UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

July 19, 2018, at 1:00 p.m.

1.	**13-23157-E-13** **RHS-1**	**HOSSEIN BAKTVAR AND LALEH MOGHADAM** **Peter Macaluso**	**CONTINUED ORDER TO SHOW CAUSE** **6-6-18 [127]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on June 9, 2018. By the court's calculation, 38 days' notice was provided. The court set the hearing for 3:00 p.m. on July 17, 2018. Dckt. 127.

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

The Order to Show Cause is sustained.

Hossein Baktvar and Laleh Moghadam, the Chapter 13 Debtor, ("Debtor") commenced this bankruptcy case on March 3, 2013. They have labored through five years of payments, with their stated projected disposable income so limited that they were unable to make any dividend disbursement to the creditors holding $337,721.00 in general unsecured claims (amount of unsecured claims stated by Debtor in Plan ¶ 2.15, Dckt. 5). This does not appear to include a Class 2 secured claim of $160,000.00 that was

valued as a $0.00 secured claim for purposes of obtaining a "lien strip." The Chapter 13 Plan could be funded with only $560.00 per month after payment of Debtor's necessary expenses. Plan ¶ 1.01, Dckt. 5.

While having only $560.00 per month in projected disposable income, the "necessary" expenses for Debtor (monthly expenses and as permitted under the Bankruptcy Code for secured claims) include the following:

Mercedes Benz Payment.....$ 392 Plan ¶ 2.09(d)

Monthly Mortgage Payment.....$3,437
Plan ¶ 2.11 (one of four cars Schedule B, Dckt. 1)

Food and Housekeeping Supplies...$1,100 Schedule J, Dckt. 1

In looking at Schedule J and the attached statement of gross income and expenses from Debtor's business, the court notes that Debtor makes no provision for payment of any income or self-employment taxes on $28,600.00 of monthly gross business income. On Schedule J, Debtor states there are $22,700.00 of monthly expenses, yielding $5,900.00 of monthly net income from their business. But Debtor states, under penalty of perjury, that Debtor does not have to pay any federal income tax, federal self-employment tax, or state income tax. Schedule J and Business Income and Expenses attachment, Dckt. 1 at 34–36; Dckt.1. This statement under penalty of perjury appears to be questionable, if not outright intentionally false.

This financial information, provided under penalty of perjury, clearly shows that Debtor should not have had an "extra" $15,000.00 to secretly make a "settlement" payment without court approval. This is true even without making any provision for payment of federal income and self-employment taxes, and state income taxes.

Failure to Comply with Order and Pending Dismissal of Case

In September 2017, Trulite WSG, LLC ("Creditor") filed a Motion for Administrative Expense, seeking payment of $60,387.45 for materials purchased by Debtor in 2013. Motion, Dckt. 67. It is alleged in the Motion that Debtor obtained post-petition credit from Creditor without notifying Creditor that Debtor was in bankruptcy. *Id.* It is further alleged that Debtor was using the name of a suspended corporation in some of these transactions.

Debtor had counsel file an Opposition to the Motion for Administrative Expense, but Debtor failed (or refused) to provide any testimony of the alleged (mis)conduct. Opposition, Dckt. 92. In the "Opposition," counsel for Debtor only argued that "it is the belief of Debtor" that the amount of the obligation was only $26,111.46. No explanation was given as to why Debtor would have only a "belief" and not have books and records from which to correctly compute the amount undisputedly owed.

The court determined that the amount of the administrative expense to be allowed under 11 U.S.C. § 503(b) was $35,033.31. Order, Dckt. 98.

Agreement of Debtor to Pay $16,200.00

At the hearing on the Chapter 13 Trustee's Motion to Dismiss, Debtor's counsel continued in the contention that Debtor tried to get the money from Creditor with whom he previously settled, but Debtor was unable to get the monies. Facing the dismissal, Debtor's counsel opined that Debtor would think about other ways to comply with the court's order. This caused the court to go back and review with counsel not only the prior order, but also the court's Civil Minutes from the prior hearing on the Motion to Approve the Compromise (which Debtor had paid, without court approval, years earlier in this Bankruptcy Case).

Some of the key findings of the court for the order issued approving the Compromise and what Debtor was ordered to do stated in the Civil Minutes include the following:

> In his declaration, debtor Hossein Baktvar states under penalty of perjury that he has settled this adversary proceeding, **prior to court approval**, by **making a $15,000.00** from monies in his business. Declaration ¶ 2, Dckt. 109. With this settlement, he states that he can then buy more materials in the future. Further, he states that he needed this money to work on future projects, and he "hopes" that he will not need such monies until he has "recouped these funds and/or get a deal on inventory as I paid [reflecting a past payment of the $15,000] him off." *Id.*
>
> **Schedule B does not show Debtor having an "extra" $15,000.00 in "working capital" lying around.** The Motion and Declaration **raise concerns that Debtor actually has $15,000.00+ in additional profits not disclosed to the court.** Debtor's Plan, based on **Debtor's dire finances committed to making only a 0.00% dividend to creditors holding general unsecured claims**. But, **Debtor** did have enough projected disposable income (based on the financial information provided under penalty of perjury) to **make the monthly payment on his Mercedes Benz, residence (a "necessary" $3,437.00** monthly payment), and Debtor's nondischargeable tax obligation to the California EDD. Plan, Dckt. 5.

Civil Minutes, Dckt. 118 at 2–3 (emphasis added).

