to Schedule I. Line 8a of Schedule I requires Debtor to "[a]ttach a statement for each property and business showing gross receipts, ordinary and necessary business expenses, and the total monthly net income." Debtor is required to submit that statement and cooperate with the Chapter 13 Trustee. 11 U.S.C. § 521(a)(3). Debtor has not provided the required attachment.

The Plan does not comply with 11 U.S.C. §§ 521 and 1325. 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 David Cusick ("the Chapter 13 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

5. **18-22133-E-13** **DONAVAN HAN** **OBJECTION TO CONFIRMATION OF**
DPC-1 **Ryan Keenan** **PLAN BY DAVID P. CUSICK**
5-23-18 [15]

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 23, 2018. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

A. Donavan Han ("Debtor") incorrectly listed a claim in Class 4, and

B. Debtor did not fully disclose his name on the petition.

The Chapter 13 Trustee notes that a claim for Patelco Credit Union has a last payment of February 19, 2022, which is within the sixty-month plan term. Therefore, the Chapter 13 Trustee argues that the claim should not be listed in Class 4.

Additionally, the Chapter 13 Trustee notes that the Petition lists "C" as Debtor's middle name, which was stated at the Meeting of Creditors to be "Chim."

On May 22, 2018, Debtor filed an Amended Plan and Amended Petition. The petition now lists "Chim" as Debtor's middle name. Dckt. 21. The Amended Plan moves the Patelco claim into Class 2. Dckt. 22.

The Chapter 13 Trustee's grounds for objecting to confirmation appear to have been resolved, but the problem for Debtor is that the Amended Plan has not been set for a confirmation hearing, and there is no evidence that the new plan has been served on all parties. The filing of a plan, though, is a *de facto* withdrawal of the pending plan.

The Objection is sustained, Debtor not pursuing confirmation of the prior plan.

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 David Cusick ("the Chapter 13 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the Chapter 13 Plan is not confirmed.

6. **18-20734-E-13** **SHAUNA ROBERTS** **MOTION TO CONFIRM PLAN**
MRL-1 **Mikalah Liviakis** **4-27-18 [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 April 28, 2018. By the court's calculation, 59 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is denied.

Shauna Roberts ("Debtor") states that she needs to amend her plan because of her current income. Dckt. 25. Other than that statement, Debtor does not provide any testimony about why an amended plan has been proposed. The Amended Plan proposes monthly payments of $2,650.00 for twenty-four months, with a 100% dividend to unsecured claims. Dckt. 26. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on May 15, 2018. Dckt. 29. Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to the Chapter 13 Trustee, the Plan will complete in 108 months due to because filed unsecured claims exceeded what the Amended Plan provides for ($44,000 v. $256,651.77). The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

As an evidentiary point, the Chapter 13 Trustee notes that the Amended Plan calls for a plan term of twenty-four months, but Debtor states in her declaration that the plan term is sixty months.

The Chapter 13 Trustee also raises three grounds that were raised previously that Debtor has not addressed.

1. Debtor's Amended Plan lists three automobile payments on Schedule I, which are being paid directly by Debtor. However, these debts are not listed on Schedule D, or in the Amended Plan, leaving a question as to whether these debts will mature prior to Plan completion, thus necessitating an increase in plan payments.

2. The Chapter 13 Trustee argues that Debtor has failed to file a statement of gross business income and expenses attached to Schedule I. Line 8a of Schedule I requires Debtor to "[a]ttach a statement for each property and business showing gross receipts, ordinary and necessary business expenses, and the total monthly net income." Debtor has not provided the required attachment.

3. Debtor listed a Safe Credit Union checking and savings account on Schedule B, with a value of $5,500.00. However, an e-mail received from Debtor's Attorney states that Debtor "does NOT have a Safe Credit Union account."

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 Shauna Roberts ("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.

7. 17-27247-E-13 JOSE AGUIAR MOTION TO CONFIRM PLAN
DCN-1 Eric Gravel 5-11-18 [46]

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 11, 2018. By the court's calculation, 46 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

The Motion to Confirm the Amended Plan has been set for hearing on the notice required by Local Bankruptcy 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.

Jose Aguiar ("Debtor") seeks confirmation of the Amended Plan to deal with mortgage arrears and unsecured debt. Dckt. 48. The Amended Plan will have Debtor paying $767.68 from future earnings for sixty months. Dckt. 49. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on June 11, 2018. Dckt. 57. The Chapter 13 Trustee argues that the Plan is based upon a plan form that is no longer effective now that the court has adopted a new plan form as of December 1, 2017. The Plan is based on a prior plan form, which is a violation of Federal Rule of Bankruptcy Procedure 3015.1 and General Order 17-03.

The Chapter 13 Trustee further alleges that the Chapter 13 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 Chapter 13 Trustee reviewed Debtor's 2016 federal tax return, which indicates a refund of $5,345.00. The Amended Plan does not propose to pay in tax refunds over the life of the Plan. The Chapter 13 Trustee requests any tax refunds in excess of $2,000.00 be paid into the Plan each year for the life of the 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 Jose Aguiar ("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.

8. **17-27751-E-13** **MISAEL/LUZ BAUTISTA** **CONTINUED MOTION TO DISGORGE FEES**
DPC-3 **Harry Roth** **3-16-18 [109]**

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, and Office of the United States Trustee on March 16, 2018. By the court's calculation, 39 days' notice was provided. 28 days' notice is required.

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

The Motion to Disgorge Fees is granted.

David Cusick ("the Chapter 13 Trustee") moves the Court for an order disgorging Harry Roth's ("Attorney") attorney fees in this case pursuant to 11 U.S.C. § 329. The Chapter 13 Trustee argues that this case is not being prosecuted actively, and the amount charged in attorney's fees may be unreasonable.

The Chapter 13 Trustee targets several deficiencies in this case. First, Statement of Financial Affairs does not disclose the date that Attorney was paid $4,000.00 for services in this case. Dckt. 19.

Second, the Chapter 13 Trustee argues that fees should be disgorged because the case was skeletal when filed on November 28, 2017; the schedules, Statement of Financial Affairs, Plan, Attorney Disclosure Statement or Rights and Responsibilities were not filed until December 12, 2017, and were dated December 6, 2017. The Chapter 13 Trustee notes that the case was even dismissed on December 18, 2017, until reinstated after a motion by Attorney.

Third, a motion for relief was filed on December 1, 2017, asserting grounds for an unlawful detainer action in state court. The plan in this case, though, was premised on Misael Bautista and Luz Bautista ("Debtor") owning the contested real property, which would require an adversary proceeding to obtain possession from the current owner. Debtor even admitted that at the Meeting of Creditors.

Fourth, the Plan also provides for a claim of Honda Financial Services in Class 2 to be valued, and Debtor filed a motion to value. *See* Dckt. 53. Pleadings by Honda Financial Services indicate that the securing vehicle is leased by Debtor. The Chapter 13 Trustee is concerned that Attorney did not discuss the lease agreement with Debtor and filed the motion to value after learning that the vehicle was leased, not purchased.

APRIL 24, 2018 HEARING

At the hearing, the court noted that Attorney filed an untimely declaration in opposition to the Motion. *See* Dckt. 117. The court noted that Attorney offers no excuses for the delays, but he requests additional time, further stating that he is acting to get an adversary proceeding filed but has been taking longer than anticipated because of addressing legal theories. Dckt. 119. The court continued the hearing to 3:00 p.m. on June 26, 2018, for Debtor and Attorney to have time to reactivate prosecution of this case. Dckt. 120.

ATTORNEY'S OPPOSITION

Attorney filed an Opposition on June 25, 2018. Dckt. 127. Attorney argues that the grounds are spelled out in his declaration, but he summarizes them as being that a contract is not yet complete and that the fees and time spent in this case are sufficient to justify what has been charged.

The Declaration provides more detail, including that Attorney asked Debtor for a retainer of $5,000.00 for costs and fees for all matters that were ancillary to this bankruptcy case. He states that additional fees were contingent upon success and were not due until the case was completed.

Attorney details the ways in which this proceeding has been longer than for a usual case (e.g., conversations longer because of interpreting languages, state court unlawful detainer). Attorney discloses that the biggest hurdle in this case was filing a plan, motion to confirm, and adversary proceeding; he states that he could not file them in good faith and states that he will elaborate further if the court wishes. Dckt. 128 at 4:4–8.

APPLICABLE LAW

The court has the authority, and responsibility, to consider attorney's fees obtained or to be paid prior to or during a bankruptcy case. 11 U.S.C. §§ 329, 330, 331; *see also Law Offices of Nicholas A. Franke v. Tiffany (In re Lewis)*, 113 F.3d 1040, 1045 (9th Cir. 1997). Fees in excess of the reasonable value of such services may be ordered repaid. *See In re Lawas*, No. 13-33513-E-13, 2014 Bankr. LEXIS 623 (Bankr. E.D. Cal. Feb. 12, 2014). The application of 11 U.S.C. § 329 and the Federal Rules of Bankruptcy Procedure may seem harsh, but they are necessary not only to protect vulnerable consumers and business owners, but also to protect the integrity of the federal judicial process. *See Neben & Starrett v. Charwell Fin. Corp. (In re Park-Helena Corp.)*, 63 F.3d 877, 881 (9th Cir. 1995). Debtor's counsel must lay bare all dealings regarding compensation and must be direct and comprehensive. *See Kavanagh v. Leija (In Re Leija)*, 270 B.R. 497, 501 (Bankr. E.D. Cal. 2001) (citation omitted); *In re Bob's Supermarket's, Inc.*, 146 B.R. 20, 25 (Bankr. D. Mont. 1992), *aff'd in part and rev'd in part*, 165 B.R. 339 (B.A.P. 9th Cir. 1993). The burden is on the person to be employed to come forward and to make full, candid, complete disclosure. *In re B.E.S. Concrete*

Products, Inc., 93 B.R. 228 (E.D. Cal. 1988). The federal courts are not mere devices to be used to generate fees for attorneys irrespective of any bona fide rights to be adjudicated.

RULING

Attorney filed this case without all of the required documents, and the case was actually dismissed for failure to timely file documents until Attorney brought a successful motion to vacate dismissal. *See* Dckt. 24, 32. No plan has been confirmed in this case, and the case was again dismissed on June 6, 2018. Order, Dckt. 124. The case was dismissed in June 2018, because of Debtor's defaults on payments due in this case. Civil Minutes, Dckt. 123.

The Court also notes that the proposed Plan in this case—which was denied confirmation on February 13, 2018—called for Debtor to file an adversary proceeding to recover asserted ownership of property to the extent that Debtor has such rights. No such adversary proceeding was filed in the seven months this bankruptcy case was pending. Additionally, the Plan calls for a secured claim to be valued, but as the court noted at the February 13, 2018, hearing the claim could not be valued because the underlying security agreement was a lease for a vehicle. Dckt. 85. There was no actual property of Debtor.

Attorney's Declaration appears calls into question how Debtor could have been prosecuted this case in good faith, stating that he (counsel) could not file an amended plan, motion to confirm, or the adversary proceeding required by the original plan because he would not have been able to do so in good faith. *See* Dckt. 128 at 4:4–8.