> **Consideration of Additional Issues**
>
> The court is presented with a difficult situation. Here, Debtor operated its business, obtained product, and did not pay its expenses during the early stages of this case. **Debtor obtained the product and appears to have had higher "profits" by not paying its current expenses.**
>
> Now, even though Debtor is purporting to fund the Chapter 13 Plan with Debtor's projected disposable income, **Debtor has an "extra" $15,000.00 to pay Trulite. The statement that there was $15,000.00 of "working capital" lying around is not adequate.**

> **At the hearing, the Debtor agreed to pay $16,200.00 to the Chapter 13 Trustee** ($15,000.00 settlement amount and additional Chapter 13 Trustee expenses estimated at 8%), with the settlement payment of $15,000.00 to be made through the Chapter 13 Trustee.
>
> Upon weighing the factors outlined in A & C Props and Woodson, the circumstances surrounding the creation of this post-petition obligation, and the information concerning the ability of Debtor to have the "extra" $15,000.00 of "working capital" to have paid the settlement before it was approved by the court, the court determines that the settlement is granted.

Id. at 5.

It is important to note that at the hearing Debtor agreed to make the $15,000.00 payment to the Chapter 13 Trustee, plus the additional amount for the projected Trustee's fees. There was not an "agreement" for Debtor to try to recover $15,000.00 from Creditor, then if and when (at some non-specific date) Debtor was able to obtain them, if ever, during the sixty (60) months of the Plan or for an indeterminate period thereafter.

The court's order is clear and unequivocal in ordering Debtor to pay the $15,000.00, unconditionally, not "if" or "when:"

> **IT IS ORDERED** that the Motion for Approval of Compromise between Movant and Trulite WSG, LLC ("Settlor") is granted, to be executed as follows:
>
> (1) Debtor shall pay $16,200.00 to the Chapter 13 Trustee for the settlement to be paid through the Plan;
>
> (2) the Chapter 13 Trustee shall disburse $15,000.00 to Trulite WSG, LLC as payment in full of the settlement amount approved by this court; and
>
> (3) the remaining $1,200.00 shall be used to pay the Trustee's administrative expenses and any remaining monies disbursed through the Plan to creditors.

Order, Dckt. 119. Believing Debtor committing to making the payment, as communicated through his attorney, the court did not set a date by which the payment was required, nor did the court give Debtor a period before which payment was required.

Though facing dismissal as posted in the tentative ruling for the May 30, 2018 hearing, neither of the two debtors attended the May 30 hearing. Rather, they merely sent their attorney to explain that the payment had not been made and then argue that notwithstanding Debtor's failure to comply with the court's order, the case should not be dismissed.

Unfortunately, Debtor's failure to comply with the court's prior order is now resulting in the case being dismissed, Debtor losing the ability to obtain a discharge in this case, and having wasted the attorney's fees paid and plan payments made with their (now apparently irrationally computed) projected disposable income.

While dismissal is reasonable, it is a harsh result, which is likely to spawn further litigation. Notwithstanding Debtor's cavalier attitude to Debtor's responsibilities under the Bankruptcy Code and the obligation to comply with orders of the court, the court has extended one final, final lifeline to Debtor.

Issuance of Order to Show Cause

The court took the Motion to Dismiss under submission and set it for a Submission Status Conference to be conducted in conjunction with an Order to Show Cause. Dckt. 127. The court ordered that Hossein Baktvar and Laleh Moghadam, the Chapter 13 Debtors, and each of them appear in person at 3:00 p.m. on July 17, 2018, no telephonic appearances permitted, to show cause why the court should not enter the order dismissing this case unless Debtor immediately makes the following payments:

A. $15,000.00 by Debtor into the Plan for disbursement to creditors holding general unsecured claims;

B. $1,200.00 by Debtor into the Plan for Chapter 13 Trustee fees on the $15,000.00 payment; and

C. $1,500.00 by Debtor to the Chapter 13 Trustee for attorney's fees caused by the failure to make the promised payment, the motion to dismiss, the hearing on the motion to dismiss, and the Order to Show Cause (computed at a discounted rate of $250.00 and for only six (6) hours of time).

The court ordered that if Debtor immediately made the $15,000.00, $1,200.00 and $1,500.00 payments, the court would consider those payments in connection with the Motion to Dismiss, and then deny without prejudice the Motion to Dismiss. That would allow Debtor to complete the Plan in this case, obtain a discharge, and allow the case to be completed as if Debtor had complied with the Bankruptcy Code and prior order of this court.

Any written responses to the Order to Show Cause by Debtor were ordered to be filed and served on or before July 3, 2018.

Chapter 13 Trustee's Response

The Chapter 13 Trustee filed a Response on July 3, 2018. Dckt. 132. The Chapter 13 Trustee reports that he received a cashier's check on May 21, 2018, in the amount of $1,760.00, which he interprets as the sixtieth plan payment of $560.00 and $1,200.00 of the money ordered in the motion to approve compromise. *See* Dckt. 119.

The Chapter 13 Trustee states that he received communication from Creditor confirming that $15,000.00 was paid to Creditor directly.

Finally, the Chapter 13 Trustee notes that Debtor had scheduled $14,000.00 per month for business materials and supplies. Dckt. 1 at 36.

Debtor's Response

Debtor filed a Response on July 3, 2018. Dckt. 136. Debtor argues that Creditor has been contacted and instructed that the $15,000.00 payment it received from Debtor needs to be sent to the Chapter 13 Trustee first to comply with the court's order, but Debtor does not have any evidence that such a transfer has occurred.

Debtor argues that its proposed compromise with Creditor included terms that the $15,000.00 would be held in trust until court approval of the settlement, and upon payment, Creditor would withdraw its administrative expense claim.

Debtor states that $1,200.00 was paid to the Chapter 13 Trustee and that $1,500.00 will be paid to the Chapter 13 Trustee for his attorney's fees before the hearing on the Order to Show Cause.

July 17, 2018 Hearing

At the hearing, Debtor agreed to a voluntary continuance of the hearing specially set at 1:00 p.m. on July 19, 2018.

Ruling

From the pleadings submitted by the parties, especially by Debtor, it appears that Debtor has not complied with the court's order. Only one of the three payments has been made—a payment of $1,200.00 to the Chapter 13 Trustee. Debtor has not provided $15,000.00 to the Chapter 13 Trustee for disbursement under the plan, and Debtor has not paid $1,500.00 to the Chapter 13 Trustee for attorney's fees.

Therefore, the Order to Show Cause is sustained, and the court shall enter a separate order as part of the Chapter 13 Trustee's motion to dismiss dismissing Debtor's bankruptcy 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 Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Order to Show Cause is sustained, and the court shall issue a separate order as part of David Cusick's ("the Chapter 13 Trustee") motion to dismiss Chapter 13 bankruptcy case 13-23157.

2.	**13-23157-E-13 DPC-5**	**HOSSEIN BAKTVAR AND LALEH MOGHADAM Peter Macaluso**	**CONTINUED STATUS CONFERENCE RE: MOTION TO DISMISS CASE 4-20-18 [120]**

Debtors' Atty: Peter G. Macaluso

The Status Conference is xxxxxxxxxx.

Notes:
Set by order of the court filed 6/6/18 [Dckt 129]. Status conference to be conducted in conjunction with the hearing on the Order to Show Cause.

SUMMARY OF MINUTES FROM MAY 30, 2018 HEARING

David Cusick ("the Chapter 13 Trustee") seeks dismissal of the case on the basis that Hossein Baktvar and Laleh Moghadam ("Debtor") are $560.00 delinquent in plan payments, which represents one month of the $560.00 plan payment. The delinquent payment is for March 2018, the sixtieth month of the Plan. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Additionally, the Chapter13 Trustee argues that Debtor has not complied with the court's order to pay $16,200.00 to the Chapter 13 Trustee, delaying the Chapter 13 Trustee from complying with the same order and from disbursing $15,000.00 to Trulite WSG, LLC ("Creditor"). *See* Dckt. 119.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on May 16, 2018. Dckt. 124. Debtor's counsel argues in the Opposition that: (1) Debtor promises to cure the delinquency before the hearing date; (2) Debtor paid directly the $15,000.00 (choosing to violate this court's Order filed on March 12, 2018); and (3) the court should just continue the hearing. Debtor has chosen not to (or refuses to) provide a declaration as evidentiary support for counsel's arguments.

Debtor's counsel argues that Debtor had paid the $15,000 to the creditor even before the Motion to Approve the Compromise (for the Creditor to be paid $15,000) was filed. Opposition ¶ 2, Dckt. 124. However, as shown in the Civil Minutes from the hearing on the Motion to Approve Compromise:

> "At the hearing, the Debtor agreed to pay $16,200.00 to the Chapter 13 Trustee ($15,000.00 settlement amount and additional Chapter 13 Trustee expenses estimated

at 8%), with the settlement payment of $15,000.00 to be made through the Chapter 13 Trustee."

Civil Minutes, Dckt. 118.

Debtor has not done as ordered or as committed to at the hearing on the earlier Motion. Rather, Debtor offers the excuse that the money has not been paid by someone else.

Debtor requests that the hearing be continued while they coordinate payment of the settlement funds to the Chapter 13 Trustee.

JULY 17, 2018 HEARING

At the hearing, Debtor agreed to a voluntary continuance of the hearing specially set at 1:00 p.m. on July 19, 2018.

RULING

Unfortunately for Debtor, a promise to pay is not evidence that resolves the Motion. Further, Debtor's conduct in this case has raised serious questions.

Failure to Make $15,000 Payment to Trustee

At the hearing, Debtor's counsel continued in the contention that Debtor tried to get the money from Creditor with whom he previously settled. Facing the dismissal, Debtor's counsel opined that Debtor would think about other ways to comply with the court's order. This caused the court to go back and review with counsel not only the prior order, but reviewed the court's Civil Minutes from the prior hearing on the Motion to Approve the Compromise (which Debtor had paid, without court approval, years earlier in this Bankruptcy Case.

Some of the key findings of the court for the order issued approving the Compromise and what Debtor was ordered to do stated in the Civil Minutes include the following:

> In his declaration, debtor Hossein Baktvar states under penalty of perjury that he has settled this adversary proceeding, **prior to court approval**, by **making a $15,000.00** from monies in his business. Declaration ¶ 2, Dckt. 109. With this settlement, he states that he can then buy more materials in the future. Further, he states that he needed this money to work on future projects, and he "hopes" that he will not need such monies until he has "recouped these funds and/or get a deal on inventory as I paid [reflecting a past payment of the $15,000] him off." *Id.*
>
> **Schedule B does not show Debtor having an "extra" $15,000.00 in "working capital" lying around.** The Motion and Declaration **raise concerns that Debtor actually has $15,000.00+ in additional profits not disclosed to the court.** Debtor's Plan, based on **Debtor's dire finances committed to making only a**

> **0.00% dividend to creditors holding general unsecured claims**. But, **Debtor** did have enough projected disposable income (based on the financial information provided under penalty of perjury) to **make the monthly payment on his Mercedes Benz, residence (a "necessary" $3,437.00** monthly payment), and Debtor's nondischargeable tax obligation to the California EDD. Plan, Dckt. 5.

Civil Minutes, Dckt. 118 at 2–3 (emphasis added).