The Declaration appears to state that the "plan" for this case was for Debtor to obtain the return of their "home" to themselves. *Id.* at 1:29, 2:1–2. Attorney states that his "retainer" was for work in state court defending the unlawful detainer. Attorney goes further to state that he cannot communicate with his clients (neither speaking the other's language). To communicate, Attorney uses the services of a "volunteer" real estate agent to translate. *Id.*, ¶ 5, FN.1. Attorney also candidly addresses some of the shortcomings.

Local Bankruptcy Rule 2016-1(c)(4) states:

> If an attorney elects to be compensated pursuant to Subpart (c) [No-Look Fees] but the case is dismissed prior to confirmation of a plan, absent a contrary order, the trustee shall pay to the attorney, to the extent funds are available, an administrative claim equal to fifty per cent (50%) of the total fee the debtor agreed to pay less any pre-petition retainer. The attorney shall not collect, receive, or demand additional fees from the debtor unless authorized by the Court.

This case was filed on November 28, 2017, and was dismissed on June 6, 2018. *See* Dckt. 1, 124. Between those dates, no plan was confirmed. The one proposed plan states that Attorney was electing to receive No-Look Fees under Local Bankruptcy Rule 2016-1(c) in the maximum amount of $4,000.00. Dckt. 21. There is no disclosure about a pre-petition arrearage.

On the Disclosure of Compensation of Attorney for Debtor(s), Dckt. 19 at 50, Attorney certified under penalty of perjury that "the foregoing is a complete statement of any agreement or payment for

payment to me for representation of debtor(s) in this bankruptcy proceeding." The Certification of the complete statement of terms is that:

A. Attorney agreed to accept as payment for the bankruptcy;

B. Fees of $4,000;

C. Of which $4,000 was paid prior to the filing of the statement;

D. Additionally, $310.00 was paid to counsel for the bankruptcy filing fees; and

E. The source of the $4,310.00 was paid to Attorney by Debtor.

Id.

In substance, Attorney's argument is that he had elected to provide other legal services, that he does not have more money than the $4,000.00, so the $4,000.00 he certified was solely for bankruptcy fees really was for, and have been diverted to, other work.

In reading the pleadings and considering counsel's good reputation, it appears that this decision falls under the "no good deed goes unpunished" adage. Attorney could not communicate directly with his client, and it is clear that effective communication was difficult. (It also puts into question the actual knowledge of Debtor for everything submitted under penalty of perjury.) The work snowballed and Debtor/Attorney could not effectively use the bankruptcy process to assert and adjudicate the asserted rights of Debtor and the bankruptcy estate.

The inability of Debtor and counsel to prosecute this bankruptcy case is reflected in the court's ruling on the Motion for Relief from the Automatic Stay in which the disputed owner of the real property sought relief to proceed with the unlawful detainer. As addressed in the Civil Minutes, Dckt. 67, though Debtor and counsel promised to file an opposition to the Motion for Relief, they did not. They promised to file an adversary proceeding to assert the estate's interest in the Property. They did not. Instead, it appears that they elected to "bang around" in state court on the unlawful detainer sideshow rather than the bankruptcy main events—the Chapter 13 Plan (for which counsel was paid $4,000) and the adversary proceeding.

The Motion before this court is to address the fees paid to Attorney for the bankruptcy case. Those fees are $4,000.00, as certified by Attorney. It is not for the court to equitably reallocate the fees to other work being done for the non-English speaking Debtor by their non-Spanish speaking Attorney. The court will limit the issues to that. To the extent that Attorney refunds monies paid for bankruptcy fees to Debtor, if Debtor chooses, after the refund has been deposited in Debtor's bank account, to make a new payment for non-bankruptcy services to Attorney, such is Debtor's right.

According to the fee provisions that Attorney elected to accept and the Local Bankruptcy Rules, he is allowed to be paid only $2,000.00 in fees in this case, which is half of the maximum in no-look fees

for a case that is dismissed before plan confirmation. Attorney has been paid, and wants to keep, $4,000.00 in fees paid.

The Motion is granted, and Attorney shall disgorge $2,000.00 back to Debtor.

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 to Disgorge Attorney Fees filed by David Cusick ("the Chapter 13 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Harry Roth ("Attorney") is ordered to disgorge $2,000.00 of attorney's fees in this case. Attorney shall pay the $2,000.00 to the Chapter 13 Trustee on or before July 24, 2018. The Chapter 13 Trustee shall disburse the $2,000.00 received from Attorney directly to Misael Bautista and Luz Bautista ("Debtor").
>
> **IT IS FURTHER ORDERED** that on or before August 15, 2018, Attorney shall file with this court his Declaration attesting to the $2,000.00 refund and a copy of the cancelled check showing deposit of the refund by Debtor into Debtor's bank account. Upon review, the Chapter 13 Trustee (the prevailing party on this Motion) shall file his certification of the refund documentation being filed, or file a motion seeking such supplemental relief, including sanctions, for the failure of Attorney to comply with this order for refund of fees to Debtor.

9.	**18-23464-E-13** **PGM-1**	**CYNTHIA PAYSINGER** **Peter Macaluso**	**MOTION TO EXTEND AUTOMATIC STAY** **6-12-18 [10]**

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 June 12, 2018. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion to Extend the Automatic Stay is denied.

Cynthia Paysinger ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(a) extended beyond thirty days in this case. This is Debtor's second bankruptcy petition pending in the past year. Debtor's prior bankruptcy case (No. 16-20016) was dismissed on December 8, 2017, after Debtor failed to make plan payments. *See* Order, Bankr. E.D. Cal. No. 16-20016, Dckt. 59, December 8, 2017. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to Debtor thirty days after filing of the petition.

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed because she had difficulty with her finances after she became disabled, retired, and received half of the income she was accustomed to receiving. Dckt. 12.

Debtor provides a very skeletal declaration supporting the Motion. She testifies:

A. She became disabled, retired, and now has only half (a non-specified amount) of her prior income. Declaration ¶ 1, Dckt. 12.

B. Her circumstances have changed, stating that "My son and his girlfriend live with me now and are assisting with financial obligations since I will be leaving home to them." Declaration ¶ 4.

C. "I have hired attorney, Peter Macaluso, and I am confident of his ability to represent me and propose a solid Chapter 13 Plan that will allow me to pay my creditors to the best of my ability."

Other than some fragmented facts (son and girlfriend will now live with Debtor, and possibly be subsidized by Debtor) and that her income is half of what it was before, the Declaration consists merely of Debtor's personal conclusion that she will prosecute this case.

CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee filed an Opposition on June 13, 2018. Dckt. 14. The Chapter 13 Trustee states that this case's filing is incomplete. He notes that the remaining documents are due on June 15, 2018, but he cannot determine if there has been a change in circumstances since the prior case.

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.

On June 13, Debtor filed the missing documents that had not been submitted with this skeletal filing. *See* Dckt. 17–19. The Plan calls for payments of $2,290.00 per month for sixty months, with a 0.00% dividend to unsecured claims. Dckt. 17. Class 1 includes Wells Fargo Bank, N.A. with arrears of $29,000.00 and 0.00% interest being paid on the arrears. Despite listing Wells Fargo in Class 1—appearing to be for a mortgage—Schedule J does not include any expenses for real estate taxes, homeowner's insurance, home maintenance, or homeowner's association dues. Dckt. 19. Schedule J also includes a mysterious entertainment expense of $2.00.

On Schedule I, Debtor lists income from employment, Social Security, and $1,000.00 per month from her son and daughter in law. Dckt. 19 at 26. No testimony is provided how Debtor's son and "daughter in law" can pay $1,000.00 per month. No declaration from either is provided.

On Schedule J, Debtor fails to provide (states under penalty of perjury that she has $0.00 of) for the payment of any expenses for repair, maintenance, and upkeep of the residence that she seeks to keep. Dckt. 19 at 27. Debtor purports to have only $200 per month in expenses for food and housekeeping supplies. *Id.* at 28. Allowing $50 per month for housekeeping expenses, that would leave only $1.66 per meal in a thirty day month for Debtor. No evidence is provided that this Debtor can properly provide to feed herself for $1.66 per meal.

For her transportation expense (gas, repairs, and maintenance), Debtor states under penalty of perjury that she has expenses of only $225 per month. *Id.* On Schedule B, Debtor lists having a 2003 Honda with 285,000 miles on it. *Id.* at 4. A vehicle of such an age and mileage commonly requires significant annual repair expenses. If the court allows only $50 per month for repairs and maintenance, there is only $175 per month for gas. Assuming $3.85 per gallon, Debtor could purchase only 45 gallons per month. Assuming an average of 25 miles per gallon, that gives Debtor the ability to drive (for work and pleasure) only 37 miles per day in a thirty-day month.

Debtor has not 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. Debtor has not explained to the court what went wrong financially in her prior case that has been addressed before filing this current case. Instead, the court's review of the filed documents indicates that Debtor may be manufacturing (or ignoring) her expenses to achieve a desired outcome.

The Motion is denied.

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

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

The Motion to Extend the Automatic Stay filed by Cynthia Paysinger ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied, and the automatic stay, as it applies to Debtor is not extended pursuant to 11 U.S.C. § 362(c)(3)(B). This order does not address the automatic stay under 11 U.S.C. § 362(a) as it applies to the bankruptcy estate and property of the bankruptcy estate.

10. 18-20665-E-13 JJC-2 | **LINDA MCINNES** | **Julius Cherry** | **MOTION TO CONFIRM PLAN** | **5-8-18 [47]**

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 May 8, 2018. By the court's calculation, 49 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

The Motion to Confirm the 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.

Linda McInnes ("Debtor") seeks confirmation of the Amended Plan because she has now hired an attorney to help her prosecute this case. Dckt. 50. The Amended Plan proposes payments of $100.00 for two months, then $500.00 for months 3 through 14, then $550.00 for months 15 through 26, and then $575.00 for months 27 through 60. Dckt. 27. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on June 4, 2018. Dckt. 66. Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). The Chapter 13 Trustee notes that Schedule J lists disposable income as $445.00, but very early in the plan term, payments increase to $500.00. The Chapter 13 Trustee notes that Debtor does not expect a significant increase in her income. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

The Chapter 13 Trustee also opposes the Amended Plan's use of *pro rata* terms in the Additional Provisions because they create an administrative burden on the Chapter 13 Trustee. He argues that such distributions to administrative expenses and to Class 2 create a burden because the software that the Chapter 13 Trustee uses requires specific dollar amounts. The Chapter 13 Trustee calculates monthly administrative expenses at a dividend of $232.06 or $327.39, depending on whether a claim is valued. Also, he argues that his software does not allow for specific dividends to be set for unsecured priority claims, and instead, the Chapter 13 Trustee will pay priority claims according to the Amended Plan.

DEBTOR'S RESPONSE

Debtor filed a Response on June 14, 2018. Dckt. 69. Debtor argues that the Chapter 13 Trustee has overlooked how Schedule J includes $150.00 for "unexpected and various miscellaneous expenses," which would be enough to fund the plan.

Debtor also agrees with the Chapter 13 Trustee that actual numbers should be used in the Additional Provisions. Debtor proposes stating that Administrative Expenses shall be $350.00 beginning in month 3, listing the Class 2 claim of Hyundai Capital America as a monthly dividend of $232.03, and paying unsecured priority claims according to Section 5.02.

RULING

Despite the proposed ruling, Debtor has not shown that she cannot afford the plan payments. The court does not understand how Debtor states under penalty of perjury that she has $150.00 per month for "unexpected and various miscellaneous expenses," but now her attorney argues that Debtor's prior statement under penalty of perjury of there being $150 per month in such expenses, that such expenses "do not really exist" and Debtor could really use the money to fund the Plan.

The court elects to believe Debtor's statement under penalty of perjury that she has such expenses of $150.00 per month. To conclude otherwise, the court would have to determine that Debtor has intentionally stated that such expenses exist under penalty of perjury, when she in fact knew no such expenses existed. Further, that would mean Debtor intentionally committed such perjury as part of her bad faith scheme to ensure that she could improperly divert money from creditors and put it "into her own pocket" (the Plan providing a 0.00% dividend for creditors holding general unsecured claims). Plan ¶ 3.14, Dckt. 27.

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 Linda McInnes ("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.

11. 14-30866-E-13 MS-1 — DENISE YAPP / Mark Shmorgon — MOTION TO MODIFY PLAN — 5-11-18 [40]

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 May 11, 2018. By the court's calculation, 46 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

The Motion to Confirm the Modified Plan is granted.

Denise Yapp ("Debtor") seeks confirmation of the Modified Plan to cure a delinquency and provide for claims as filed. Dckt. 43. The Modified Plan calls for $19,054.00 to be paid into the plan so far, with plan payments of $255.00 per month for months 44 through 60. Dckt. 42. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

CHAPTER 13 TRUSTEE'S LIMITED OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed a Limited Opposition on June 5, 2018. Dckt. 56. The Chapter 13 Trustee notes that the order confirming the current plan included the language "The debtor shall turn over all future tax refunds, for the duration of the Chapter 13 Plan, to the Chapter 13 Trustee." *See* Dckt. 25. He notes that the language is not in the proposed plan, but he would not oppose if it were.

DEBTOR'S RESPONSE

Debtor filed a Response on June 5, 2018. Dckt. 59. Debtor agrees that the order confirming the Modified Plan should include an amendment requiring Debtor to turn over all future tax refunds to the Chapter 13 Trustee.

RULING

Debtor agrees with the Chapter 13 Trustee about tax refunds being provided and proposes that the Modified Plan be modified to include a requirement that tax refunds be turned over to the Chapter 13 Trustee. The Modified Plan, as amended to require Debtor to turn over all future tax refunds to the Chapter 13 Trustee, 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 Denise Yapp ("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 11, 2018, as amended to require Debtor to turn over all future tax refunds to David Cusick ("the Chapter 13 Trustee"), 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. **17-24875-E-13** **LINDA VANPELT** **CONTINUED MOTION TO CONFIRM PLAN**
PGM-4 **Peter Macaluso** **3-21-18 [117]**

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 March 21, 2018. By the court's calculation, 55 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is denied without prejudice.

Linda VanPelt ("Debtor") seeks confirmation of the Amended Plan because she became delinquent on mortgage payments. Dckt. 119. The Amended Plan proposes payments of $4,400.00 through December 2017, then $2,040.00 per month for three months, then $3,500.00 for the remaining fifty-two months, with a zero percent dividend to general unsecured claims. The Additional Provisions propose terms for a loan modification. Dckt. 123. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on April 16, 2018. Dckt. 126. He notes that the Plan proposes incomplete Ensminger provisions, specifically not proposing proper adequate protection payments. Additionally, the Chapter 13 Trustee questions whether this Plan was proposed in good faith because it does not address the concerns raised by the court previously. *See* Dckt. 114.

CREDITOR'S OPPOSITION

HSBC Bank USA, National Association as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2007-10, by and through its servicing agent Wells Fargo Bank, N.A., ("Creditor") filed an Opposition on April 18, 2018. Dckt. 129. Creditor argues that pursuant to 11 U.S.C. § 1322(b)(2) & (5) and 1325(a)(5)(B), the Plan must fully cure the arrearages on its claim as well as provide ongoing monthly payments. Creditor argues that Debtor's intention to apply for a loan modification is too speculative to support confirmation, however.

DEBTOR'S REPLIES

Debtor filed two near-identical Replies, one on May 1 and the other on May 5, 2018. Dckt. 138, 141. Debtor states that a loan modification application has been submitted and that Debtor is working to provide additional documents that have been requested.

Debtor requests that the hearing on this Motion be continued sixty days while the application is pending.

MAY 15, 2018 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on June 26, 2018, to allow Debtor to file supplemental documents regarding a loan modification. Dckt. 143.

CREDITOR'S SUPPLEMENTAL DECLARATION

Tonya Caldwell of Creditor filed a Supplemental Declaration on May 31, 2018. Dckt. 151. Creditor states that Debtor's request for a loan modification was reviewed and denied, with a denial letter mailed on April 25, 2018. *See* Exhibit A, Dckt. 152.

RULING

Creditor's Opposition relies upon the legal assertion that the automatic stay provision of 11 U.S.C. § 362 and the adequate protection provisions of 11 U.S.C. § 361 are inapplicable in Chapter 13 cases. Creditor essentially asserts that a Chapter 13 debtor can be "punished" by being forced to make payments on a loan arrearage that debtor has the right (either legally or based on economic reality) to have modified. Further, Creditor asserts that it has the right to extract from Debtor the much higher payments, ignoring any obligation to modify the loan. Creditor is wrong. The automatic stay applies. The adequate protection provisions apply. Creditor is entitled to receive adequate protection payments if Debtor is going to use the automatic stay while Debtor exercises her rights. But Creditor is not entitled to bonus payments or to use the Bankruptcy Code to pummel the consumer debtor into foregoing the rights granted by Congress under the Bankruptcy Code. The Ensminger Additional Provisions do not modify the contract but ensure that the adequate protection rights placed by Congress are fully enforced. If grounds for relief from the stay exist, Creditor can move forward to enforce its rights. The court is at a loss to understand what good faith opposition grounds exist as advanced by Creditor.

Here, Debtor seeks to make an adequate protection payment of $2,258.32 per month until Creditor grants or denies the loan modification, or if other grounds exist, Creditor seeks and obtains relief from the automatic stay. Third Amended Plan, Additional Provisions § 6.07. The issue may well exist as to whether this is an "adequate" protection payment as provided for by Congress in 11 U.S.C. § 361. However, Creditor has waived any such opposition, instead asserting that 11 U.S.C. § 361 does not exist.

The Chapter 13 Trustee, potentially riding to Creditor's rescue, notes the court's prior analysis that it appears the adequate protection payment should be in the amount of $3,160.34. Opposition, Dckt. 126 at 2:1–13.5. However, Creditor does not believe the amount is inadequate under 11 U.S.C. § 361, so the court will not force the Chapter 13 Trustee's observation on Creditor, it having carefully prepared and presented its limited basis of opposition.

While the Third Amended Plan could be confirmable, Debtor's demonstrated lack of credibility in providing a "testimony on demand" declaration warrants denial of the Motion. The court presumes that the testimony under penalty of perjury, provided in the cool calm outside of court, prepared by Debtor's experienced counsel, is the best that can be done. Debtor's best consists of her legal conclusions, parroting Bankruptcy Code provisions, and imposing on the court Debtor's personal "findings of fact." Debtor's counsel is well aware of the Federal Rules of Evidence, of what constitutes admissible and credible testimony, and that the court does not treat federal court proceedings as a "free-for-all so long as one can get away with it" to abuse the federal judicial process.

Debtor has not provided credible evidence for the court to determine that the proposed Chapter 13 Plan complies with the provisions of 11 U.S.C. §§ 1325 and 1322. Debtor demonstrates that she has little knowledge of her plan and these proceedings. The Motion is denied without prejudice. FN.1.

FN.1. Given that this is not Debtor's first, second, or even third recent foray into bankruptcy, one presumes that she and her counsel worked extra hard to craft the best declaration and allow Debtor to demonstrate her most credible testimony. The current case was filed on July 25, 2017, and now ten months later, Debtor has been unable to confirm a Chapter 13 plan. Debtor's prior recent cases are:

Chapter 13 Case No. 15-24979
Filed.....June 21, 2015
Dismissed.....September 19, 2015

Plan Payments by Debtor.....$0.00; 15-24976; Trustee's Final Report, Dckt. 49.

Chapter 13 Case No. 15-20897
Filed.....February 5, 2015
Dismissed.....June 26, 2015

Plan Payments by Debtor.....$0.00; 15-20897; Trustee's Final Report, Dckt. 39.

Chapter 13 Case No. 14-27048
Filed.....July 7, 2014
Dismissed.....December 3, 2014

Plan Payments by Debtor.....$13,500.00; 14-27048; Trustee's Final Report, Dckt. 41.

Monies Refunded to Debtor.....$ 6,062.38; *Id.*

Creditor Payments Only For Post-Petition Mortgage Installments, No Arrearage. *Id.*

Chapter 13 Case Converted to Chapter 7 Case No. 11-30525
Filed.....April 28, 2011

Converted.....February 13, 2013; 11-30525; Notice of Voluntary Conversion, Dckt. 37

Plan Payments by Debtor.....$2,200; *Id.*; Trustee's Final Report, Dckt. 45.

Discharge Entered.....March 7, 2016

The entry of discharge was delayed because of ongoing litigation with the Chapter 7 Trustee. In requesting extension of time to enter discharge, the Chapter 7 Trustee stated grounds including the Debtor's continuing failure to turn over non-exempt assets to the Chapter 7 Trustee. *Id.*; Motion, Dckt. 138.

In substance, Debtor has been utilizing Chapter 13 since April 2011, has made little in plan payments, and has enjoyed living in bankruptcy. This may well add another dimension to the confirmation process, and these prior unsuccessful Chapter 13 cases may well be the reason Debtor fails (refuses) to provide personal knowledge testimony, instead choosing to have her attorney prepare declarations for which she (incorrectly) believes that she can assert plausible deniability:

Plausible Deniability

The ability to deny blame because evidence does not exist to confirm responsibility for an action. The lack of evidence makes the denial credible, or plausible. **The use of the tactic implies forethought, such as intentionally setting up** the conditions to plausibly avoid responsibility for one's future actions.

The term was coined by the CIA in the 1960s to describe the withholding of information from senior officials in order to protect them from repercussions in the event that certain activities by the CIA became public.

Taegan Goddard's Political Dictionary, http://politicaldictionary.com/words/plausible-deniability/. The use of this political device is antithetical to a debtor and counsel filing and prosecuting a bankruptcy case in good faith.

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 Linda VanPelt ("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 without prejudice.

13. 17-24875-E-13 DPC-3 — LINDA VANPELT, Peter Macaluso — CONTINUED MOTION TO DISMISS CASE, 11-29-17 [56]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on November 29, 2017. By the court's calculation, 84 days' notice was provided. 28 days' notice is required.

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

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

David Cusick ("the Chapter 13 Trustee") seeks dismissal of the case on the basis that Linda VanPelt ("Debtor") is $600.00 delinquent in plan payments, which represents one month of the $600.00 plan payment. Before the hearing, another plan payment will be due. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

The Chapter 13 Trustee's Motion argues that Debtor did not file a Motion to Confirm for an Amended Plan that had been filed. A review of the docket shows that Debtor has filed a new plan or a motion to confirm a plan.