> **Consideration of Additional Issues**
>
> The court is presented with a difficult situation. Here, Debtor operated its business, obtained product, and did not pay its expenses during the early stages of this case. **Debtor obtained the product and appears to have had higher "profits" by not paying its current expenses.**
>
> Now, even though Debtor is purporting to fund the Chapter 13 Plan with Debtor's projected disposable income, **Debtor has an "extra" $15,000.00 to pay Trulite. The statement that there was $15,000.00 of "working capital" lying around is not adequate.**
>
> **At the hearing, the Debtor agreed to pay $16,200.00 to the Chapter 13 Trustee** ($15,000.00 settlement amount and additional Chapter 13 Trustee expenses estimated at 8%), with the settlement payment of $15,000.00 to be made through the Chapter 13 Trustee.
>
> Upon weighing the factors outlined in A & C Props and Woodson, the circumstances surrounding the creation of this post-petition obligation, and the information concerning the ability of Debtor to have the "extra" $15,000.00 of "working capital" to have paid the settlement before it was approved by the court, the court determines that the settlement is granted.

Id. at 5.

It is important to note that at the hearing Debtor agreed to make the $15,000 payment to the Chapter 13 Trustee, plus the additional amount for the projected Chapter 13 Trustee's fees. There was not an "agreement" for Debtor to try to recover $15,000 from Creditor, then if and when (at some non-specific date) Debtor was able to retain, if ever during the sixty (60) months of the Plan.

The court's order is clear and unequivocal in ordering Debtor to pay the $15,000, unconditionally, not "if" or "when:"

> **IT IS ORDERED** that the Motion for Approval of Compromise between Movant and Trulite WSG, LLC ("Settlor") is granted, to be executed as follows:

(1) Debtor shall pay $16,200.00 to the Chapter 13 Trustee for the settlement to be paid through the Plan;

(2) the Chapter 13 Trustee shall disburse $15,000.00 to Trulite WSG, LLC as payment in full of the settlement amount approved by this court; and

(3) the remaining $1,200.00 shall be used to pay the Trustee's administrative expenses and any remaining monies disbursed through the Plan to creditors.

Order, Dckt. 119. Believing Debtor committing to making the payment, as communicated through his attorney, the court did not set a date by which the payment was required, nor did the court give Debtor a period before which payment was not required.

Though facing dismissal as posted in the tentative ruling for the May 30, 2018 hearing, neither of the two debtors attended the May 30 hearing. Rather, they merely sent their attorney to explain that the payment had not been made but that the case should not be dismissed.

Potential Prejudice to Debtor and Counsel with Dismissal of Case

Debtor commenced this bankruptcy case on March 3, 2013. They have labored through five years of payment, unable to make any dividend to the creditors holding $337,721.00 in general unsecured claims (amount of unsecured claims stated by Debtor in Plan ¶ 2.15, Dckt. 5). This does not appear to include a Class 2 secured claim of $160,000, which was valued as a $0.00 secured claim for purposes of obtaining a "lien strip." The Chapter 13 Plan could be funded with only $560 per month after payment of Debtor's necessary expenses. Plan ¶ 1.01, Dckt. 5.

While having only $560 per month in projected disposable income, the "necessary" expenses for Debtor (monthly expenses and as permitted under the Bankruptcy Code for secured claims) include the following:

Mercedes Benz Payment.....	$ 392	Plan ¶ 2.09(d)
Monthly Mortgage Payment.....	$3,437	Plan ¶ 2.11 (one of four cars Schedule B, Dckt. 1)
Food and Housekeeping Supplies...	$1,100	Schedule J, Dckt. 1

In looking at Schedule J and the attached statement of gross income and expenses from Debtor's business, the court notes that Debtor makes no provision for payment of any income or self-employment taxes on $28,600 of monthly gross business income. On Schedule J, Debtor states there are $22,700 of monthly expenses, yielding $5,900 of monthly net income. But Debtor states, under penalty of perjury, that Debtor does not have to pay any federal income tax, federal self-employment tax or state income tax. Schedule J and Business Income and Expenses attachment, Dckt. 1 at 34–36. This statement under penalty of perjury appears to be questionable, if not outright intentionally false.

This financial information, provided under penalty of perjury, clearly shows that Debtor should not have had an "extra" $15,000 to secretly make a "settlement" payment without court approval. This is

true even without making any provision for payment of federal income and self-employment taxes, and state income taxes.

Unfortunately, Debtor's failure to comply with the court's prior order is now resulting in the case being dismissed, Debtor losing the ability to obtain a discharge in this case, and having wasted the attorney's fees paid and plan payment made with their (now apparently irrationally computed) projected disposable income.

While dismissal is reasonable, it is a harsh result, which is likely to spawn further litigation. Notwithstanding Debtor's cavalier attitude to Debtor's responsibilities under the Bankruptcy Code and the obligation to comply with orders of the court, the court will extend one final, final lifeline to Debtor.

Therefore, the court takes this Motion under submission and sets it for a Submission Status Conference to be conducted in conjunction with an Order to Show Cause. The OSC shall be for the Debtor to show cause why the court should not allow the Debtor move the plan to completion by the payment of:

> $15,000.00 by Debtor into the Plan for disbursement to creditors holding general unsecured claims
>
> $ 1,200.00 by Debtor into the Plan for Chapter 13 Trustee fees on the $15,000 payment
>
> $1,500.00 by Debtor to the Chapter 13 Trustee for attorney's fees caused by the failure to make the promised payment, the motion to dismiss, the hearing on the motion to dismiss, and the Order to Show Cause (computed at a discounted rate of $250 and for only six (6) hours of time.
>
> $ 999.99 by Peter Macaluso, Esq., counsel for Debtor, to the Clerk of the Court as civil corrective sanctions for having represented to the court the agreement for Debtor to pay the $15,000.00, filing an Opposition premised on Debtor not making the payment promised by counsel because "he couldn't get it back from Creditor," not providing any evidence with the Opposition, and seeking a continuance after the sixty months of the plan had expired so Debtor could "figure out" how to address the failure to comply with the court's prior order (for which counsel argued that there was a "condition" of getting the payment from Creditor).

If Debtor immediately makes the $15,000.00, $1,200.00 and $1,500 payments, the court can consider that in connection with the Motion to Dismiss, and then deny without prejudice the Motion to Dismiss. This would allow Debtor to complete the Plan in this case, obtain Debtor's discharge, and allow the case to be completed as if Debtor had complied with the Bankruptcy Code and prior order of this court.

UPDATE AFTER SUBMISSIONS ON ORDER TO SHOW CAUSE

The pleadings submitted for the Order to Show Cause issued in this matter indicate that Debtor has not complied with the court's order and has not made all of the required payments. The court conducted the hearing on the Order to Show Cause on July 17, 2018, and concluded that it be sustained and that a separate order be entered dismissing this bankruptcy case pursuant to the Chapter 13 Trustee's motion to dismiss.

Pursuant to the court's ruling on the Order to Show Cause, 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.

3. **18-23464-E-13** **CYNTHIA PAYSINGER** **CONTINUED MOTION TO EXTEND**
PGM-1 **Peter Macaluso** **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.

JUNE 26, 2018 HEARING

At the hearing, the court extended the automatic stay on an interim basis through July 17, 2018, and set this matter for final hearing on July 17, 2018. Dckt. 24.

JULY 17, 2018 HEARING

At the hearing, Debtor agreed to a voluntary continuance of the hearing specially set at 1:00 p.m. on July 19, 2018.

DISCUSSION

No further pleadings have been filed since the June 26, 2018 hearing.

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.

Review of Plan and Financial Information

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.

4. **18-22366-E-13** **AMY HINKLE** **CONTINUED MOTION TO VALUE**
MOH-1 **Michael Hays** **COLLATERAL OF CHRYSLER CAPITAL**
7-3-18 [21]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, and Office of the United States Trustee on July 3, 2018. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion to Value Collateral and Secured Claim of Chrysler Capital ("Creditor") is granted, and the secured claim is determined to have a value of $14,164.00.

Amy Hinkle ("Debtor") moves to value the secured claim of Chrysler Capital ("Creditor"). The Motion alleges that Debtor is the owner of a 2016 Jeep Patriot Sport 4x4 ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $14,164.00 as of the petition filing date. Debtor has not submitted a declaration asserting what she believes to be the Vehicle's value.

Debtor has provided the court with a Kelley Blue Book Valuation Report for the Vehicle. The Kelley Blue Book Report is authenticated in the Declaration of Clancy Callahan, who works in the office of Debtor's counsel. While stated as merely that Clancy Callahan "was asked to download the Kelley Blue Book information for the Debtor's vehicle," the court reads it to state that Callahan downloaded the Report and authenticates (Federal Rule of Evidence. 901(b)(1)) the Report. Dckt. 23 at 2. The Report being a market report that is generally recognized and relied upon in the vehicle sale and purchase industry, it is excepted from the hearsay rule. FED. R. EVID. 803(17).

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on July 6, 2018. Dckt. 26. The Chapter 13 Trustee argues that the Motion fails to comply with Local Bankruptcy Rule 9014-1(d) and Federal Rule of Bankruptcy Procedure 9013 because it does not cite a Code provision that would allow the requested relief, albeit common.

The Chapter 13 Trustee also notes that Debtor has not provided a declaration regarding any information about the Vehicle, including its purported value. The Chapter 13 Trustee argues that the submitted declaration is inadmissible hearsay that has not been qualified for an exception.

JULY 17, 2018 HEARING

At the hearing, Debtor agreed to a voluntary continuance of the hearing specially set at 1:00 p.m. on July 19, 2018.

DISCUSSION

Creditor filed Proof of Claim No. 1-1 on May 16, 2018. Attached to that Proof of Claim is a copy of the Retail Installment Sale Contract, dated October 17, 2015, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $25,799.39, $15,700.00 of which Creditor claims as secured by the Vehicle. Therefore, Creditor's claim secured by a lien on the asset's title is under-collateralized.

Debtor has provided the court with evidence, that the Kelley Blue Book Report lists the Vehicle as worth $14,164.00.

The lien on the Vehicle's title secures a purchase-money loan incurred on October 10, 2015 (purchase contract date), which is more than 910 days (the court computing it to be 930 days) prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $25,799.39. Claim #1. Therefore, Creditor's claim secured by a lien on the asset's title is under-collateralized. Creditor's secured claim is determined to be in the amount of $14,164.00, 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 Lauro Avila and Danelle Avila ("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 Chrysler Capital ("Creditor") secured by an asset described as 2016 Jeep Patriot Sport 4x4 ("Vehicle") is determined to be a secured claim in the amount of $14,164.00, 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 $14,164.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

5. 18-22366-E-13 DPC-1 | **AMY HINKLE** **Michael Hays** | **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 6-18-18 [17]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on June 18, 2018. By the court's calculation, 29 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is overruled.

David Cusick ("the Chapter 13 Trustee") opposes confirmation of the Plan on the basis that it relies upon a pending motion to value and will not be feasible without that motion being granted.

JULY 17, 2018 HEARING

At the hearing, Debtor and the Chapter 13 Trustee agreed to a voluntary continuance of the hearing specially set at 1:00 p.m. on July 19, 2018.

RULING

A review of Debtor's Plan shows that it relies on the court valuing the secured claim of Chrysler Capital. The court heard that valuation motion at the July 17, 2018 hearing and granted the Motion, determining the secured claim to be $14,164.00. The proposed Plan provides for paying such secured claim as a Class 2 Claim. Plan, ¶ 3.08; Dckt. 7.

The Plan does comply with 11 U.S.C. §§ 1322 and 1325(a). The Objection is overruled, and the Plan is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to 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 overruled, and the proposed Chapter 13 Plan filed on April 23, 2018, is confirmed. Counsel for the Debtor shall prepare and forward to the Chapter 13 Trustee a proposed order confirming the Plan, which upon approval by the Trustee shall be lodged with the court.