The Chapter 13 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,

specifically for 2016. *See* 11 U.S.C. § 521(e)(2)(A); FED. R. BANKR. P. 4002(b)(3). That is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

The Chapter 13 Trustee reports that Debtor failed to disclose on the petition the following four prior bankruptcy cases:

A. Case No. 11-30525
B. Case No. 14-27048
C. Case No. 15-20897
D. Case No. 15-24979

Debtor was required to report any bankruptcy cases filed within the previous eight years. *See* Voluntary Petition. Debtor has since amended the petition to list the four cases. Dckt. 62 at 9.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on January 3, 2018. Dckt. 63. Debtor promises to file an amended plan before the hearing date and to provide the Chapter 13 Trustee with her 2016 tax return. Debtor also reports that the petition has been amended to address the missing cases.

CHAPTER 13 TRUSTEE'S STATUS REPORT

The Chapter 13 Trustee filed a Status Report on February 8, 2018. Dckt. 96. He states that this Motion to Dismiss has not been resolved by the filing of the Amended Plan. The Chapter 13 Trustee states that he is opposing confirmation and that Debtor does not appear to be making a legitimate attempt to confirm a plan in this case.

FEBRUARY 21, 2018 HEARING

At the hearing, Debtor's counsel addressed the lack of Debtor having to pay any state or federal taxes on her annual income as being based, after his due diligence investigation and good faith statement of applicable law. He also addressed how the response was lacking in explanation for how a professionally licensed real estate agent would in good faith state under penalty of perjury that she had no obligation to pay state and federal taxes. Dckt. 107.

The court continued the hearing to 10:00 a.m. on May 30, 2018. Dckt. 113.

MAY 30, 2018 HEARING

At the hearing, the court continued the hearing to 3:00 p.m. on June 26, 2018. Dckt. 154.

RULING

As the Chapter 13 Trustee has noted, Debtor has had four prior recent bankruptcy cases. Three of these were with the assistance of counsel, and only one in *pro se*. In dismissing the most recent prior case (in which Debtor was represented by counsel), the court found:

> "The Trustee argues that the Debtor did not commence making plan payments and is $5,608.00 delinquent in plan payments, which represents multiple months of the $2,804.00 plan payment. 11 U.S.C. §1307(c)(4) permits the dismissal or conversion of the case for failure to commence plan payments. The Debtor presented no opposition to the Motion.
>
> Cause exists to dismiss this case for failure to commence plan payments. The motion is granted and the case is dismissed."

15-24979; Civil Minutes, Dckt. 44.

In dismissing the case before that, filed in *pro se*, the court's findings include:

> "The Chapter 13 Trustee seeks dismissal of Debtor's case on the basis that Debtor is causing unreasonable delay prejudicial to creditors. 11 U.S.C. § 1307(c).
>
> 1. Debtor is $5,292 delinquent in plan payments to the Trustee to date, and the next scheduled payment of $2,646 is due on May 25, 2015. Debtor has paid $0 into the plan to date.
>
> 2. Trustee's objection to confirmation was heard and sustained on April 21, 2015. Debtor has not filed a subsequent amended plan or motion to confirm plan.
>
> On June 9, 2015, Debtor filed her own motion to dismiss the Chapter 13 case. Dckt. 33. The Motion does not state any reason Debtor say wants to dismiss the case. . .
> . . .
> Cause exists to dismiss this case. The motion is granted and the case is dismissed."

15-20897; Civil Minutes, Dckt. 34.

The case before that, 14-27048, the case was dismissed due to Debtor's failure/inability to confirm a Chapter 13 Plan, notwithstanding the assistance of counsel. 14-27048; Order, Dckt. 35.

Debtor filed her Second Amended Plan on January 10, 2018. Dckt. 69. January 2010 is the seventh month of this Chapter 13 case. For the first five months of this case, Debtor is to fund the Plan with the aggregate sum of $4,400.00, and then months six through sixty of the Plan fund it with $2,040 per

month. Plan ¶ 2.01, Dckt. 69. For the Class 1 Claim treatment, Debtor will be making a monthly payment of $517.00 for the $28,405.77 post-petition arrearage on the Wells Fargo Bank, N.A. secured claim. For the $256,806.77 pre-petition arrearage, Debtor will make a $930.00 "adequate protection payment" while diligently prosecuting a loan modification. Plan Additional Provisions ¶¶ 6.05-6.07, *Id.* These Plan Additional Provisions also disclose that the regular contractual monthly payment for this debt is $5,681.04. These Additional Provisions include the "standard" Ensminger Loan Modification terms.

On Schedule I, Debtor states under penalty of perjury that she is employed in real estate, having been so employed for twenty-one years. Dckt. 27 at 1. Debtor states her gross monthly income is $6,000, from which there is no withholding for income taxes, Social Security, or other standard employee withholdings. *Id.* In the note at the bottom of Schedule I as to whether Debtor anticipates an increase in income, Debtor states under penalty of perjury that she anticipates her income increasing because:

> "Alta Realty Group Ca Change: The Housing Market Is Picking Up Again, After The Crash."

Id. It appears that in Debtor's real estate world the real estate "crash" has extended through 2017 and is only starting to improve in August 2017. That is inconsistent with every other case that has been presented to this court over the past four years, during which time the California real estate market has roared back.

On her Amended and Supplemental Schedule J (Debtor having checked the boxes for the filing somehow being both amended and supplemental), Debtor states having monthly expenses of $3,500.00. Dckt. 121 at 5. Debtor reduces her monthly mortgage expense for her residence from being only $1,717.00 to $0.00. *Id.* While listing her forty-five-year old son as a dependent, she states having a monthly food and housekeeping supply expense of $600.00 per month. *Id.*. This is not credible, appearing to be highly unreasonable for two adults.

There is a missing expense that indicates that Debtor's finances are not as stated. No provision is made for Debtor to pay:

A. Any Federal Income Tax

B. Any State of California Income Tax

C. Any Social Security Tax

D. Any Self-Employment Tax

E. Any Unemployment Tax

Debtor, with a purported income of $72,000 per year, Debtor fails to provide any basis for being exempt from the state and federal taxes that burden every other working person.

Beginning in January 2018, Debtor is required to pay all of her projected disposable income, to fund the Plan, with Debtor only making an adequate protection payment to Wells Fargo Bank, N.A. If

Debtor has to pay $1.00 of federal or state taxes, by Debtor's own statement of finances, she will default in the plan payments. It appears that Debtor's state and federal taxes will be well in excess of $1.00 in light of her having at least $72,000 per year in gross income.

On February 14, 2018, Debtor and her counsel filed Amended Schedule I. Dckt. 99. Debtor increases her income to $6,170.00 per month. While reducing her income from her real estate business to $4,560 per month, she now discloses receiving $1,610.00 per month in Social Security Income. *Id.* at 5. In her business income and expense attachment, she lowers her monthly gross income to $5,000, and has ($440) in expenses. *Id.* at 6.

Debtor no longer skips listing expenses for taxes, now showing a monthly expense of $150.00 for income taxes. Dckt. 121 at 5.

Chapter 13 Trustee's Opposition to Motion to Confirm, Dckt. 93. The Chapter 13 Trustee's Opposition includes the lack of Debtor disclosing her personal property assets on Schedule A/B. The Chapter 13 Trustee also notes Debtor excluding any expense for state and federal taxes relating to her $72,000 per year income.

HSBC Bank, N.A., Trustee for the Wells Fargo Bank, N.A. claim, also filed an opposition. The Opposition restates there being a $256,806.77 pre-petition arrearage. While HSBC Bank, N.A. chaffs at the adequate protection provisions of the proposed plan (ignoring that it holds the key to such terms by filing a motion for relief from the stay, and such relief not being contingent on the loan modification process being completed), it asserts that Debtor is unable to make the plan payments.

Proofs of Claims. The Wells Fargo Bank, N.A. claim for which there is a $256,806.77 pre-petition arrearage, is stated to be a claim totaling $956,617.00. Proof of Claim No. 5. From the Attachments to Proof of Claim No. 5, it appears that the defaults in payments go back to 2009.

The Internal Revenue Service has filed its proof of claim for $15,901.53 in priority taxes and $7,053.60 general unsecured claim. Amended Proof of Claim No. 7. The Attachment to Proof of Claim No. 7 discloses that the taxes are for 2013, 2014, and 2016 tax years. Further, the opposition asserts that Debtor has not filed a tax return for 2016. This claim demonstrates that Debtor does have federal and state tax expenses from her income, even at the lower-earning rates in prior years than now stated under penalty of perjury going forward.

Schedules, Assets, and Claims. On Amended Schedule A/B, Debtor lists owning the real property identified as 7824 English Hills Road, Vacaville, California. Debtor states the Property has a value of $550,000.00. Dckt. 108.

Debtor then lists the 7824 English Hills Road two more times on the Schedules, one time stating it has a value of $56,191.68 and then $0.00. Dckt. 1 at 8–9. For personal property, Debtor has corrected her omissions to state under penalty of perjury that she has:

A. One vehicle (a Toyota Land Cruiser),

B. $2,500.00 of furniture,

C. $2,000.00 of electronics,

D. $500.00 of pictures and books,

E. $350.00 for an antique poodle collection,

F. $80.00 of exercise equipment,

G. $250.00 of clothing,

H. $800.00 of jewelry,

I. $20.00 of cash on hand, and

J. $1,000.00 in a Wells Fargo checking account.

Amended Schedule A/B, Dckt. 108.

After the February 21, 2018 hearing, the court reviewed the schedules again and concluded that Debtor may have $1,610.00 per month to pay taxes and fund plan payments of $2,040.00. The court noted that two motions to value have been granted in this case, and any dismissal of the case would result in those motions having to be relitigated in any future case.

Debtor's counsel has affirmatively prosecuted the case and plan, built around Debtor not having to pay any state or federal taxes. These acts have all been subject to counsel's certifications under Federal Rule of Bankruptcy Procedure 9011.

The court has denied confirmation of the pending plan, and there is cause to dismiss this case. The Motion is granted, and the case is dismissed.

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

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

14. **10-50178-E-13** **MARIA DE LA GARZA** **CONTINUED MOTION TO AVOID LIEN**
TJW-5 **Timothy Walsh** **OF AMERICAN EXPRESS BANK, FSB**
5-24-18 [105]

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. FN.1.

FN.1. Movant has not specified clearly whether the Motion is noticed according to Local Bankruptcy Rule 9014-1(f)(1) or (f)(2). The Notice of Motion states that a hearing will be held for an order avoiding a judicial lien, and the hearing will be based upon submitted pleadings as well as argument at the hearing. Based upon language that any opposition must be presented at the hearing, the court treats the Motion as being noticed according to Local Bankruptcy Rule 9014-1(f)(2). Counsel is reminded that not complying with the Local Bankruptcy Rules is cause, in and of itself, to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(c)(l).

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 29, 2018. By the court's calculation, 14 days' notice was provided. 14 days' notice is required. Service was made by Certified Mail.

The Motion to Avoid Judicial Lien was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion.

No Opposition having been asserted, the default of American Express Bank, FSB is entered.

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of American Express Bank FSB ("Creditor") against property of Maria De la Garza ("Debtor") commonly known as 451 Ebbetts Pass Road, Vallejo, California ("Property").