6. **18-22883-E-13** **RICHARD HARRIS** **CONTINUED MOTION TO VALUE COLLATERAL OF WILMINGTON SAVINGS FUND SOCIETY**
MWB-1 **Mark Briden** **5-24-18 [19]**

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, and Office of the United States Trustee on May 24, 2018. By the court's calculation, 54 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 Wilmington Savings Fund Society ("Creditor") is xxxxxxxxxxxx.

The Motion to Value filed by Richard Harris ("Debtor") to value the secured claim of Wilmington Savings Fund Society ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 17237 Marianas Way, Cottonwood, California ("Property"). Debtor seeks to value the Property at a fair market value of $295,000.00 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 RESPONSE

David Cusick ("the Chapter 13 Trustee") filed a Response on July 2, 2018. Dckt. 34. The Chapter 13 Trustee notes that Creditor filed an objection to confirmation in this case alleging that the proposed plan included an impermissible lien strip (this Motion) and that Creditor had the Property appraised as being worth $360,000.00.

CREDITOR'S OPPOSITION

Creditor filed an Opposition on July 3, 2018. Dckt. 37. Creditor argues that it obtained an appraisal of the Property on May 31, 2018, showing that its value is $360,000.00. Because of that valuation, Creditor argues that its claim is fully secured by the excess equity in the Property, preventing Debtor from valuing Creditor's claim.

No Declaration has been filed providing testimony of an expert as to the value of the Property. Exhibit 1, the document identified as an Appraisal Report is not authenticated. While arguing a value, Creditor has not provided the court with evidence.

JULY 17, 2018 HEARING

At the hearing, Debtor agreed to a voluntary continuance of the hearing specially set at 1:00 p.m. on July 19, 2018.

DISCUSSION

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

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

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

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

The appraisal attached as Exhibit 1 to Creditor's Opposition shows that the Property has a value of $360,000.00 as of May 31, 2018. Dckt. 38. No proofs of claim have been filed affecting the Property in this case. Debtor has listed the Property as having a value of $295,000.00 on Schedule A, with $1.00 claimed as exempt on Schedule C. Dckt. 1. On Schedule D, Debtor lists two claims as secured by the Property: one for $306,000.00 and the other for $82,000.00. *Id.*

Using the $360,000.00 value for the Property, there would be at least $53,999.00 in additional equity to support Creditor's claim secured by a second deed of trust.

However, the evidence of value presented is very slim for Debtor, he just stating an opinion that he, as the owner, believes the property is worth only $295,000. While the Appraisal would appear to identify a number of comparable properties, there is no testimony provided by Creditor.

Xxxxxxxxxxxxxxxxxxxx

The Motion is **xxxxxxxxxxxxxxx**.

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 Richard Harris ("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 **xxxxxxxxxxx**.

7. **18-22883-E-13** **RICHARD HARRIS**
ASW-1 **Mark Briden**

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY WILMINGTON SAVINGS FUND SOCIETY, FSB
6-21-18 [30]

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, and Chapter 13 Trustee on June 21, 2018. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is overruled without prejudice.

Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, as indenture trustee, for the CSMC 2017-1 Trust, Mortgage-Backed Notes, Series 2017-1 ("Creditor") holding a secured claim opposes confirmation of the Plan on the basis that it violates the anti-modification provisions of 11 U.S.C. § 1322(b)(2).

JULY 17, 2018 HEARING

At the hearing, Debtor and Creditor agreed to a voluntary continuance of the hearing specially set at 1:00 p.m. on July 19, 2018.

RULING

Creditor's counsel argues that Creditor has a secured claim because counsel argues that the real property securing the claim has a value of $360,000. However, no person comes forward to provide testimony of value. Creditor has filed a document titled "Appraisal" as an exhibit, but there is no one who has come forward to properly authenticate it or provide any expert testimony. The Exhibits not having been authenticated and there being no testimony, Creditor has not provided any credible evidence with the merely factual arguments in the Objection.

Creditor has a detailed discussion of the law and limitation of valuing secured claims for less than the value of the collateral. Further, Creditor argues that a debtor cannot "stip a lien" when the claim is not wholly unsecured (citing *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002)).

Unfortunately, Creditor has also chosen not to file a proof of claim in this case. As the Chapter 13 Plan clearly provides, it is the creditor's claim, in the absence of an order of the court, that controls the value of the secured claim. Plan ¶ 3.02. If Creditor had filed a secured claim, this Objection is as easy as: (1) Proof of Secured Claim filed for $82,000, (2) Plan does not provide for Secured Claim, (3) Objection sustained, but Creditor has not done that, depriving the court of a basis to deny confirmation.

The Objection is overruled without prejudice. Not having the necessary evidence, the court cannot determine what secured claim needs to be provided for in connection with Creditor. FN.1.

FN.1. The rejection of this objection may be but a Pyrrhic victory for the Debtors. If this asserted creditor is correct and an unprovided for arrearage exists, the court can envision shortly seeing a motion for relief from the stay. At that point, Debtor and counsel would have to prepare a modified plan, motion to confirm modified plan, evidence to support the modified plan, notice a hearing, and conduct a hearing on the proposed modified plan. Any such proceedings because of the unprovided for cure of the arrearage would be clearly anticipated work to be covered by the no-look fee and likely not be reasonable additional costs and expenses if counsel has chosen to opt out of the no-look fee.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, as indenture trustee, for the CSMC 2017-1 Trust, Mortgage-Backed Notes, Series 2017-1 ("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 overruled without prejudice.

8. **18-22883-E-13** **RICHARD HARRIS** **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK**
DPC-1 **Mark Briden** **6-18-18 [26]**

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, and Chapter 7 Trustee on June 18, 2018. By the court's calculation, 29 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

A. Richard Harris ("Debtor") cannot comply with the Plan because of an active Chapter 7 case (No. 18-21699);

B. Debtor admitted to having additional income at the Meeting of Creditors; and

C. The Plan relies on a pending motion to value.

First, the court notes that Debtor's Chapter 7 Case has been dismissed. No. 18-21699, Dckt. 28. As to the additional income, Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor admitted at the Meeting of Creditors that two sources of income (from

Social Security for a granddaughter and from Shasta County) may cease providing funds, and the non-filing spouse may be employed such that Schedule I's calculations would be incorrect. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

A review of Debtor's Plan shows that it relies on the court valuing the secured claim of Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, as indenture trustee, for the CSMC 2017-1 Trust, Mortgage-Backed Notes, Series 2017-1 ("Creditor"). The court heard Debtor's motion to value Creditor's claim at the July 17, 2018 hearing and denied it. Without the court valuing the claim, the Plan is not feasible. 11 U.S.C. § 1325(a)(6).

DEBTOR'S DECLARATION

Debtor filed a Declaration on July 10, 2018. Dckt. 43. Debtor states that his wife become employed against on May 14, 2018, as well as receiving disability payments from the state of California. He states that the total amount of her contributions to the Plan would be $692.00 per month.

Debtor states that the Shasta County program will not be terminated because it has been renewed, but he does not state for how long. Debtor claims that the program will provide him with $630.00 per month on average.

For Social Security payments, he states that payments to his granddaughter will decrease from $815.00 to $374.00 per month beginning on September 1, 2018.

JULY 17, 2018 HEARING

At the hearing, Debtor and the Chapter 13 Trustee agreed to a voluntary continuance of the hearing specially set at 1:00 p.m. on July 19, 2018.

RULING

The Chapter 13 Trustee's objections are well-taken. Debtor does not appear to have sufficient ongoing income to support plan payments, and the court has not valued a claim that was necessary to be valued for the Plan to be feasible. 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.

9. 14-20519-E-13 PGM-1 — STEVEN/DEBORAH MCCONNELL — Peter Macaluso — CONTINUED MOTION TO MODIFY PLAN — 5-28-18 [50]

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 28, 2018. By the court's calculation, 50 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.

Steven McConnell and Deborah McConnell ("Debtor") seek confirmation of the Modified Plan because mortgage expenses increased. Dckt. 52. The Modified Plan proposes that $57,500.00 be paid through April 2018, followed by payments of $2,230.00 for nine months. Dckt. 53. 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 28, 2018. Dckt. 63. 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 not complete timely because the Modified Plan does not

list an arrearage dividend to NationStar Mortgage in Class 1, but that creditor filed Proof of Claim No. 2-1 showing arrears of $8,023.30. Additionally, the creditor filed a Notice of Mortgage Payment Change that increases the monthly amount due from $1,512.83 to $1,730.01. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

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 shows disposable income of $2,030.14, which is less than the proposed plan payment of $2,230.00. Debtor's own assertion of disposable income indicates that the Modified Plan is confirmable.

DEBTOR'S REPLY

Debtor filed a Reply on July 10, 2018. Dckt. 66. Debtor promises to file amended schedules showing an ability to afford plan payments, and Debtor requests a continuance until after an Objection to Notice of Mortgage Payment Change scheduled for July 31, 2018.

JULY 17, 2018 HEARING

At the hearing, Debtor agreed to a voluntary continuance of the hearing specially set at 1:00 p.m. on July 19, 2018.

RULING

Unfortunately for Debtor, no supplemental schedules have been filed showing an ability to make the plan payments. Additionally, Debtor has elected (or refused) to provide any testimony in opposition to the Motion to Dismiss, which could have been as simple as explaining what counsel argues (Debtor can somehow increase the disposable income) in opposing the Motion.

The Motion to Confirm includes some "curious" allegations, stated to be supported by Debtor's testimony under penalty of perjury that their prior plan was to have a $17,000+ "Surplus." Motion ¶ 3, Dckt. 50. Debtor's testimony under penalty of perjury in the Declaration in support of the Motion to Confirm includes:

> 2. We have had several changes/problems that have arose which now require us to further modify our Chapter 13 Plan. These factors include; **Our mortgage lender increased our payment by almost double,** which we could not afford. **Was told we had $17,000+ surplus/reserve** in our Plan and to continue making our original plan payment. Was **not aware that the Trustee send our surplus back to the lender**. Had the surplus been sent to us, we would have sent it to the Trustee to apply to any debt and we would not be behind.
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> 3. As of April 2018, we have paid a total of $57,500.00 to the Chapter 13 Trustee over the last 51 months. **We are delinquent with our Plan payments $10,242.00.** The increase in the mortgage payment was too high and we could not afford it. We thought we were under a loan mod and so kept making our original payments.

Declaration, Dckt. 52.

In the Plan confirmed in this case (Dckt. 5), the terms pertinent to this discussion include the following:

1. Monthly Plan Payment.....$1,150
2. Plan Term..... Sixty Months

3. Debtor's Atty Fee.....($ 45) [Plan provides to pay in advance of mortgage cure payment]

4. CH 13 Fee.....($ 92) [Est. 8%]

5. Class 1 Secured Claim
   a. Current Post-Petition Pmt...($ 700)
   b. $10,000 Arrearage Pmt.....($ 167)

6. Class 2 Secured Claims
   a. Car Loan Pmt.....($ 172)
   b. WFB 2nd DOT.....($ 0) [§ 506(a) valuation]

7. Class 4 Direct Pmt.....None

8. Class 5 Priority Pmt.....None

9. Class 7 General Unsecured Claims

   a. Dividend on $142,666.....0.00%

On its face, there is no "surplus" provided for in the Plan. Additionally, there is no "secret surplus" that might exist if Debtor intentionally grossly understated the unsecured claim dividend when there was actually money in the Plan for that class of claims. Adding up all of the monies required to be disbursed for administrative expenses and Debtor's secured claims to be paid so Debtor can keep the real and personal property, ($1,176) of the plan payment is exhausted.