JUNE 12, 2018 HEARING

At the hearing, Debtor requested a continuance to allow the record to be supplemented. Dckt. 112. The court granted the request and continued the hearing to 3:00 p.m. on June 26, 2018. *Id.*

Discussion at June 12, 2018 Hearing, Judgement Against Debtor's Former Spouse

A judgment was entered against Debtor's former spouse in favor of Creditor in the amount of $11,178.08. An abstract of judgment was recorded with Solano County on June 8, 2010, that encumbers the Property.

The court has reviewed the various pleadings submitted by Debtor in this case and does not see a date listed anywhere for when Debtor and her former spouse were divorced. The petition was filed on November 16, 2010, and it indicates that Debtor and her former spouse separated at some point before this case was filed. *See* Dckt. 1. No mention is made of whether the Property was acquired as community property or when it was acquired, but Debtor lists her interest on Schedule A as "fee simple" ownership of the Property. *Id.*

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of $150,000.00 as of the petition date. *Id.* The unavoidable consensual liens that total $346,800.19 as of the commencement of this case are stated on Debtor's Schedule D. *Id.* Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of $100.00 on Schedule C. *Id.*

What is clear from the pleadings is that Creditor's judgment lien was acquired pre-petition, and it named only Debtor's former spouse (Diego Ortiz) as the judgment debtor.

SUPPLEMENTAL EXHIBITS

Debtor filed Supplemental Exhibits on June 16, 2018. Dckt. 114. The two exhibits are labeled as a Title Profile and a Preliminary Title Report. There are no supporting declarations seeking to authenticate the exhibits and admit them as proper evidence. FED. R. EVID. 901. The one statement appears at before the exhibits and states in its entirety:

> The undersigned declares the above exhibits were received from the WFG Title Company, in the ordinary course of business, are not altered, and are presented for the purpose of verifying the contents stated in each exhibit.
>
> The undersigned further declares this declaration is executed at Fairfield, at:
>
> Dated this 16th Day of JUNE, 2018
>
> /S/ TIMOTHY J. WALSH

Id. Debtor's Counsel is an attorney who appears regularly in this court and knows that the court applies the Federal Rules of Evidence, including Rule 901 requiring a declarant to authenticate evidence under penalty of perjury while providing competent, personal knowledge testimony. *See* FED. R. EVID. 601, 602.

The Title Profile exhibit is a print-out from a webpage presenting information about the Property, including that Debtor and her former spouse are listed as primary owners and appearing to assert that the last sale of the Property was on June 26, 2003. *See* Exhibit 3, Dckt. 114. The Preliminary Report from WFG National Title Insurance Company is dated March 16, 2018, and reports that interest in the Property is held by "Diego Ortiz and Maria Elena Ortiz, husband and wife, as joint tenants." Exhibit 4, *id.* at 5. The Preliminary Report also includes a list of secured obligations and shows a first deed of trust on June 16, 2003, with Debtor and her former spouse as the trustors, and it also shows the judgment lien being recorded on June 8, 2010.

DISCUSSION

While Debtor has been "challenged" in presenting the court with properly authenticated evidence (counsel testifying that somehow he knows that someone got documents from a title company in the course of somebody's business), even considering such weighs against Debtor.

From Exhibit Four, Debtor represents that the Property is owned as joint tenants with Diego Ortiz. Exhibit 4, Dckt. 114 at 4. Debtor and Diego Ortiz were granting deeds of trust on the Property dating back to 2003. *Id.* at 6. Thus, it appears that both—as asserted by Debtor—Diego Ortiz and Debtor have long held, and continue to hold, interests in this Property.

On June 8, 2010, a judgment lien was recorded against the interests of Diego Ortiz. *Id.*

Debtor has now filed this bankruptcy, without Diego Ortiz. In her Declaration, Debtor states that she, as the debtor in her bankruptcy case, seeks to avoid Creditor's lien securing the obligation of Diego Ortiz. Dckt. 107.

However, Diego Ortiz, and his assets, are not part of this bankruptcy case. It appears that Diego Ortiz may be Debtor's ex-spouse.

Congress provides in 11 U.S.C. § 522(f)(1) [emphasis added] for the avoiding of certain liens, and as those provisions apply to judgment liens:

> (f) (1) Notwithstanding any waiver of exemptions but subject to paragraph (3), the **debtor may avoid the fixing of a lien** on **an interest of the debtor in property** to the extent that such **lien impairs an exemption** to which the debtor would have been entitled under subsection (b) of this section, if such lien is–

(A) a judicial lien, other than a judicial lien that secures a debt of a kind that is specified in section 523(a)(5); . . .

The "debtor" who may avoid the fixing of a lien on the "interests of the debtor in property" is Maria De la Garza (aka Maria Ortiz). While Debtor claims to now own the Property, the lien affixed to Diego Ortiz's interests in the Property, not Debtor's. That Debtor may have subsequently acquired Diego Ortiz's interests in the Property, that does not change whose interests were encumbered.

Being married, the judgment lien encumbered Diego Ortiz's interest in all of the Property, assuming that this was community property. CAL. FAM. CODE § 910. All property acquired during the marriage (except as otherwise provided, for which no other grounds have been shown) is community property. CAL. FAM. CODE § 760. Each spouse to the marriage has existing and equal interests in community property. CAL. FAM. CODE § 751.

No Opposition by Creditor

Though given several opportunities, Creditor has elected not to oppose this Motion. The default of Creditor has been entered. This court follows the clear and unambiguous direction of the Supreme Court in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, (2010), that merely because a default is entered a federal trial court does not grant whatever relief is requested without regard to the law. The law and evidence presented must provide the legal and factual basis for the relief that is awarded.

Granting of Motion

For the factual grounds presented, this is a close call for the court. The judgment lien at issue attached to Diego Ortiz's interests in the Property, not Debtor's. However, Diego Ortiz's interests are in the entire property. CAL. FAM. CODE §§ 910, 751. However, conversely, Debtor also had her interest in all of the Property. So, a question exists as to whether the judgment lien just affixed to Diego Ortiz's interests (all of the property) or also simultaneously affixed to Debtor's interest in the Property (if such interests could be treated separately with respect to community property and judgments).

Debtor does not provide the court with any legal analysis of this point, treating this as if it were a simple situation of Debtor owned Property, Judgment entered against Debtor, Judgment Lien recorded against Debtor's Property. It is not that simple.

Creditor has not opposed, though, and has not provided the court with any legal analysis, or sought to protect whatever value its $11,000 judgment may have by virtue of the lien against this Property. It appears fairly obvious that it has no value and is not worth Creditor's lawyer's time (and Creditor's money) to address this legal point.

The court chooses not to provide such *pro bono* legal services for Creditor. On its face, granting the Motion is not clearly wrong. Debtor had an interest in the Property when the lien attached to the Property. Debtor's interest was in all of the Property. Debtor now seeks to avoid the fixing of that judgment lien. FN.2.

FN.2. Another possible complication that is unaddressed is that the title report provided by Debtor indicates that Debtor and Diego Ortiz elected to take and hold title, to this day, as "tenants in common." A presumption of community property arises, and the "tenants in common" designation in a deed is not controlling. CAL. FAM. CODE § 2581; *Hunter v. Hunter*, 202 Cal. App. 2d 84 (Cal. Ct. App. 1962). Again, no opposition has been asserted based on the Property not being community or that Debtor did not have an interest in the Property to which the lien affixed.

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 Maria De la Garza ("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 American Express Bank FSB, California Superior Court for Solano County Case No. VCM 107942, recorded on June 8, 2010, Document No. 201000052548, with the Solano County Recorder, against the real property commonly known as 451 Ebbetts Pass Road, Vallejo, 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.

15. 17-25985-E-13 MRL-4 | **DANIEL MARTINEZ** Mikalah Liviakis | **CONTINUED MOTION TO CONFIRM PLAN** 4-17-18 [92]

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 17, 2018. By the court's calculation, 56 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

The Motion to Confirm the Amended Plan is denied.

Daniel Martinez ("Debtor") seeks confirmation of the Amended Plan filed April 17, 2018, stating he has a steady income of $4,000.00, which will provide for the adjusted monthly payments, and Debtor has updated Schedules I and J. Dckt. 94. The Amended Plan calls for payments of $2,450.00 for one month; $500.00 for eleven months; and $880.00 for forty-eight months; with 0.00% dividend to general unsecured claims. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CREDITOR'S FIRST OPPOSITION

Wells Fargo Bank, N.A., ("Creditor") holding a secured claim filed an Opposition on May 8, 2018. Dckt. 102.

The objecting creditor holds a deed of trust secured by Debtor's residence. Creditor has filed a timely proof of claim in which it asserts $32,623.53 in pre-petition arrearages. Claim 5-1. The Plan does not propose to cure those arrearages. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments because it does not provide for the surrender of the collateral for this claim. *See* 11 U.S.C. §§ 1322(b)(2) & (5), 1325(a)(5)(B). The Plan cannot be confirmed because it fails to provide for the full payment of arrearages.

Creditor argues that Debtor's Plan was not filed in good faith and is an improper modification of a claim secured only by a security interest in real property that is Debtor's principal residence. Creditor states that the currently monthly payment due is $543.73. Creditor objects to the proposed modification of the Plan and argues that Debtor has proposed lower monthly payments than due. Creditor argues that Debtor is unable to modify a claim secured by real property that is Debtor's principal residence. 11 U.S.C. § 1322(b)(2). The anti-modification provision applies to any loan secured only by real property that Debtor uses as a principal residence. *In re Wages*, 508 B.R. 161, 168 (B.A.P. 9th Cir. 2014).

Creditor has filed a Proof of Claim indicating a secured claim in the amount of $333,307.98, secured by a mortgage deed of trust against the property commonly known as 600 5th Ave., Sacramento, California. Claim 5-1. Debtor's Schedules indicate that this is Debtor's primary residence. This modification violates 11 U.S.C. § 1322(b)(2), which prohibits the modification of an obligation secured only by Debtor's residence.

CREDITOR'S SECOND OPPOSITION

Creditor filed a second Opposition through difference counsel for another secured claim it asserts in this case on May 23, 2018. Dckt. 105.

The objecting creditor holds a deed of trust secured by Debtor's residence. Creditor has filed a timely proof of claim in which it asserts $3,224.12 in pre-petition arrearages. Claim 3-2. The Plan does not propose to cure those arrearages. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments because it does not provide for the surrender of the collateral for this claim. *See* 11 U.S.C. §§ 1322(b)(2) & (5), 1325(a)(5)(B). The Plan cannot be confirmed because it fails to provide for the full payment of arrearages.

Creditor argues that Debtor's Plan was not filed in good faith and is an improper modification of a claim secured only by a security interest in real property that is Debtor's principal residence. Creditor states that its claim is secured in the amount of $36,528.24. Claim 3-2. Creditor objects to the Plan modification which reflects a monthly dividend of $64.38. Dckt. 96. Creditor argues that Debtor is unable to modify a claim secured by real property that is Debtor's principal residence. 11 U.S.C. § 1322(b)(2). The anti-modification provision applies to any loan secured only by real property that Debtor uses as a principal residence. *In re Wages*, 508 B.R. 161, 168 (B.A.P. 9th Cir. 2014).