In reality, the Plan advanced by Debtor was slightly underfunded each month. Possibly at the time it was confirmed the Chapter 13 Trustee fees were slightly lower. If 6.5%, then the plan payments and disbursements just about balance.

The court's review of the files in this case discloses the following documents that have been filed and served with respect to the current monthly mortgage payment that is now reported by Debtor and Debtor's counsel to have suddenly doubled, as well as information on Debtor's finances:

A. July 2015 Declaration of Debtor explaining why $7,800 increase in income would not result in an increase in Plan payments because of increased expenses. Dckt. 42.

1. Rent expense, for Debtor's employment in San Francisco, increase of ($500)
2. Increase in transportation costs.
3. Increase of medical and food related expenses.
4. Debtor had underpaid income taxes and had a $3,200 tax bill due.

B. May 11, 2017 Filed Notice of Mortgage Payment Change

1. Beginning June 1, 2017, total current mortgage payment increased to $1,500.58.

2. The increase is stated to have been caused by an increase in the interest rate from 2.625% to 3.625%.

3. This is stated to have been served on Debtor and Debtor's counsel on May 11, 2017.

C. November 9, 2017 Filed Notice of Mortgage Payment Change

1. Beginning December 2, 2017, total current mortgage payments increased to $1,512.83.

2. The increase is stated to have been caused by an increase in the interest rate from 3.625% to 3.750%.

3. This is stated to have been served on Debtor and Debtor's counsel on November 9, 2017.

At this juncture, the court notes that attached to Proof of Claim No. 2 filed for the secured claim at issue, a copy of the Adjustable Rate Note is included as an attachment. The terms of the Note provide that the interest rate starts at 4.250% (Note ¶ 2) and that the interest rate will be adjusted every six months (Note ¶ 4). Thus, Debtor, their original counsel, and their current counsel well knew that the amount of the payment on this secured claim was subject to adjustment—but Debtor intentionally confirmed a Plan that had no cushion for such increases, proceeding with a plan being able to fund only the mortgage payment when the interest rate had dipped to some of the lowest in history.

D. May 1, 2018 Filed Notice of Mortgage Payment Change

1. Beginning June 1, 2017, total current mortgage payments increased to $1,730.01.

2. The increase is stated to have been caused by an increase in the interest rate from 3.750% to 4.750%.

3. This is stated to have been served on Debtor and Debtor's counsel on May 1, 2018.

Notwithstanding receiving these notices and the dramatic increase in payment occurring in May 2017, Debtor and Debtor's counsel somnolence was the response until May 2018 when they faced the Trustee's Motion to Dismiss (Dckt. 44).

Debtor has filed a Supplemental Schedule J to support Debtor's contention that they can now increase their projected disposable income. Dckt. 55. Debtor does not identify what expenses are being adjusted, leaving it for the court to ferret out. The court compares this Supplemental Schedule J to the one filed when the Debtor stated that expenses had increased so much that none of the $7,800 increase in income would increase Debtor's Projected Disposable Income.

	July 22, 2016 Filed Amended Schedule J, Dckt. 41	**May 28, 2018 Filed Amended Schedule J, Dckt. 55**	**Percentage Change increase% -decrease%**
Real Estate Taxes	($88.00)	$0.00	-100.00%
Home Maintenance	($200.00)	($100.00)	-50.00%
Electricity, Heat	($298.00)	($293.00)	-2.00%
Water, Sewer, Garbage	($80.00)	($100.00)	25.00%
Phone, Cable, Internet	($375.00)	($375.00)	0.00%
Food, Housekeeping Supplies	($1,250.00)	($1,250.00)	0.00%
Childcare	($131.00)	$0.00	-100.00%
Clothing, Laundry	($350.00)	($150.00)	-57.00%
Personal Care	($280.00)	($100.00)	-64.00%
Medical, Dental Exp	($240.00)	($240.00)	0.00%
Transportation	($500.00)	($500.00)	0.00%
Entertainment	($200.00)	$0.00	-100.00%
Charitable	($80.00)	($84.00)	5.00%
Life Ins	($114.00)	($114.00)	0.00%
Health Ins	($285.00)	($285.00)	0.00%
Vehicle Ins	($140.00)	($140.00)	0.00%

Car Registration	($31.33)	($31.33)	0.00%
Rent for Bay Area Employment	($500.00)	($500.00)	0.00%
Total Expenses	($5,142.33)	($4,262.33)	
Stated Take-Home Income	$6,292.47	$6,292.47	
Prior Stated Projected Disposable Income	$1,150.14	$2,030.14	**Presently Stated Projected Disposable Income**

Debtor relies on the court finding the adjustments to the expenses proffered as "necessary" for Debtor not to have to include any of a $7,800 increase in income becoming part of the projected disposable income to fund a plan. Now, it appears that such "additional" expenses are not actually "necessary" and can be reduced to allow Debtor to modify the Plan. Debtor chose not to tell the court how in the Declaration, just that it shall be.

The court takes statements made under penalty of perjury seriously, not treating them as mere arguments, conjecture, or puffery.

Debtor's testimony under penalty of perjury shows that they cannot decrease their expenses and increase the funding to pay for the known, expected increases in the mortgage payments for the semi-annual interest rate adjustments.

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 Steven McConnell and Deborah McConnell ("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.