Creditor has filed a Proof of Claim indicating a secured claim, secured by a mortgage deed of trust against the property commonly known as 600 5th Ave., Sacramento, California. Claim 3-2. Debtor's Schedules indicate that this is Debtor's primary residence. This modification violates 11 U.S.C. § 1322(b)(2), which prohibits the modification of an obligation secured only by Debtor's residence.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on May 25, 2018. Dckt.108.

The Chapter 13 Trustee asserts that Debtor is $2,500.00 delinquent in plan payments, which represents multiple months of the $500.00 plan payment ($2,450.00 due for month 1, $500.00 per month for 11 months, and $880.00 per month for 48 months). Dckt. 96. The Chapter 13 Trustee asserts that Debtor has paid $2,450.00 into the Plan to date and $4,450.00 is the total amount due to date. According to the Chapter 13 Trustee, the Plan in § 2.01 calls for payments to be received by the Chapter 13 Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

The Chapter 13 Trustee asserts that Debtor may have intended to list the first and second mortgages held by Creditor, which are treated as Class 2 claims in the Plan, as Class 4 claims. Dckt. 108. Class 2 claims subject to Section 3.08(c) of the Chapter 13 Plan are paid by the Chapter 13 Trustee as a monthly dividend. Class 2 claims, are secured by Debtor's principal residence, and, except as permitted by 11 U.S.C. § 1322(c), may not be modified as to the rights of a holder of a secured claim. Debtor lists the claims secured by his primary residence in Section 3.08 of the Plan as Class 2 claims. Dckt. 96. Debtor states that the sale of real property, commonly known as 600 5th Avenue, Sacramento, California, will allow Debtor to pay in full the Class 2 Claims. Dckt. 92. As stated in the Chapter 13 Trustee's Opposition, Debtor cannot pay said claims directly from the proceeds of the sale of his real property unless the claims are treated as Class 4. Dckt. 108.

The Chapter 13 Trustee asserts that Debtor's non-standard payment provision in Section 2.02 of the Plan (Other Payments) indicates that the payments for months 2 through 12 are subject to the sale of Debtor's real property. Dckt. 96. Section 7 of Debtor's Plan indicates the monthly payment plan amounts. Section 2.01 provides that monthly payments are due "each month after the order for relief under chapter 13." *Id.* Debtor lists a payment of $5,500 in "net proceeds that he receives from the sale of his real property" under section 2.02 of the Plan. Section 2.02 provides for *additional payments* derived from the sale of property. Also, Section 2.02 of Debtor's plan is inconsistent with statements in page 2, lines 5–8 of Debtor's Motion to Confirm Plan, which indicate a good faith proposal by Debtor to make monthly payments. Dckt. 92.

11 U.S.C. §§ 1322(a)(1), 1325(a) provides that a plan shall specify how it will be funded and requires a timely, regular monthly payment—a plan that is also required to verify how that debtor has the ability to make the regular monthly payments required by the plan. *See In re Keller*, 329 B.R. 697, 700 (Bankr. E.D. Cal. 2005); *see also In re Gavia*, 24 B.R. 573, 575 (B.A.P. 9th Cir. 1982) ("[W]e construe [section 1322(b)(8)] as permitting a plan to *supplement payments* from future income.") (emphasis added). If Debtor is proposing a lump sum payment rather than monthly payments required by the Plan, this modification needs to be expressly proposed for the creditors and Chapter 13 Trustee to review the impact or benefit of Debtor's additional income. *In re Keller*, 329 B.R. at 701.

JUNE 12, 2018 HEARING

At the hearing, Debtor stated that there was a problem because closing of a prior approved sale that would fund the Plan for the objecting creditors had been delayed. Dckt. 112. Debtor stated that the sale was projected to close during the week of June 11, 2018. The parties concurred that a continuance was appropriate to close the sale.

The court continued the hearing to 3:00 p.m. on June 26, 2018. Dckt. 113.

RULING

Since the prior hearing, no party has filed any supplemental pleadings indicating whether the sale closed. As the motion stands, there are grounds to deny confirmation.

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 Daniel Martinez ("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 Amended Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

16. 18-22285-E-13 DL-1 | **TROY VALDEZ KAUFMAN** **Mohammad Mokarram** | **OBJECTION TO CONFIRMATION OF PLAN BY SACRAMENTO MUNICIPAL UTILITY DISTRICT** **5-15-18 [13]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 15, 2018. By the court's calculation, 42 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

Sacramento Municipal Utility District ("Creditor") holding a secured claim, opposes confirmation of the Plan on the basis that Troy Kaufman's ("Debtor") plan does not provide for Creditor's secured claim.

Creditor asserts a claim of $14,760.11 in this case. Proof of Claim No. 3-1. Creditor alleges that the Plan violates 11 U.S.C. § 1322(b)(2) because it contains no reference to Creditor's secured claim which is secured by Debtor's residence. *See* 11 U.S.C. § 1325(a)(5).

11 U.S.C. § 1322(b) specifies the provisions that a plan may include at the option of the debtor. With reference to secured claims, the debtor may not modify a loan secured only by a security interest in real property that is the debtor's principal residence, but may modify other secured claims (11 U.S.C.

§ 1322(b)(2)), cure any default on a secured claim—including a home loan—(11 U.S.C. § 1322(b)(3)), and maintain ongoing contract installment payments while curing a pre-petition default (11 U.S.C. § 1322(b)(5)).

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

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

B. Provide for payment in full of the entire claim if the claim is modified or will mature by its terms during the term of the Plan (11 U.S.C. § 1325(a)(5)(B)), or

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

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

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

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

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 Sacramento Municipal Utility Disctrict ("Creditor") holding a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

17. 18-22285-E-13 DPC-1 | **TROY VALDEZ KAUFMAN** **Mohammad Mokarram** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 5-25-18 [20]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on May 25, 2018. By the court's calculation, 32 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

David Cusick ("the Chapter 13 Trustee") opposes confirmation of the Plan on the basis that the Plan does not provide for a secured claim.

Troy Kaufman's ("Debtor") Schedule F estimates the amount of Sacramento Municipal Utility District's ("Creditor") claim as $12,000.00, but Creditor filed Proof of Claim No. 3-1 for $14,760.11 as secured debt.

11 U.S.C. § 1322(a) is the section of the Bankruptcy Code that specifies the mandatory provisions of a plan. It requires only that a debtor adequately fund a plan with future earnings or other future income that is paid over to the Chapter 13 Trustee (11 U.S.C. § 1322(a)(1)), provide for payment in full of priority claims (11 U.S.C. § 1322(a)(2) & (4)), and provide the same treatment for each claim in a particular class (11 U.S.C. § 1322(a)(3)). Nothing in § 1322(a) compels a debtor to propose a plan that provides for a secured claim, however.

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

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

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

B. Provide for payment in full of the entire claim if the claim is modified or will mature by its terms during the term of the Plan (11 U.S.C. § 1325(a)(5)(B)), or

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

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

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

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

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 David Cusick ("the Chapter 13 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

18. **18-22385-E-13** **BARTH BRAGER** **OBJECTION TO CONFIRMATION OF**
DPC-1 **Seth Hanson** **PLAN BY DAVID P. CUSICK**
5-25-18 [15]

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 25, 2018. By the court's calculation, 32 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

David Cusick ("the Chapter 13 Trustee") opposes confirmation of the Plan on the basis that Barth Brager's ("Debtor") plan fails the liquidation analysis.

The Chapter 13 Trustee's objection is well-taken. The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtor's plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). The Chapter 13 Trustee calculates that there is $173,930.92 in non-exempt equity, but Debtor has proposed a 65% dividend to general unsecured claims, which approximates to $146,448.00.

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

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

19. 18-21488-E-13 DPC-1 | **DANIEL/ALLISON BRENNAN** **Charles Hastings** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **5-29-18 [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 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 29, 2018. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

A. Daniel Brennan and Allison Brennan ("Debtor") are delinquent on plan payments;

B. A claim listed in Class 4 should be in Class 1 to cure arrears;

C. Debtor cannot make the plan payments because of filed tax claims; and

D. The Plan may fail the liquidation analysis.

The Chapter 13 Trustee's objections are well-taken. The Chapter 13 Trustee asserts that Debtor is $5,000.00 delinquent in plan payments, which represents one month of the $5,000.00 plan payment. According to the Chapter 13 Trustee, the Plan in § 2.01 calls for payments to be received by the Chapter 13 Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). First, debtor included a direct-pay mortgage in Class 4, but after the creditor filed Proof of Claim No. 4-1 showing arrears of more than $25,000.00, it appears that the claim should be provided for in Class 1. Second, the Internal Revenue Service and the Franchise Tax Board both filed proofs of claim for secured, priority unsecured, and general unsecured debt. The Plan does not provide for secured claims for those agencies, and Schedule J does not include payment on pre-petition tax debt. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtor's plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). The Chapter 13 Trustee states that original Schedule A showed Debtor's residence having a value of $1,000,000.00, but Amended Schedule A shows a value of $780,000.00. *Compare* Dckt. 1, *with* Dckt. 27. The Chapter 13 Trustee does not what value is accurate, but using the first one, the Chapter 13 Trustee calculates that there would be non-exempt equity of $242,722.70.

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 David Cusick ("the Chapter 13 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

20. 17-22489-E-13 EUGENE NIERI — MOTION TO MODIFY PLAN
MRL-7 Mikalah Liviakis — 5-4-18 [106]

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 5, 2018. By the court's calculation, 52 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

The Motion to Confirm the Modified Plan is denied.

Eugene Nieri ("Debtor") seeks confirmation of the Modified Plan, which calls for payments of $3,400.00 for three months followed by $1,600.00 per month for fifty-seven months. Dckt. 109. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on June 5, 2018. Dckt. 112. The Chapter 13 Trustee asserts that Debtor is $1,544.50 delinquent in plan payments, which represents less than one month plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

RULING

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

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

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

21. 18-22497-E-13 DPC-1 | **ROBERT MAC BRIDE** **Pro Se** | **MOTION FOR DENIAL OF DISCHARGE OF DEBTOR UNDER 11 U.S.C. SECTION 727(A)** **5-29-18 [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—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) and Office of the United States Trustee on May 29, 2018. 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). Debtor (*pro se*) has not filed opposition. If the *pro se* Debtor appears at the hearing, the court shall consider the arguments presented and determine if further proceedings for this Objection are appropriate.

The Objection to Discharge is sustained.

David Cusick, the Chapter 13 Trustee, ("Objector") objects to Robert Mac Bride's ("Debtor") discharge in this case. Objector argues that 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 April 5, 2017. Case No. 17-22283. Debtor received a discharge on February 21, 2018. Case No. 17-22283, Dckt. 109.

The instant case was filed under Chapter 13 on April 25, 2018.

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 February 21, 2018, which is less than four years preceding the date of the filing of the instant case. Case No. 17-22283, Dckt. 109. 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. 18-22497), 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, ("Objector") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to Discharge is sustained, and upon successful completion of the instant case, Case No. 18-22497, the case shall be closed without the entry of a discharge.

FINAL RULINGS

22. 18-22010-E-13 DPC-1 — JERRY/CAROLINE CHAVEZ — Jeffrey Ogilvie — OBJECTION TO DEBTORS' CLAIM OF EXEMPTIONS — 5-15-18 [19]

Final Ruling: No appearance at the June 26, 2018 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 and Debtor's Attorney on May 15, 2018. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

The Objection to Claimed Exemptions 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 Objection to Claimed Exemptions is sustained, and the exemptions are disallowed in their entirety.

David Cusick ("the Chapter 13 Trustee") objects to Jerry Chavez and Caroline Chavez's ("Debtor") claimed exemptions under California law because Debtor has not indicated why they are entitled to the Homestead Exemption. California Code of Civil Procedure § 704.730 allows a maximum exemption of $175,000.00 if the debtor qualifies for one of three categories pertaining to age, disability, or a combination of age and income. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the amount of $175,000.00 on Schedule C. Dckt. 1 at 18. The Chapter 13 Trustee asserts that because Debtor received combined income of $66,725.00 in 2017 and because Debtor listed their ages as "63 and 59 years old" on Schedule A/B, Debtor may not qualify for the exemption claimed. *See* Dckt. 1.

California Code of Civil Procedure § 704.730(a)(3) states that a debtor may claim an exemption of $175,000.00 if:

1. The debtor is at least 65 years old,

2. The debtor is physically or mentally disabled and unable to acquire gainful employment, or

3. The debtor is at least 55 years old with a gross annual income of no more than $35,000 when married, including the spouse's income.

Here, Debtor does not meet the age requirement alone, there is no evidence of a disability, and Debtor's income is more than the maximum allowed by statute. The Chapter 13 Trustee's Objection is sustained, and the claimed exemption is disallowed.

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 Claimed Exemptions 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 is sustained, and the claimed exemption for $175,000.00 under California Code of Civil Procedure § 704.730 is disallowed in its entirety.

23. 18-22713-E-13 FF-2 | **DAMION HRIBIK** Gary Fraley | **MOTION TO VALUE COLLATERAL OF WELLS FARGO DEALER SERVICES 5-25-18 [26]**

Final Ruling: No appearance at the June 26, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on May 25, 2018. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

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

The Motion to Value Collateral and Secured Claim of Wells Fargo Dealer Services ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $8,951.92.

The Motion filed by Damion Hribik ("Debtor") to value the secured claim of Wells Fargo Dealer Services ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2011 Chevrolet Camaro, VIN ending in 3185 ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $9,000.00 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).

CHAPTER 13 TRUSTEE'S NON-OPPOSITION

Davis Cusick ("the Chapter 13 Trustee") filed a Non-Opposition on June 7, 2018. The Chapter 13 Trustee states that Debtor's Declaration indicates Vehicle is in poor condition and provides a list of needed repairs and that Debtor's Schedules A/B and D describe the Vehicle as in fair condition with water damage, front end damage, new brakes needed, and interior damage from use and kids. The Chapter 13 Trustee also states that Creditor has not filed a proof of claim to date.

DISCUSSION

Creditor has not filed a response or opposition to the Motion, but Creditor filed a proof of claim on June 7, 2018. Proof of Claim No. 6-1. Creditor asserts that the value of Vehicle is $17,525.00 and the amount of the claim that is secured is $8,951.92. Creditor has not provided evidence in support of that valuation, however.

At the same time, Debtor has not presented any admissible evidence as to the Vehicle's value. Debtor's Declaration is not sworn under penalty of perjury in violation of Federal Rule of Evidence 603, meaning that nothing alleged in the declaration is admissible.

Debtor's declaration is very detailed, providing an explanation of the factors used to decrease the value as stated in Kelley Blue Book, but Debtor—who clearly is relying on Kelley Blue Book as the starting point for his value—fails to provide a copy of the trade journal upon which he relies.

While stating in the Proof of Claim the Vehicle is worth $17,525.00, Creditor does not attach a copy of a Kelley Blue Book, NADA, or other valuation report for that statement. Though such is not required for a proof of claim, the failure to do so prevents this court from taking such statement as "gospel" for purposes of value.

If the court begins with the $17,525.00 value stated in Proof of Claim No. 6 and then considers the following damages, repairs, and necessary maintenance:

A. Damage to front right of car due to impact of another car;

B. Dents to outside of car and paint;

C. Multiple damage that would require repainting and body work to entire car;

D. Extensive damage to interior of car due to massive water damage, with odor;

E. Extensive damage to interior leather seats of car, including melted crayons, sugar confections, and wear from abrasions. Possible need for replacement;

F. Need for change of all fluids in car that have not been changed since purchase of car. Oil has been changed, but check oil light is on;

G. Damage to air filter container that would require replacement of entire unit; and

H. All brakes and rotors need replacement, current noise while driving;

the court determines that a value of $9,000 for an eight-model-year-old car with 58,000 miles on it, and needing the above repairs and maintenance, is not unreasonable.

However, as of the time this matter was reviewed on June 25, 2018, to prepare the tentative ruling to be posted, the above testimony had not been provided under penalty of perjury.

Despite the above analysis of the problems in the presentation of this Motion, the court notes that Creditor's Proof of Claim No. 6-1 asserts a secured claim that is in line with Debtor's valuation request. Creditor's assertion is that its secured claim is only $8,951.92, which is consistent with Debtor's assertion that the Vehicle has only a value of $9,000.00 to secured the claim. The court notes that Proof of Claim No. 6-1 was filed on June 7, 2018, and this Motion was filed earlier on May 25, 2018. If the proof of claim had been filed before the Motion, then Debtor would have found himself in agreement with Creditor about the amount of the claim.

The lien on the Vehicle's title secures a purchase-money loan incurred on May 1, 2012, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $8,951.92. The court determines that the value of the Vehicle is $9,000.00 as sought by Debtor. Therefore, Creditor's claim secured by a lien on the asset's title is fully-collateralized. Creditor's secured claim is determined to be in the amount of $8,951.92, as stated in its proof of claim. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value Collateral and Secured Claim filed by Damion Hribik ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of Wells Fargo Dealer Services ("Creditor") secured by an asset described as 2011 Chevrolet Camaro ("Vehicle") is determined to be a secured claim in the amount of $8,951.92, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is $9,000.00 and is encumbered by a lien securing a claim against the asset.

24. **18-22316-E-13** **JOSHUA/JAIME QUINTANA** **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK**
DPC-1 **Thomas Gillis** **5-29-18 [14]**

Final Ruling: No appearance at the June 26, 2018 hearing is required.

David Cusick ("the Chapter 13 Trustee") having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Objection to Confirmation was dismissed without prejudice, and the matter is removed from the calendar.** The court entered an order confirming the Plan on June 19, 2018. Dckt. 19.

25. **17-25221-E-13** **TOMMIE RICHARDSON** **MOTION TO CONFIRM PLAN**
PGM-4 **Peter Macaluso** **5-14-18 [98]**

Final Ruling: No appearance at the June 26, 2018 hearing is required.

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

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 14, 2018. By the court's calculation, 43 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The hearing on the Motion to Confirm the Amended Plan is continued to 3:00 p.m. on July 17, by prior order.

Tommie Richardson ("Debtor") seeks confirmation of the Amended Plan, but he does not present any explanation why he is proposing an Amended Plan. *See* Dckt. 101. The Amended Plan in Section 2.01 proposes "a monthly basis the sum of $165,970.66 as of 5-18," lasting for nine months; no additional

provisions are attached. Dckt. 100. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on May 24, 2018. Dckt. 110. He argues that the Amended Plan relies upon the court sustaining an objection to the claim of Seneca Leandro View LLC, and without sustaining that objection, the full amount of the claim will be approximately $258,176.66. The Chapter 13 Trustee argues that Debtor will not have sufficient plan funds to pay all claims.

CONTINUANCE OF HEARING

On June 6, 2018, Debtor filed an *Ex Parte* Request to continue the hearing. Dckt. 116. The court granted Debtor's request and continued the hearing to 3:00 p.m. on July 17, 2018. Dckt. 117.

The hearing on the Motion to Confirm Amended Plan is continued to 3:00 p.m. on July 17, by prior order. *Id.*

26.	**18-22038-E-13** **DPC-1**	**MARILYN CRISP** **Michael Benavides**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **5-23-18 [20]**

Final Ruling: No appearance at the June 26, 2018 hearing is required.

David Cusick ("the Chapter 13 Trustee") having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Objection to Confirmation was dismissed without prejudice, the matter is removed from the calendar, and the Chapter 13 Plan filed on April 17, 2018, is confirmed.**

Counsel for Marilyn Crisp ("Debtor") shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

27. 18-20453-E-13 MAC-1 LLOYD/CLARITA EDWARDS Marc Carpenter MOTION TO CONFIRM PLAN 5-10-18 [41]

Final Ruling: No appearance at the June 26, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on May 10, 2018. By the court's calculation, 47 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Lloyd Edwards and Clarita Edwards ("Debtor") have provided evidence in support of confirmation. David Cusick ("the Chapter 13 Trustee") filed a Response indicating non-opposition on May 25, 2018. Dckt. 51. The Chapter 13 Trustee also indicates that Amended Schedules A/B and C, filed on May 10, 2018, add a 2001 Acura but inadvertently remove all other assets previously listed on the Schedules filed on January 29, 2018. 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 Lloyd Edwards and Clarita Edwards ("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 10, 2018, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to David Cusick ("the Chapter 13 Trustee") for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

28. 18-20665-E-13 JJC-3 | **LINDA MCINNES** **Julius Cherry** | **MOTION TO VALUE COLLATERAL OF HYUNDAI CAPITAL AMERICA DBA KIA MOTORS FINANCE** **5-14-18 [57]**

Final Ruling: No appearance at the June 26, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditor, and Office of the United States Trustee on May 14, 2018. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

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

The Motion to Value Collateral and Secured Claim of Hyundai Capital America DBA Kia Motors Financial ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $16,423.80.

The Motion filed by Linda McInnes ("Debtor") to value the secured claim of Hyundai Capital America DBA Kia Motors Financial ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2016 Kia Soul ("Vehicle"). Debtor does not provide any testimony as to the Vehicle's value.

The lien on the Vehicle's title secures a purchase-money loan incurred in June 24, 2016, which is fewer than 910 days prior to filing of the petition.

Debtor requests that the loan held by Creditor be determined to be secured in the amount of $15,572.14 and that the negative equity carried into the loan from trading in a vehicle and from purchasing gap insurance and an extended warranty in the amount of $4,071.20 be determined to be an unsecured claim.

Creditor filed a Proof of Claim No. 5-1 on March 29, 2018, claiming a secured claim in the amount of $19,643.34. A review of the Retail Installment Contract filed as an attachment to Creditor's Proof of Claim shows that the total amount financed by Debtor was $24,841.20. There was a net trade-in of ($2,081.20). Essentially, the total amount financed is two separate loans, one for negative equity arising from the trade-in, optional insurance coverage, and an extended warranty and another for the new financing for the Vehicle.

Out of the total amount financed, the negative equity, insurance, and warranty is 16.39% of the amount financed, and the remaining 83.61% is new financing secured as a purchase money security interest in the new Vehicle. Applying those percentages to the amount claimed by Creditor, $3,219.54 of the amount financed is to the negative equity, insurance, and warranty. The remaining $16,423.80 is the amount loaned to secure the purchase of the Vehicle.

While the portion of the financing secured by the new Vehicle is a purchase money security interest acquired fewer than 910 days prior to the filing that prevents Debtor from valuing the claim under the hanging paragraph of 11 U.S.C. § 1325(a), Debtor is only seeking to value the portion of the financing that was for negative equity, insurance, and warranty, not the actual purchase of the Vehicle.

In the Ninth Circuit, negative equity is not considered as part of the price for a new vehicle and is not included in the purchase money security interest. *AmeriCredit Fin. Servs. v. Penrod (In re Penrod)*, 611 F.3d 1158,1161–62 (9th Cir. 2009), *reh'g denied*, 636 F.3d 1175 (2011), *cert. denied* 565 U.S. 822 (2011). Debtor may value that portion of the secured claim relating to the negative equity financed in addition to the purchase price.

The definition of a "purchase money security interest" is determined by state law. *Id.* California Commercial Code § 9103 "does not provide a precise, encapsulated definition of a purchase money security interest, but rather a string of connected definitions." *Id.* at 1161; CAL. COM. CODE § 9103.

In *Penrod*, the Ninth Circuit Court of Appeals quoted the plain language of the California Commercial Code, stating,

> "'Purchase money collateral' means goods or software that secures a purchase money obligation." CAL. COM. CODE § 9103(a)(1). "'Purchase money obligation' means an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used." CAL. COM. CODE § 9103(a)(2).

611 F.3d at 1161.

The California Commercial Code defines the term "goods" to be,

> (44) "Goods" means all things that are movable when a security interest attaches. The term includes (i) fixtures, (ii) standing timber that is to be cut and removed under a conveyance or contract for sale, (iii) the unborn young of animals, (iv) crops grown, growing, or to be grown, even if the crops are produced on trees, vines, or bushes, and (v) manufactured homes. The term also includes a computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program if (i) the program is associated with the goods in such a manner that it customarily is considered part of the goods, or (ii) by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods. The term does not include a computer program embedded in goods that consist solely of the medium in which the program is embedded. The term also does not include accounts, chattel paper, commercial tort claims, deposit accounts, documents, general intangibles, instruments, investment property, letter-of-credit rights, letters of credit, money, or oil, gas, or other minerals before extraction.

CAL. COM. CODE § 9102(44). Physical "things" are included in the definition, but contracts, claims, instruments, letters of credit, and other non-physical "things" are not included.

Here, Debtor purchased a vehicle (a thing) and obtained additional credit to finance the negative equity, insurance, and warranty. The court organizes the various purchases and obligations as follows:

Purchase of 2016 Kia Soul	Source Document—Retail Installment Sale Contract. Proof of Claim 5-1	
Purchase Price of Vehicle (Cash Price Day of Sale)	$19,000.00	Price of Collateral
Document Processing	$80.00	Documentation as part of purchase of Vehicle
Sales Tax	$1,431.00	Though This is not a tax that the purchaser is obligated to pay, but a tax that the seller is obligated to pay, the court includes it as part of the actual necessary cost in buying the vehicle. FN.1.
Electric Vehicle Registration	$29.00	Cost with above purchase price
Vehicle License	$124.00	Estimated cost with above purchase price
Registration	$99.00	Estimated cost with above purchase
California fees	$7.00	Cost with above purchase

Total obligation incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral	$20,770.00	

FN.1. As discussed by the California Court of Appeal, the state sales tax is not a tax on the sale but an excise tax imposed upon the retailer for the "privilege of conducting a retail business." *Xerox Corp. v. County of Orange*, 66 Cal. App. 3d 746, 756 (Cal. Ct. App. 1977); *see* CAL. REV. & TAX. CODE § 6051 (imposing tax on retailers). A retailer is allowed to add the sales tax to the sales price under specified circumstances (which is the common practice in California). CAL. CIV. CODE § 1656.1.

In addition to the credit extended for the purchase of the Vehicle, Creditor extended further credit to purchase or finance these additional items:

Item	Source Document—Retail Installment Sale Contract. Proof of Claim 5-1	
Service Contract	$1,195.00	This is a form of optional "insurance," in which the insurer is obligated to provide payments during a specified period for repairs required to the vehicle.
GAP Insurance Coverage	$795.00	This is another form of insurance that Creditor chose to finance, rather than having Debtor provide evidence of insurance.
Negative Equity in Trade-In	$2,081.20	This negative equity that Creditor chose to provide additional credit for is not part of the purchase money obligation as determined by the court in *Penrod*.
Total obligation incurred not as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral	$4,071.20	

As discussed by the court in *Penrod*, creditors are given some extraordinary rights for purchase money finance and a purchase money lien. While extraordinary rights are given, the California Legislature carefully circumscribed the obligations that would be protected.

Therefore, based on the foregoing, Creditor's secured claim is determined to be in the amount of $16,423.80. *See* 11 U.S.C. § 506(a). The remaining $3,219.54 is determined to be a general unsecured claim arising from negative equity, insurance, and warranty. The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Linda McInnes ("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 Hyundai Capital America DBA Kia Motors Financial ("Creditor") secured by an asset described as a 2016 Kia Soul ("Vehicle") is determined to be a secured claim in the amount of $16,423.80. That is the amount of the secured claim pursuant to the "hanging paragraph" of 11 U.S.C. § 1325(a), and the balance of the claim, $3,219.54, is a general unsecured claim to be paid through the confirmed bankruptcy plan.

29. 14-30866-E-13 MS-2 | **DENISE YAPP** / **Mark Shmorgon** | **MOTION FOR COMPENSATION FOR MARK SHMORGON, DEBTOR'S ATTORNEY**
5-11-18 [46]

Final Ruling: No appearance at the June 21, 2018 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, and Office of the United States Trustee on May 11, 2018. By the court's calculation, 46 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Allowance of Professional Fees is granted.

Mark Shmorgon, the Attorney ("Applicant") for Denise Yapp, 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 May 11, 2018, through May 11, 2018. Applicant requests fees in the amount of $2,000.00.

CHAPTER 13 TRUSTEE'S RESPONSE

David Cusick ("the Chapter 13 Trustee") filed a Response on June 11, 2018. Dckt. 62. The Chapter 13 Trustee states that he does not oppose the Motion, provided that a motion to confirm modified plan filed in this case is granted.

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 still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the services provided because the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign to run up a [fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney is obligated to consider:

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

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

A review of the application shows that Applicant's for the Estate include substituting into the case, responding to a motion to dismiss, and proposing a modified plan. The court finds the services were beneficial to Client and the Estate and were reasonable.

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 1.0 hour in this category. Applicant discussed the case with Client.

Substitution of Attorney: Applicant spent 1.0 hour in this category. Applicant prepared and filed a substitution of attorney.

Motion to Dismiss: Applicant spent 1.0 hour in this category. Applicant drafted and filed a response to the Chapter 13 Trustee's motion to dismiss.

Amendments and Responses: Applicant spent 1.0 hour in this category. Applicant reviewed the notice of filed claims and amended the schedules as necessary.

Motion to Modify: Applicant spent 1.5 hours in this category. Applicant drafted a motion to modify the Chapter 13 plan.

Modified Chapter 13 Plan: Applicant spent 1.5 hours in this category. Applicant drafted a modified plan.

Application for Compensation: Applicant spent 1.0 hour in this category. Applicant drafted this application for compensation.

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**
Mark Shmorgon	8.0 hours	$250.00	$2,000.00
Total Fees for Period of Application			$0.00

FEES ALLOWED

The unique facts surrounding the case, including responding to a motion to dismiss and proposing a modified plan, raise substantial and unanticipated work for the benefit of the Estate, Debtor, and parties in interest. The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. The request for additional fees in the amount of $2,000.00 is approved pursuant to 11 U.S.C. § 330 and authorized to be paid by David Cusick ("the Chapter 13 Trustee") from the available funds of the Plan in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

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

Fees $2,000.00

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

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

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

The Motion for Allowance of Fees and Expenses filed by Mark Shmorgon ("Applicant"), Attorney having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

Mark Shmorgon, Professional Employed by Denise Yapp ("Debtor")

Fees in the amount of $2,000.00,

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

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

30. 18-22178-E-13 DPC-1 | **BLAIRE KNIGHT** **Muoi Chea** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **5-23-18 [20]**

Final Ruling: No appearance at the June 26, 2018 hearing is required.

David Cusick ("the Chapter 13 Trustee") having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Objection to Confirmation was dismissed without prejudice, and the matter is removed from the calendar. Blaire Knight ("Debtor") filed an Amended Plan that has been set for hearing on July 17, 2018.**

31. **18-20387-E-13** **ERIC FERRARI** **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK**
DPC-1 **James Keenan** **3-8-18 [15]**

Final Ruling: No appearance at the June 26, 2018 hearing is required.

David Cusick ("the Chapter 13 Trustee") having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Objection to Confirmation was dismissed without prejudice, the matter is removed from the calendar, and the Chapter 13 Plan filed on January 24, 2018, is confirmed.**

Counsel for Eric Ferrari ("Debtor") shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

32. **18-22288-E-13** **DAVINDER ARMAN** **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK**
DPC-1 **Kathleen Crist** **5-25-18 [18]**

Final Ruling: No appearance at the June 26, 2018 hearing is required.

David Cusick ("the Chapter 13 Trustee") having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Objection to Confirmation was dismissed without prejudice, and the matter is removed from the calendar.**

The court entered an order confirming the Plan on June 19, 2018. Dckt. 26.

33. 17-22395-E-13 JEFFERY ROBERSON MOTION TO MODIFY PLAN
MET-1 Mary Ellen Terranella 5-20-18 [24]

Final Ruling: No appearance at the June 26, 2018 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, and Office of the United States Trustee on May 20, 2018. By the court's calculation, 37 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

The Motion to Confirm the Modified Plan is granted.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. Jeffery Roberson ("Debtor") has filed evidence in support of confirmation.

David Cusick ("the Chapter 13 Trustee") filed a Response indicating non-opposition on June 5, 2018. Dckt. 34. The Chapter 13 Trustee notes that the Franchise Tax Board ("FTB") filed amended Claim No. 4-1 on April 3, 2018, as a general unsecured claim for $4,876.12. Page 5 of that claim includes the following language:

> FTB's claim related to the 1998, 1999, 2000, 2001, 2002, 2003, 2004 tax year(s) is secured by a Notice of State Tax Lien, as described on the prior page of this proof of claim. However, because the debtor's plan does not provide for the FTB's secured claim, FTB has filed an unsecured claim in this case. FTB has do so without waiving its lien rights. Accordingly, to the extent that FTB's secured claim related to 1998, 1999, 2000, 2001, 2002, 2003, 2004 tax year(s) is not paid in full during this case, FTB will continue to asserts its lien rights during and after this case.

The Chapter 13 Trustee states he will pay the claim as a general unsecured claim with a proposed dividend of 0.00% pursuant to the Plan and the amended claim, which states in Section 9 that there is no secured claim. The Chapter 13 Trustee notes that either the proof of claim should be amended, or Debtor should object to the claim.

A review of the claims filed in this case shows that the FTB filed amended Proof of Claim No. 4-3 on June 7, 2018, showing now that its claim is $4,876.12, all secured. The FTB has not objected to the Plan, and the Plan provides for the claim in Class 2(A) in the amount of $4,876.12.

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 Jeffery Roberson ("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 20, 2018, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to David Cusick ("the Chapter 13 Trustee") for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.